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This COMPREHENSIVE AGREEMENT RELATING TO THE I-95 HOV/HOT LANES PROJECT (this “Agreement”) is made and entered into as of July 31, 2012 by and between the VIRGINIA DEPARTMENT OF TRANSPORTATION (the “Department”), an agency of the Commonwealth of Virginia (the “State”), the address of which Department is 1401 East Broad Street, Richmond, Virginia 23219; and 95 EXPRESS LANES LLC, a Delaware limited liability company (the “Concessionaire”), the address of which is 6440 General Green Way, Alexandria, Virginia 22312.

ARTICLE 1.

RECITALS

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

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

WHEREAS, pursuant to the Act, on September 24, 2003, Clark/Shirley submitted an unsolicited conceptual proposal to the Department for the Proposed Project. In accordance with the Department’s Act guidelines then in effect, the Department posted and published notice of the conceptual proposal and solicited competing proposals. On March 17, 2004, Fluor (as defined herein) submitted a conceptual proposal to the Department for the development, design, financing, construction, operation and maintenance of the HOT Lanes on I-95.

WHEREAS, both competing proposals were referred to an initial review committee (the “Initial Review Committee”) for preliminary review.

WHEREAS, following a determination by the Initial Review Committee that the conceptual proposals offered by both proposers merited further review, the Commonwealth Transportation Board on January 20, 2005 adopted a resolution approving both such conceptual proposals for further evaluation. The Deputy Secretary of Transportation invited both proposers to submit detailed proposals for consideration by the Public-Private Transportation Advisory Panel (the “Advisory Panel”) in accordance with the Department’s Act guidelines.

WHEREAS, on June 3, 2005, Clark/Shirley and Fluor and Transurban (as defined herein), which was identified as a subcontractor in Fluor’s conceptual proposal, submitted detailed proposals to the Advisory Panel for consideration.

WHEREAS, the Advisory Panel evaluated the detailed proposals, and on November 1, 2005, recommended to the Acting Commissioner that the detailed proposal submitted by Fluor and Transurban be further developed pursuant to the Act.
WHEREAS, on October 24, 2006, the Department, Fluor Virginia, Inc. and Transurban (USA) Development Inc. entered into an Interim Agreement, which was amended as of May 6, 2008, and further amended by an Amendment No. 2 dated as of March 23, 2012, each by and among the Department, Fluor Enterprises, Inc. (the successor-in-interest to Fluor Virginia, Inc.) (“Fluor”) and Transurban (USA), Inc. (“Transurban”) (as so amended, the “Interim Agreement”).

WHEREAS, on January 7, 2009, the FHWA issued a Categorical Exclusion for the Proposed Project. The FHWA approved the Department’s Special Experimental Project 14 work plan on June 27, 2006.

WHEREAS, on February 2, 2011, the Department (i) reduced the scope of the Proposed Project by eliminating the originally planned construction of six miles of HOV/HOT lanes on I-395 and planned upgrades to specific interchanges and (ii) changed the name of the Proposed Project to the I-95 HOV/HOT Lanes Project.

WHEREAS, on November 7, 2011, the Department submitted to FHWA the Environmental Assessment, and requested that FHWA issue a FONSI for the Project.

WHEREAS, FHWA reviewed the Environmental Assessment and other information and issued the FONSI on December 5, 2011.

WHEREAS, the Department, the Concessionaire, Fluor and Transurban entered into an agreement dated as of the date hereof terminating the Interim Agreement.

WHEREAS, the Department and the Concessionaire desire to herein set forth the terms to develop and operate the Project pursuant to a long-term concession arrangement granted to the Concessionaire by the Department by this Agreement.

AGREEMENT

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

ARTICLE 2.

DEFINITIONS

All capitalized terms used in this Agreement, but not expressly defined in this Agreement, have the respective meanings set forth in Exhibit A attached to this Agreement.
ARTICLE 3.

BASIS ROLES AND RESPONSIBILITIES

Section 3.01 Basic Agreement

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

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

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

(d) The Concessionaire may retain Contractors to perform certain of its responsibilities pursuant to this Agreement, subject to the terms and conditions of this Agreement. Performance of any of the Work by a Contractor will satisfy the obligation of the Concessionaire to perform such Work; provided that any such Work performed will be binding on the Concessionaire and the foregoing shall not relieve the obligation of the Concessionaire to manage such Contractor. Except with regard to Limited Notices to Proceed, notices relating to Substantial Completion pursuant to Section 8.08(e), notices relating to Final Acceptance pursuant to Section 8.09(b), and notices relating to Service Commencement pursuant to Section 9.02(a), the making of any submittals or the giving of any notices to the Department by the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work) will satisfy the obligation of the Concessionaire to make such submittal or give such notice; provided that any such submittal made or notice given by the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work) will be binding on the Concessionaire and the foregoing shall not relieve the obligation of the Concessionaire to manage the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work). In any such event, the Concessionaire will remain fully and primarily responsible for the performance of the Work, the making of submittals or the giving of any notices by any Contractors.

(e) The Department will be entitled to exercise such oversight of the activities of the Concessionaire and its Contractors in accordance with this Agreement, but will also be entitled to rely upon the Concessionaire to directly manage, oversee and resolve disputes involving its Contractors, without the involvement of the Department (except as otherwise provided in this Agreement).
The Department will use reasonable efforts in performing its rights and duties under this Agreement to minimize any disruption to or impairment of the performance of the Concessionaire’s rights and obligations under this Agreement; provided, that nothing in this Section 3.01(f) will limit the Department’s rights and obligations under this Agreement.

**Section 3.02 Project Agreements**

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

(a) Escrow Agreement attached as Exhibit D;
(b) Design-Build Contract attached as Exhibit E;
(c) Design-Build Work Guarantee attached as Exhibit F;
(d) Operations and Maintenance Agreement attached as Exhibit I; and
(e) Shared Facilities Agreement attached as Exhibit X.

**Section 3.03 Nature of Parties’ Interests Pursuant to This Agreement**

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

(b) The Department and the Concessionaire acknowledge their mutual intent that, despite the Department’s retention of fee title to (or other good and valid real property interest in) the Project Assets and the Project Right of Way, as a result of the Concessionaire’s rights and interests therein pursuant to the Permit granted to the Concessionaire under this Agreement, to the maximum extent permitted by Law, for federal income tax purposes the Concessionaire will be treated as having acquired (i) an ownership interest in those Project Assets that have an expected economic useful life equal to or less than the Term, (ii) an interest in the Project Right of Way and those Project Assets that have an expected economic useful life greater than the Term (with the amount allocable under this clause (ii) treated for purposes of section 467 as giving rise to rent that is allocated ratably to each year during the Term) and (iii) a franchise and license, permit, or other right within the meaning of section 197(d)(1)(F) and 197(d)(1)(D) of the Internal Revenue Code of 1986, as amended, and in that regard an amount equal to the Concessionaire’s cost of development, design, construction and start-up of the Project represents acquisition cost of such assets (the “Cost”), and no payment by the Department to the Concessionaire pursuant to Section 7.02 will be treated as part of the Cost. The Cost will be allocated for all income tax purposes in the manner determined by the Concessionaire, which allocation will be consistent with Section 1060 of the Internal Revenue Code of 1986, as amended and the Concessionaire will execute and file all income tax returns with the Internal...
Revenue Service in a manner consistent with such allocation, including Form 8594. The Department and the Concessionaire do not contemplate that the Department will be required to file any return with the Internal Revenue Service with respect to such allocation, but that if required to do so the Department will file such return in a manner consistent with such allocation.

**Section 3.04 Quiet Possession and Enjoyment**

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

**ARTICLE 4.**

**GRANT OF PERMIT; TERM**

**Section 4.01 Grant of Permit**

(a) Pursuant to the Act and subject to the terms and conditions of this Agreement, the Department grants to the Concessionaire the exclusive right, and the Concessionaire accepts (i) the obligation to develop, design, finance, construct, operate and maintain the Project and (ii) the right to establish, impose, charge, collect, use and enforce payment of tolls and related charges (the “Permit”).

(b) The Department’s grant of the Permit pursuant to Section 4.01(a), and the Concessionaire’s obligations with respect thereto pursuant to Section 4.01(a), are conditional upon Financial Close having occurred in accordance with Section 7.03; provided however that portions of the Work may be performed by the Concessionaire prior to Financial Close pursuant to Section 8.02 and Section 8.04.

(c) In consideration of the Permit granted to the Concessionaire by the Department pursuant to this Section 4.01, the Concessionaire will perform the Work at its own expense except as otherwise provided herein and pay (to the extent required) to the Department the Permit Fee in accordance with the Permit Fee calculation attached as Exhibit J.
Section 4.02  Term

This Agreement will take effect on the Agreement Date and will remain in effect, until the first to occur of (i) the 73rd anniversary of the Service Commencement Date or (ii) the effective date of the termination of this Agreement pursuant to Article 20 (the “Term”).

ARTICLE 5.

TOLLING

Section 5.01  Tolling of the Project

(a)  Toll Revenues.

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

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

(b)  Users of the HOT Lanes.

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

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

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

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

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

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

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

(d) Incidental Charges. The foregoing authorization to establish, impose, charge, collect, use and enforce the collection and payment of tolls includes the right, to the extent permitted by Law, and subject to the requirement to be interoperable with E-ZPass (and any successor to E-ZPass utilized on State Highways at that time) to impose, charge, collect, use and enforce, with respect to electronic tolling accounts managed by or on behalf of the Concessionaire, the following incidental charges:

(i) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable administrative fees for account maintenance, account statements and customer service;

(ii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable amounts for the purchase or rental of transponders or other electronic tolling devices;

(iii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable, refundable security deposits for the distribution of transponders or other electronic toll devices;

(iv) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable video surcharges or other reasonable fees for permitted travel on the Project Assets by vehicles that are not equipped with a transponder or other available equipment allowing the processing of the applicable tolls through E-ZPass (or any successor to E-ZPass utilized on State Highways at that time); and

(v) reasonable fees, penalties and interest for toll violations, including costs of collection in accordance with Law; and
(vi) other incidental fees and charges reasonable and customary in connection with the services being provided at that time by the Concessionaire; provided, that the amount of any such other incidental fees and charges will not exceed the amount reasonably necessary for the Concessionaire to recover its Allocable Costs, directly incurred with respect to the items, services and work for which they are levied.

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

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

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

(g) Transaction Costs.

(i) Without limiting the immediately succeeding sentence, the Department or its agents will use commercially reasonable efforts to work with the Concessionaire to limit transaction costs charged to the Project by the Department, including charges for toll transaction account management services. The Department will not charge the Concessionaire or the Project any fees or other transaction amounts for toll transaction account management services, other than as set forth in the Electronic Toll Collection Agreement.
(ii) If the Department, or its successors or assigns, ceases to provide all or a material part of the ETC Services and as a result the Concessionaire incurs costs related to self-performing, or engaging a Contractor to perform, the ETC Services no longer provided by the Department, or its successors or assigns, then the Department agrees to pay the Concessionaire the amount of such reasonable costs. If the Concessionaire self-performs or contracts with a Contractor to provide ETC Services, the Department, or its successors or assigns, will provide the same access to customer accounts as if the Department continued to provide the ETC Services, if such access is permitted by Law and if the Concessionaire pays to the Department, or its successors or assigns, the reasonable costs of providing such access.

(h) Violations Processing Services.

(i) The Department has implemented and maintains a processing system for the enforcement of penalties for toll violations in Virginia for electronic toll collection systems on State Highways. The Concessionaire may, but is not obligated to, enter into an agreement with the Department to obtain the benefits of such enforcement system, in accordance with the Violation Processing Services Agreement in the form attached as Exhibit L. In consideration of such services, the Concessionaire will pay the Department its customary charges for such services in effect from time to time. For purposes of identifying and apprehending toll violators of the Project, provided it is authorized under Law, and any applicable agreements or arrangements, the Department will make available to the Concessionaire the benefits of any agreements or arrangements which the Department has in place with other state authorities or agencies that provide access to records in their possession relating to vehicle and vehicle owner data, and will coordinate with the Virginia State Police in accordance with Section 9.06(a) with respect to the provision of policing services, emergency services, traffic patrol and traffic law enforcement services on the Project.

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

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

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

Section 5.02 Toll Rates

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

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

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

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

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

(i) type, weight and occupancy of the vehicle;

(ii) number of axles;

(iii) time of day and/or week;

(iv) time and location of entry or exit to or from the HOT Lanes;

(v) traffic volume, vehicle speed, vehicle type; and

(vi) similar variables or combinations of such variables.

Notwithstanding the foregoing, (A) the Concessionaire may adopt and implement discount programs for different classes or groups of persons using the HOT Lanes under like conditions, subject to the provisions of Section 24.01 and (B) it is understood that dynamic tolling may result in vehicles that enter the HOT Lanes at different times being subject to different toll rates as well as in vehicles travelling on the same section of the HOT Lanes being subject to different toll rates.
Section 5.03  Reserved

Section 5.04  User Confidentiality

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

Section 5.05  Suspension of Tolls

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

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

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

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

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

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

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

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

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

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

Section 5.06 Disposition of Gross Revenues

(a) Gross Revenues will be used first to pay all due and payable Operating Costs, specifically including all amounts due to the Department pursuant to this Agreement (which amounts will be paid on a pari passu basis with all other operations and maintenance costs), before they may be used and applied for any other purpose.

(b) The Concessionaire will not use Gross Revenues to make any Distributions (or to pay any amount payable pursuant to an Affiliate Contract subject to approval but not approved by the Department pursuant to Section 24.02(l)), unless and until the Concessionaire first pays the following:

(i) any undisputed amounts due to the Department pursuant to the terms of this Agreement;
(ii) current and delinquent operating and maintenance costs (including any payments to Affiliates made solely in accordance with the applicable Affiliate Contracts entered into in accordance with Section 24.02(l));

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

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

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

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

In the event there are any disputed amounts due to the Department pursuant to the terms of this Agreement, the Concessionaire will maintain a cash reserve for such disputed amounts in accordance with GAAP or any other generally accepted accounting principles which are acceptable to the Department as a condition precedent to making any Distribution or payment to an Affiliate. If the Concessionaire makes any Distribution or payment to an Affiliate in violation of this Section 5.06(b), the same will be deemed to be held in trust by such Person for the benefit of the Department and the Collateral Agent, and will be payable to the Department or the Collateral Agent on demand. If the Department collects any such amounts held in trust, it will make them available for any of the purposes set forth above and, at the request of the Collateral Agent, deliver them to the Collateral Agent.

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

Section 5.07 Revenue Risk Related to Traffic Volume

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

(b) (i) From the period beginning on the second anniversary of the Service Commencement Date to December 31, 2030 (the “First Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of 35% of the total flow of all Permitted Vehicles in two consecutive Toll Sections that are then using such Toll Sections going in the same direction.
for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “First Threshold HOV Percentage and Rate”) of 1,450 vehicles per hour per traffic lane; \textit{provided}, however, that the Department will not be required to make any payment, in question pursuant to this Section 5.07(b)(i) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeds the First Threshold HOV Percentage and Rate. 

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

(iii) From January 1, 2041 to the 40th anniversary of the Financial Close Date (the “Third Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of 38% of the total flow of all Permitted Vehicles in two consecutive Toll Sections that are then using such Toll Sections going in the same direction for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “Third Threshold HOV Percentage and Rate”) of 1,550 vehicles per hour per traffic lane; \textit{provided}, however, that the Department will not be required to make any payments pursuant to this Section 5.07(b)(iii) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeded the Third Threshold HOV Percentage and Rate. 

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

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

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

(vii) Notwithstanding the foregoing, this Section 5.07(b) will cease to apply on the first to occur of: (A) the date on which the Highest Revenue Share IRR has been reached and (B) the 40th anniversary of the Financial Close Date.

Section 5.08 Failure to Meet OSPS

(a) At any time after the second full month following the Service Commencement Date, the Concessionaire will notify the Department if the Concessionaire’s scheduled monthly report identifies an instance of the Project’s failure to meet the OSPS (as provided in the Technical Requirements). The notice will describe such failure in reasonable detail. The Department will notify the Concessionaire within 30 Days of its receipt of the Concessionaire’s report whether or not it requires an OSPS Improvement Plan (the “OSPS Improvement Plan”).
(b) Upon a notification from the Department pursuant to Section 5.08(a) that the Project requires an OSPS Improvement Plan, the Concessionaire (at its sole cost and expense) will prepare and submit the OSPS Improvement Plan to the Department for its approval. The OSPS Improvement Plan will not be required to propose a general strategy to improve overall OSPS compliance, but will be required to propose a strategy to address the specific reasons which the Concessionaire reasonably believes caused such failure as described in the Concessionaire’s report. The OSPS Improvement Plan will be delivered to the Department within 30 Days of the Department’s notice (or longer if mutually agreed to by the parties) and will cover the matters set forth in Section 5.08(a). The Department will review the OSPS Improvement Plan in accordance with the provisions of Section 10.05. The Concessionaire will diligently implement the elements of the approved OSPS Improvement Plan that are within the control of the Concessionaire promptly following the Department’s approval thereof and within the schedule set forth in such OSPS Improvement Plan.

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

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

(i) will not be higher than 55 mph;

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

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

Section 5.09 SAFETEA-LU Compliance

(a) The Department agrees to provide to FHWA the certifications required of a State agency under 23 U.S.C. §166 and acknowledges that it has entered into the Toll Agreement attached as Exhibit M. The delivery of a certification by the Department that the HOT Lanes do not comply with the applicable requirements of 23 U.S.C. §166, or such other federal, rule or regulation will not constitute a default by the Department under this Agreement.
(b) The Concessionaire agrees to maintain and operate the HOT Lanes, at all times, in compliance with the provisions of 23 U.S.C. §166 and 23 U.S.C. §129, successor provisions, all regulations promulgated thereunder, and the Toll Agreement. Accordingly, the Concessionaire will be responsible for the satisfaction of the requirements of 23 U.S.C. §166(b)(4), in accordance with the terms of this Agreement, and will otherwise coordinate its compliance efforts with the Department so as to enable the Department to provide the certifications required by Section 5.09(a).

Section 5.10 USDOT Reporting Requirements

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

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

(c) If the Concessionaire enters into one or more agreements with the USDOT in connection with the TIFIA Credit Assistance, TIGER Credit Assistance or other financing program, the Concessionaire agrees to provide the Department with executed versions of such agreements together with any agreements or instruments evidencing or securing the Concessionaire’s obligations thereunder, including any collateral pledge agreements. In Exhibit G, the Department is providing the Concessionaire with a listing of the reports, notices and other filings, copies of which are to be provided to the Department concurrently with the Concessionaire’s delivery (or receipt) thereof. The Concessionaire agrees to provide the Department with copies of such reports, notices and other filings made under such agreements as are requested by the Department pursuant to the preceding sentence; provided however, that the Concessionaire, in its reasonable discretion, may determine not to provide the Department with reports, notices and filings that it believes are not germane to the Project and the Department. The Concessionaire will provide within ten days after its receipt of a request by the Department, its rationale for not providing a report, notice or other filing requested by the Department pursuant to this Section 5.10(c).

(d) If the Concessionaire enters into a Project Financing Agreement with the Collateral Agent that provides for the collection and distribution of Gross Revenues, the Concessionaire agrees to provide to the Department, as soon as reasonably practicable after the Concessionaire's actual receipt of the same, a copy of: any written notice of resignation or removal of the Collateral Agent; any written notice of the appointment of a successor Collateral Agent; any written notice of any merger of the Collateral Agent; any written notice of any transfer by the Collateral Agent of its rights under the Project Financing Agreements to an affiliate; and any written notice of any change in any Deposit Account Bank.
ARTICLE 6.

BASE CASE FINANCIAL MODEL

Section 6.01 Initial Base Case Financial Model and Base Case Financial Model

(a) The Concessionaire and the Department agree to the composition of the Initial Base Case Financial Model as of the Agreement Date, which is included in the Escrow Documents and which will be deposited with the Escrow Agent as described in Section 18.05.

(b) The Initial Base Case Financial Model will be updated upon Financial Close in accordance with Section 7.03(b)(i) through (vi) and will become the Adjusted Financial Model.

(c) The Adjusted Financial Model will be updated upon Financial Close in accordance with Section 7.03(b)(vii) and this Agreement and such update will become the Base Case Financial Model.

(d) The Concessionaire will not cause (or permit any other Person to cause) the Initial Base Case Financial Model, the Adjusted Financial Model or the Base Case Financial Model to contain any hidden data. The Concessionaire will furnish to the Department any password or other access rights for each of the Initial Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model.

Section 6.02 Base Case Financial Model Updates

(a) Other than in accordance with the terms of this Agreement, in no event will the Base Case Financial Model, the Adjusted Financial Model, the Adjusted Financial Model Update or any Base Case Financial Model Update be changed except with the prior written approval of both the Department and the Concessionaire. The Concessionaire will furnish to the Department any password or other access rights for the Base Case Financial Model Update or Adjusted Financial Model Update.

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

(i) upon submission of a notice of a Refinancing under Section 7.05;

(ii) within 60 Days after the delivery of a Delay Event Notice that extends the Guaranteed Substantial Completion Date;

(iii) within 60 Days after the delivery of a Compensation Event Notice;

(iv) within 60 Days after the delivery of a notice of a Net Cost Savings or positive Net Revenue Impact under Section 14.04;
(v) within 60 Days after the Concessionaire notifies the Department that it proposes to undertake a Concessionaire Project Enhancement; and

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

(c) Any proposed Base Case Financial Model Update shall become the Base Case Financial Model Update following its approval by the Department in accordance with Section 6.03.

(d) Within 150 Days following the end of each fiscal year, the most recent undisputed Base Case Financial Model Update (or, if there has been no undisputed Base Case Financial Model Update, the Base Case Financial Model) will be updated to reflect audited historical cash flows for the most recently audited fiscal year; provided, however, such Base Case Financial Model Update will not: (i) include changes in Financial Model Formulas, (ii) include changes in forecast cash flows or (iii) allow such historical information to flow through the Financial Model Formulas.

Section 6.03 Certain Adjustments

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

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

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

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

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

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

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

**Section 6.04 Financial Model Disputes**

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

(b) In the event of a Dispute, the Initial Base Case Financial Model, the immediately preceding Adjusted Financial Model or the immediately preceding Base Case Financial Model Update (as applicable) that is not being disputed (or, if there has been no undisputed Base Case Financial Model Update and no disputed Adjusted Financial Model, the Base Case Financial Model) will remain in effect until such Dispute is resolved or a new Adjusted Financial Model or a new Base Case Financial Model Update is issued and not disputed. If a proposed Base Case Financial Model, Adjusted Financial Model or Base Case Financial Model Update (as applicable) has not been disputed, or if any such Dispute has been so resolved, the proposed Base Case Financial Model, Adjusted Financial Model or Base Case Financial Model Update (as applicable) will serve as the Base Case Financial Model, new Adjusted Financial Model Update or the current Base Case Financial Model Update (as applicable) and will be submitted to the Escrow Agent in accordance with Section 18.05(d).

**Section 6.05 Audit of Financial Model**

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

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

ARTICLE 7.

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

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

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

(b) Each bond or promissory note evidencing Concessionaire Debt must include a conspicuous recital on its face to the effect that payment of the principal thereof and interest thereon does not constitute a claim against the Department’s fee simple title to or other good and valid real property interest in the Project Assets, the Project Right of Way, the Department’s interest hereunder or its interest and estate in and to the Project Assets or any part thereof, is not an obligation of any State Party, moral or otherwise, and neither the full faith and credit nor the taxing power of any State Party is pledged to the payment of the principal thereof and interest thereon.

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

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

(ii) a representation, warranty or other assurance as to (A) the ability of the Concessionaire to perform its obligations with respect to the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project or (B) the adequacy of the Gross Revenues to provide for payment of the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project.
(d) The Concessionaire will make or cause to be made Equity Contributions (the “Equity Contribution Amount”) equal to: (i) an amount equal to the Base Capital Contributions set forth in Section 2.2 of each Equity Funding Agreement (the “Base Equity Contributions”), as adjusted pursuant to this Agreement (the “Initial Equity Commitment Amount”); provided, however, that after the Agreement Date, the Concessionaire will not adjust the Initial Equity Commitment Amount without the approval of the Department in its sole discretion, (ii) an amount equal to the Contingent Capital Contributions set forth in Section 2.3 of each Equity Funding Agreement, as required pursuant to such Equity Funding Agreement (the “Contingent Capital Contribution Amount”); and (iii) $108,113,295 (the “Concessionaire TIFIA Protection Amount”), which is subject to adjustment or cancellation pursuant to Section 7.07.

Section 7.02 Public Funds

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

(b) The Department will make or cause to be made a supplemental Public Funds Amount for the Project equal to $224,250,000 (the “Department TIFIA Protection Amount”), subject to adjustment or cancellation pursuant to Section 7.07.

Section 7.03 Financial Close

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

(i) the Concessionaire has provided the Department: (A) a list of and proposed initial drafts of the Initial Project Financing Agreements and Financing Assignments set forth in Exhibit O and (B) a proposed initial draft of the Base Case Financial Model reflecting any changes in financing from the Initial Base Case Financial Model, contemporaneously with the distribution of such drafts to the Lenders and other parties to Financial Close for the Department’s review and comment, and has included the Department on all subsequent distributions of such drafts to the Lenders and other parties to Financial Close up and until the Concessionaire has furnished the proposed final drafts pursuant to Section 7.03(a)(ii);

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Design-Build Letter of Credit;

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

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

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

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

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

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

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

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

(L) the Equity Funding Agreements; and

(M) the Equity Funding Guaranties.

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

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

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

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

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

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

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

(iv) PABs Interest Rate Protection.

(A) (1) The Department will bear the risk and have the benefit of the first 25bps of change in PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate and (2) the Department and the Concessionaire will equally share the risk and the benefit in any change between 25bps and 100bps in the PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate to the actual PABs Interest Rate applicable to the PABs issued as of the Financial Close Date, and (3) the Concessionaire will bear the risk and have the benefit of any change in excess of 100 bps in PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate.
(B) If the PABs Interest Rate as of the Financial Close Date has changed from the Benchmark PABs Interest Rate, the Initial Base Case Financial Model will be updated in accordance with the Financial Close Adjustment Protocol set forth in Exhibit BB to reflect the PABs Interest Rate and to reflect the risk and benefit allocated to the Department (ignoring for this calculation any change in the Benchmark PABs Interest Rate the risk and benefit of which has been allocated to the Concessionaire) and used to adjust the Initial Public Funds Amount in accordance with the Financial Close Adjustment Protocol such that the Equity IRR is equal to the Initial Equity IRR.

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

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

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

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

(d) Payments at Financial Close.

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

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

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

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

Section 7.04 Project Financing Agreements; Department’s Rights and Protections

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

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

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

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

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

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

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

(vii) each Financing Assignment will require that if the Concessionaire is in default under the Concessionaire Debt secured by the Financing Assignment or under the Financing Assignment and the Lender or Collateral Agent gives notice of such default to the Concessionaire, then the Collateral Agent will also give concurrent notice of such default to the Department. Each Financing Assignment also will require that the Collateral Agent deliver to the Department, concurrently with delivery to the Concessionaire or any other Person, every notice of election to sell, notice of sale or other notice required by Law or by the Financing Assignment in connection with the exercise of remedies under the Financing Assignment;
(viii) no Financing Assignment will grant to a Lender any right to apply funds deposited with the Depositary in accordance with Section 17.07, except for the express purposes for which the reserve or deposit is established;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Section 7.05 Refinancing Requirements**

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

(b) Project Financing Agreements Related to Refinancings.

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

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

(c) Department’s Right to Approve Refinancing. Any Refinancing of Concessionaire Debt will be subject to the Department’s prior approval, which approval will not be unreasonably withheld or delayed; provided, that no such approval will be required if the Concessionaire first demonstrates to the Department that:

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

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

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

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

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

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

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

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

(d) Payment of Department Expenses.

(i) In connection with any Refinancing, the Concessionaire will pay the Department for the Department’s Allocable Costs incurred related to the Refinancing at the time of the closing of the Refinancing. The Department will provide the Concessionaire with an estimate of its expected costs related to such Refinancing; if there is a change in circumstances relating to the Refinancing following the submission of the Department’s initial estimate that is expected to result in higher expenses, then the Department will provide a revised estimate. For any Refinancings that do not close, the Department will be paid for its documented expenses for such Refinancings from and at the time of (or, at the Concessionaire’s option, at any time prior to) any subsequent successful Refinancings, and will be entitled to payment of interest on such expenses based on the Bank Rate calculated from the date on which such expenses were due and payable according to the first invoice issued by the Department for such expenses until paid by the Concessionaire.

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

(e) Other Requirements.

(i) Every Refinancing will be subject to the provisions of Section 7.01 and Section 7.03 and the other provisions of this Agreement pertaining to Concessionaire Debt and Financing Assignments.

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

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

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

Section 7.06 Collateral Agent’s Rights

The Collateral Agent’s rights are set forth in the Direct Agreement.

Section 7.07 TIFIA Credit Assistance Protection

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

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

(ii) If the Concessionaire fails to execute and deliver, prior to March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)) (A) any TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) or (B) any TIFIA Loan Documentation containing terms consistent with the terms described in Exhibit H, but containing other terms and conditions that are inconsistent with the terms and conditions contained in the TIFIA loan agreements and intercreditor agreements for Relevant Precedent, which inconsistent terms and conditions are reasonably expected to have a material adverse effect on the Concessionaire’s financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile, and the Department has not agreed to perform or cause to be performed such term or condition or otherwise resolve such inconsistent terms or conditions to the mutual satisfaction of the Concessionaire and the Department, each acting reasonably, then in each case, the Department TIFIA Protection Amount will be decreased by an amount equal to $30,000,000 and the Concessionaire TIFIA Protection Amount will be increased by $30,000,000. For the avoidance of doubt, the Concessionaire may choose to execute and deliver the TIFIA Loan Documentation described in clause (B), in which case no adjustment to the Department TIFIA Protection Amount or the Concessionaire TIFIA Protection Amount will be made. The failure of the Concessionaire to enter into the TIFIA Loan Documentation pursuant to this Section 7.07(a)(ii) will not be a Concessionaire Default and the Department will have no right to terminate this Agreement or exercise any other rights or remedies that may be available to the Department hereunder as a result thereof (other than as specifically provided in this Section 7.07(a)(ii)).

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

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

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

(b) Funding Adjustments at TIFIA Closing Date. If the Concessionaire enters into the TIFIA Loan Documentation on or before March 31, 2013, the Adjusted Financial Model will be updated to calculate a further change, positive or negative, in the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount using the following protocol (ignoring for these calculations any adjustments to the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount pursuant to Section 7.07(a)):

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

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

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

(B) the revenue sharing / prepayment clauses; or

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

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

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

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

(d) TIFIA Protection Amount Funding.

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

(ii) If the Department TIFIA Protection Amount is a negative amount (the “Department Credit Amount”) as a result of the adjustments pursuant to this Section 7.07, the Department will not be required to make the Department TIFIA Protection Amount, the Public Funds Amount will be decreased by an amount equal to the Department Credit Amount, and the parties will provide written notice to the GARVEE Trustee or the Trustee, as relevant, to transfer an amount equal to the Department Credit Amount to or to the order of the Department within 10 days after the later of (A) the giving of such notice to the GARVEE Trustee or the Trustee, as relevant, or (B) the Second Funding Closing Date. If the Concessionaire TIFIA Protection Amount is a negative amount as a result of the adjustments pursuant to this Section 7.07, the Concessionaire TIFIA Protection Amount will be zero, the Equity Contribution Amount payable by the Equity Sponsors under the Equity Funding Agreements will be automatically reduced by such amount effective as of the Second Funding Closing Date, and the parties will provide prompt written notice to the Trustee of such reduction.

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

ARTICLE 8.

DESIGN AND CONSTRUCTION OF THE PROJECT

Section 8.01 General Obligations of the Concessionaire

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

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

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

(i) physical conditions of an unusual nature that differ materially from those ordinarily encountered in the area;
(ii) changes in surface topography;
(iii) variations in subsurface moisture content;
(iv) Utility facilities;
(v) Hazardous Substances, including contaminated groundwater;
(vi) any archeological, paleontological or cultural resources; and
(vii) any species listed as threatened or endangered under Federal or State endangered species Law;
provided, that the foregoing will not limit the Concessionaire’s rights with respect to Compensation Events and Delay Events.

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

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

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

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

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

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

Section 8.02 Limited Notices to Proceed to Perform Certain Work

(a) The Concessionaire may request that the Department issue one or more Limited Notices to Proceed (“LNTP”) authorizing the Concessionaire to commence certain portions of the Work as set forth in this Section 8.02. Prior to issuance of a LNTP, the parties will agree upon the conditions to the issuance of such LNTP, as well as the scope, schedule and payment terms (if applicable) for such portion of the Work.
(b) The Concessionaire will deliver notice to the Department upon the satisfaction of the agreed conditions to the issuance of any LNTP and request that the Department issue such LNTP for the applicable portion of the Work. The Department will endeavor to respond to such request, within 21 Days following receipt of such request by the Department, by delivery to the Concessionaire of the applicable LNTP or notice of the conditions that the Department believes, in its reasonable discretion, to have not been satisfied. The Concessionaire will have a reasonable opportunity to address those deficiencies and re-submit a notice to the Department or, if the Concessionaire does not agree with the Department’s assessment, to refer the matter to the dispute resolution procedures pursuant to Article 21. If the Concessionaire has not received a response within such 21-Day period, such failure by the Department to respond will be deemed approval, but will not be deemed a waiver of the Department’s other rights or the Concessionaire’s other obligations, including compliance with Good Industry Practice, the Technical Requirements, Governmental Approvals and Law.

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

Section 8.03 Conditions Precedent for Notices to Proceed

(a) Notice to Proceed with Design Work. Except with respect to Early Work approved and undertaken pursuant to Section 8.02(c) and except as may be authorized in a LNTP, the Concessionaire will not commence any design Work unless and until the following conditions have been satisfied (or the Department has advised that it will waive such conditions) and the Department has delivered notice to that effect to the Concessionaire (such notice being referred to as the “Design Work Notice to Proceed”):

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

(ii) the Department has approved the following Project Development Plans: (A) Concessionaire Management Plan; (B) Document Management Plan; (C) Quality Management System Plan; (D) Design Quality Management Plan; (E) Public Information and Communications Plan; and (F) DBE/SWaM Plan;

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

(iv) the Concessionaire certifies to the Department that all representations and warranties of the Concessionaire set forth in Section 23.02 remain true in all material respects;
the Concessionaire certifies to the Department that all insurance policies required under Section 17.01(a) specified in the Design Work Notice to Proceed for the Work, except with respect to the builder’s risk insurance, have been obtained and will be in full force and effect, and in the case of Project-specific policies, the Concessionaire has delivered to the Department duplicate originals or copies thereof certified by the Concessionaire’s insurance broker to be true and correct copies of the originals; and

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

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

(b) Notice to Proceed for Construction. In addition to the conditions set forth in Section 8.03(a), the Concessionaire will not commence construction of the Project Assets unless and until the following conditions have been satisfied (or the Department, in its discretion, waives such conditions) and the Department has delivered notice to that effect to the Concessionaire (such notice being referred to as the “Construction Notice to Proceed”):

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

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

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

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

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

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

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

Section 8.04 Design Work

(a) Except as provided in Section 8.02(c) with respect to the Early Work, the Concessionaire will submit to the Department accurate and complete copies of all Design Documentation and Construction Documentation relating to the Work, which is required to be submitted, within three Days after such documentation is delivered to the Concessionaire by the Design-Build Contractor under the Design-Build Contract. Each submittal will comply with the applicable requirements of the Technical Requirements. The Department’s review of any submittal shall comply with the submittal and review procedures set forth in Section 10.05.

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

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

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

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

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

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

(h) The design and construction of the Project Assets will accommodate certain improvements, projects and plans, all as set forth in the Technical Requirements.
Section 8.05 Acquisition of Project Right of Way; Utility Relocations; Railroad Easements

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

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

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

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

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

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

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

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

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

(d) ROW Costs.

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

(ii) If the aggregate ROW Costs exceed $275,000, the Concessionaire will pay the first $150,000 of such excess. If the aggregate ROW Costs exceed $425,000, the Department will pay any such excess. If the aggregate ROW Costs are less than $275,000, the Concessionaire will deposit an amount equal to the difference between such amount and the aggregate ROW Costs into the Project Enhancement Account.

(e) Utility Relocations.

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

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

(f) Acquisition of Railroad Easements. The Department will obtain, at the Department’s sole cost and expense, any easements and other property rights necessary for the Work located on property owned by Norfolk Southern Corporation, and facilitate the negotiation of a construction agreement between the Concessionaire and Norfolk Southern Corporation (the “Railroad Easement”). Notwithstanding the foregoing, (i) the Concessionaire will pay the Department for Allocable Costs incurred by the Department in the Department’s efforts to obtain the Railroad Easement, to the extent such Allocable Costs are incurred by the Department as a result of any Concessionaire Party’s misconduct, negligence or other culpable act, error or omission and (ii) the Concessionaire will pay the costs of any Work performed on the Railroad Easement and reimburse Norfolk Southern Corporation any of its costs in connection therewith, all as provided in the Technical Requirements.

Section 8.06 Governmental Approvals

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

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

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

(d) The Concessionaire will at all times and at its sole cost and expense comply with the NEPA Documents, including, without limitation, compliance necessitated by a change in the base design of the Project. If supplements to the NEPA Documents or additional NEPA Documents are needed following the Agreement Date, the Department will prepare the necessary documentation using data and other information provided by the Concessionaire, and the Concessionaire will pay the Department for its Allocable Costs incurred in the preparation of such documentation; provided, that the Department will pay for supplements to the existing
Section 8.07 Construction Work and Project Schedule

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

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

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

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

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

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

Section 8.08 Substantial Completion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 8.09 Final Acceptance

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

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

(i) Substantial Completion has occurred;

(ii) other than the Permitted Encumbrances (not including clause (c) of the definition thereof), the Project is free and clear of all Liens, claims, security interests or encumbrances arising out of or in connection with the performance of the Work during the Construction Period;
(iii) all Punch List items have been completed and delivered to the reasonable satisfaction of the Department;

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

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

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

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

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

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

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

Section 8.10 Liquidated Damages for Delayed Completion

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

(b) **Liquidated Damages Related to Final Acceptance.** If the Concessionaire does not achieve Final Acceptance by the Final Acceptance Deadline, the Department will be entitled to assess $5,000 as liquidated damages for each Day that Final Acceptance of the Project remains to be achieved following the expiration of the Final Acceptance Deadline, and the Concessionaire will cause any related liquidated damages payable by the Design-Build Contractor under the Design-Build Contract.

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

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

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

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

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

(v) notwithstanding the above, liquidated damages are not intended to excuse Concessionaire or any of its Contractors from liability for any other breach of its obligations under the Project Agreements, or limit the Department’s recourse to other remedies hereunder such as termination pursuant to Article 19 and Article 20; provided, that no Concessionaire Default will occur solely as a result of a delay in achieving Substantial Completion by the Guaranteed Substantial Completion Date, except as set forth in Section 19.01(e).
(d) Payment of Liquidated Damages. The Concessionaire will pay all undisputed liquidated damages under this Section 8.10 monthly in arrears not later than 30 Days after the end of each calendar month, and in accordance with the requirements set forth in Section 5.06(b).

Section 8.11 Warranties; Defective Design and Construction

(a) Warranties.

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

(ii) The warranties in Section 8.11(a) are exclusive and are in lieu of all other warranties by contract. No implied or statutory warranties will apply. Subject to Section 8.11(a)(iii) below and to such limitations on coverage including aggregate caps specified in the Design-Build Contract, the foregoing warranties for Work relating to the Project Assets will be effective for a period of, with respect to the Design-Build Work, 60 months beginning on the date on which substantial completion of the Design-Build Work is achieved as such date is defined in the Design-Build Contract (the “Warranty Period”). Such warranties will survive termination of this Agreement for Work that was in place prior to termination.

(iii) With respect to the warranty furnished by the Design-Build Contractor pursuant to Section 8.11(a)(i) and if and to the extent the Concessionaire obtains general or limited warranties from any Contractor in favor of the Concessionaire with respect to design, materials, workmanship, construction, equipment, tools, supplies, software or services, the Concessionaire will cause such warranties to be expressly extended to the Department; provided, that the foregoing requirement will not apply to standard, pre-specified manufacturer warranties of mass-market materials, products (including software products), equipment or supplies where the warranty cannot be extended to the Department using commercially reasonable efforts. The Department will only have the right to exercise remedies under any such warranty so long as the Concessionaire or a Lender is not pursuing remedies thereunder. To the extent that any Contractor warranty would be voided by reason of the Concessionaire’s negligence or failure to properly incorporate material or equipment into the Work, the Concessionaire will be responsible for correcting such defect.

(iv) Contractor warranties are in addition to all rights and remedies available pursuant to this Agreement or Law or in equity, including Claims against the Performance Security, and will not limit the Concessionaire’s liability or responsibility imposed by this Agreement or Law or in equity with respect to the Work, including liability for Non-Conforming Work, design defects, patent and latent construction defects, strict liability, breach, negligence, willful misconduct or fraud.
(b) **Non-Conforming Work.** In the event of the occurrence of a Defect in the design or construction Work, including in any materials and equipment furnished as part of the construction, and including any Non-Conforming Work, the Department will be entitled, in addition to any other remedies:

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

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

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

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

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

**Section 8.12 Transportation Management Plan.**

(a) The Department will develop, fund and implement a transportation management plan for the Project ("Transportation Management Plan" or "TMP"), which will be undertaken in coordination with the Concessionaire’s Maintenance of Traffic Plan and Sequence of Construction Plan. The Department will provide the Concessionaire with a reasonable opportunity to comment on the TMP. The TMP will set forth the program for traffic management and related activities to ensure safety and mobility for the travelling public throughout the I-95 Corridor for the duration of the Construction Period. The Concessionaire’s Maintenance of Traffic Plan (as described further in the Technical Requirements) will be consistent with, and included as part of, the TMP for the Construction Period.

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

Section 8.13 Substantial Completion of Segments of the Project. In the Department’s sole discretion, it may issue a Substantial Completion Certificate and an authorization to commence Service Commencement with respect to certain Segments of the Project to be identified by the Concessionaire and approved by the Department, prior to issuing a Substantial Completion Certificate and authorization to commence Service Commencement for the balance of the Project. In such case, solely for the purpose of processing such early acceptance, the Department and the Concessionaire will develop a set of requirements that must be satisfied and other conforming changes to this Agreement, so that such Segments of the Project may be accepted early by the Department, in its sole discretion, pursuant to this Section 8.13.

Section 8.14 Lane Closure Damages. In its performance of the Work during the Construction Period, the Concessionaire may temporary close existing lanes on the Project Right of Way only in accordance with the Technical Requirements. Any such closure that exceeds the time period permitted therefor in the Technical Requirements is a “Non-Permitted Closure”. If a Non-Permitted Closure occurs, the Department will notify the Concessionaire thereof and of the associated Lane Closure Damages, in writing, within 48 hours. The Concessionaire will pay to the Department the liquidated damages set forth below (the “Lane Closure Damages”) at the time and in the manner set forth in the Technical Requirements. The Lane Closure Damages for any Non-Permitted Closure will not exceed $200,000 per incident.

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Section 8.15 Failure to Achieve Substantial Completion by Long Stop Date; Substantial Completion Recovery Plan

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

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

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

(a) The Parties acknowledge that the contract price for the Design-Build Work in the Design-Build Contract includes certain agreed quantities set forth in the Technical Requirements (the “Baseline Quantities”) and associated unit prices and markups for concrete sign foundations, electric service panel feeds, and undercut excavation (the “Allowance Items”) as set forth in the Technical Requirements. If the actual quantities of the Allowance Items in the Design-Build Work exceed the Baseline Quantities, the Design-Build Contractor will be entitled to payment by the Concessionaire of an amount equal to the agreed unit price and markup multiplied by the actual quantities which exceed the Baseline Quantities; provided however, that such payment by the Concessionaire to the Design-Build Contractor will not exceed $15,000,000. The Department will pay the Concessionaire for any such amount that the Concessionaire pays to the Design-Build Contractor; provided however, that the maximum such amount payable by the Department to the Concessionaire pursuant to this Section 8.16(a) will not exceed $15,000,000.

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

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

(d) The Department will pay for the acquisition of stream and wetland credits in accordance with the Technical Requirements. The Concessionaire will perform stream restoration construction activities in accordance with the Technical Requirements.
ARTICLE 9.

PROJECT MANAGEMENT; OPERATIONS AND MAINTENANCE

Section 9.01  Transition of Operations and Maintenance to Concessionaire

(a) Care, Custody and Control.

(i) Except as otherwise specifically provided for in a LNTP, after the Financial Close Date and prior to the Substantial Completion Date, the Concessionaire will (A) have care, custody and control of the Design Build Right of Way for the Project Assets and (B) be responsible for the security and protection of active construction areas on the Project Assets and the Project Right of Way and (1) all materials, equipment, supplies and any other property of any Concessionaire Party and (2) all materials, equipment, supplies and any other property of the Department being held in a secure location at or on the Project Assets or otherwise being used or procured in connection with the Work, whether or not on the Project Right of Way. Notwithstanding the foregoing, during the Construction Period, the Department will (x) except as otherwise provided herein, operate and maintain the existing HOV Lanes and access ramps at its own cost and expense to the extent they are not actively under construction as provided in Section 9.07 (the “HOV Assets”); (y) have care, custody and control of the HOV Assets; and (z) be responsible for the security and protection of the HOV Assets and all materials, equipment, supplies and any other property of the Department at or on the HOV Assets, in all cases except as otherwise provided in Section 9.02.

(ii) Through the coordination process described in Section 8.07, the Concessionaire and the Department will determine from time to time which portions of the existing HOV Lanes will be open for traffic or under construction.

(iii) On and after the Substantial Completion Date to the end of the Term, the Concessionaire will have care, custody and control of the Project Assets (other than the Department Shared Assets).

(b) Turnover Process. The Concessionaire will implement and comply with the Turnover Plan to ensure the timely and orderly transition of operations and maintenance of the Project from the Department to the Concessionaire. The parties will cooperate and coordinate with each other with respect to activities undertaken pursuant to the Turnover Plan attached as Exhibit V.

Section 9.02  Conditions Precedent to Service Commencement of the Project

(a) The Concessionaire will not initiate Service Commencement until the following conditions have been satisfied (or the Department, in its sole discretion, waives any such condition) and the Department has delivered notice to that effect to the Concessionaire (the “Service Commencement Notice to Proceed”):
(i) the Department has issued the Substantial Completion Certificate, or it has been determined pursuant to the dispute resolution procedures set forth herein that the Department should have issued such certificate;

(ii) the Department has approved the Operations and Maintenance Plan, the updated Performance Requirements Baseline Tables, all other Project Documentation and all other Project Development Plans required by the Technical Requirements to be submitted on or before the Service Commencement Date;

(iii) the Concessionaire has received and delivered to the Department copies of all Governmental Approvals necessary to operate the Project and has satisfied all conditions and requirements thereof which must be satisfied before the Project can be lawfully opened for regular public use, all such Governmental Approvals remain in full force and effect, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval;

(iv) all insurance policies required under Section 17.01 for the Operating Period have been obtained and will be in full force and effect, and the Concessionaire has delivered to the Department duplicate originals or copies thereof (or endorsements reasonably acceptable to the Department extending coverage to the Project), certified by the Concessionaire’s insurance broker to be true and correct copies of the originals;

(v) there exists no Concessionaire Default for which the Concessionaire has received notice from the Department, except as to any Concessionaire Default that has been cured or for which Service Commencement will effect its cure, and there exists no event or condition that, with notice or lapse of time, would constitute a Concessionaire Default;

(vi) all Operations and Maintenance Agreements and agreements relating to toll collection and violation enforcement on the HOT Lanes are in full force and effect;

(vii) the Concessionaire has implemented the Maintenance Management System in accordance with the Technical Requirements;

(viii) to the extent not previously completed pursuant to Section 8.08, the Concessionaire has completed the toll commissioning process described in the Technical Requirements, and the ETMM System is completed, has passed all demonstration and performance testing in accordance with the Construction Documentation and the Technical Requirements, including demonstration of interoperability with E-ZPass or any successor to E-ZPass then utilized on State Highways, and is ready for normal operation unless previously completed pursuant to Section 8.08;

(ix) the Concessionaire has deposited the Source Code Documentation with the Escrow Agent in accordance with Section 18.06;

(x) all Project Agreements are in full force and effect;
(xi) the Concessionaire has paid or caused to be paid to the Department all amounts due and payable from the Concessionaire to the Department, including, but not limited to, Lane Closure Damages, in connection with this Agreement, including any applicable interest thereon (except such amounts subject to dispute in accordance with the dispute resolution procedures);

(xii) the Concessionaire has provided to the Department the training required to have been provided prior to Service Commencement by the Technical Requirements;

(xiii) the Concessionaire has submitted to the Department an Annual Budget for the remainder of the Agreement Year in which the Substantial Completion Date occurs (or, if the remainder of such year is shorter than 90 Days, an Annual Budget that conforms with the requirements specified in Section 9.08, for the remainder of such Agreement Year and for the following Agreement Year); and

(xiv) the Concessionaire has certified to the Department in writing that the conditions set forth in this subsection (a) have been satisfied as of the date of such certification.

(b) The parties will comply with the submittal and review procedures set forth in Section 10.05 in the Department’s determination of whether the Concessionaire has satisfied the conditions precedent for achieving Service Commencement.

(c) The Department’s issuance (or deemed issuance) of the Service Commencement Notice to Proceed will not constitute a waiver by the Department of any then-existing breach of this Agreement by the Concessionaire.

Section 9.03 Concessionaire Obligation to Manage and Operate

(a) At all times following the Service Commencement Date, the Concessionaire, at its sole cost and expense (except as otherwise provided herein), will cause the Project to be managed, maintained and operated in accordance with Law, all Governmental Approvals, the terms, conditions and standards set forth in this Agreement, including the requirements set forth in the Technical Requirements, and in accordance with Good Industry Practice. Without limiting the foregoing, the Concessionaire agrees to be responsible for the following, at its sole cost and expense at all times following the Service Commencement Date for the Project:

(i) the management and control of traffic on the Project Assets, including, but not limited to, incident response services and temporary partial or full closures of the Project Assets, subject to the Department’s rights to assume control as expressly provided in this Agreement;

(ii) the maintenance and repair of the Project Assets and all systems and components thereof, including the ETTM System, which the Concessionaire may upgrade, modify, change and replace, as applicable, in accordance with this Agreement and the requirements set forth in the Technical Requirements;
(iii) the operation of the Project Assets and the ETTM System, and otherwise carrying out the collection and enforcement of tolls and other incidental charges in accordance with Article 5 respecting the Project Assets;

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

(v) traffic management, and maintenance and repair responsibilities under Section 9.04(a) in accordance with the Technical Requirements; and

(vi) except as otherwise specifically provided herein (including the right of the Concessionaire to close all or a portion of the HOT Lanes in accordance with the provisions hereof), at all times during the Term, causing the Project Assets to be continuously open and operational for use by all members of the public travelling in Permitted Vehicles 24 hours a day, 365 Days a year.

(b) Snow and Ice Removal.

(i) Prior to the Service Commencement Date, the Department will, at its own cost, remove snow and ice from the HOV Lanes that are open to traffic.

(ii) Subject to Section 9.03(b)(iv), the Department will provide snow and ice removal services on the HOT Lanes at a comparable level of service to that it provides on the GP Lanes. The Concessionaire will provide access to the HOT Lanes to the Department or its contractors to provide snow and ice removal services. If the Concessionaire does not provide access to the HOT Lanes to the Department or its contractors, then the Department will not be required to provide snow and ice removal services on the applicable HOT Lanes during the pendency of such denial of access.

(iii) Other than as provided in Section 9.03(b)(iv), the Department will have no liability to the Concessionaire arising out of its snow and ice removal services. If the Department’s contractors for snow and ice removal damage the Project Assets, the Department will provide to the Concessionaire any amounts that the Department has received in respect of such damage from such contractor or its insurer. Subject to Section 9.03(b)(i) and Section 9.03(b)(ii), the Department will have full discretion to establish priorities for its contractors regarding timing and location of services, materials and equipment, without liability to the Concessionaire, other than as provided in clause (iv) below.

(iv) The Concessionaire may notify the Department if the Department fails at any time to provide snow and ice removal to the HOT Lanes at a level of service comparable to that it provides on the GP Lanes. Such notice will be given verbally, to be immediately followed up in writing, to the Department’s District Administrator and Assistant District Administrator for Maintenance or its designee (i.e. Duty Officer) for the Northern Virginia District and the Fredericksburg District for the applicable section of the HOT Lanes. If the Department fails to respond affirmatively within two hours of
the written notice from the Concessionaire or if the Department does not begin snow and ice removal services within four hours of such written notice, except if the Concessionaire does not provide access to the HOT Lanes to the Department, then the Concessionaire may arrange for other contractors to provide such service and the Department will pay the Concessionaire for such contractors’ reasonable documented cost of snow and ice removal services; provided that such contractors will not in any way hinder the removal of snow and ice from the GP Lanes.

(v) The Concessionaire may arrange for a contractor to provide snow and ice removal services to the HOT Lanes, at the Concessionaire’s sole cost and expense, even if the Department is providing such services at a level of service comparable to that it provides on the GP Lanes, with prior written notice to the Department; provided that any such contractor will not in any way hinder the removal of snow and ice from the GP Lanes. Such notice will be given verbally, to be immediately followed up in writing, to the Department’s District Administrator and Assistant District Administrator for Maintenance or its designee (i.e. Duty Officer) for the Northern Virginia District and the Fredericksburg District for the applicable section of the HOT Lanes.

(c) Drainage. The Concessionaire will be responsible, at its own cost and expense, for the maintenance, repair and replacement of the existing drainage system located within and outside of the Project Right of Way in accordance with the Technical Requirements, except to the extent such responsibility is allocated to the Department in accordance with the Technical Requirements.

Section 9.04 Procedures Relating to Maintenance Work

(a) General. The Concessionaire will perform all maintenance obligations with respect to the Project in accordance with this Agreement and the Technical Requirements.

(b) Life Cycle Maintenance Plan. No later than 90 Days before the beginning of each calendar year after the Service Commencement Date, the Concessionaire will prepare and deliver to the Department a full five-year period maintenance plan on a rolling basis that describes life cycle asset maintenance for the Project (each, a “Life Cycle Maintenance Plan”) in accordance with the Technical Requirements. The Life Cycle Maintenance Plan will include a description of all Major Maintenance to be undertaken during such five-year period, by component, item or discrete project (each, a “Task”), the estimated costs and timing relating to each Task, the underlying assumptions used to develop such plan, including assumptions arising from the re-evaluations of the physical condition of the Assets conducted pursuant to Section 9.04(d); and such other information as may be reasonably requested by the Department.

(c) Review and Approval of Life Cycle Maintenance Plan.

(i) The Department will review and approve the Life Cycle Maintenance Plan and components thereof, including, but not limited to, the proposed scope of work, timing and estimated costs for the Major Maintenance. The Department will deliver its comments, approval or disapproval to the Concessionaire within 45 Days after the
Concessionaire has delivered each proposed Life Cycle Maintenance Plan to the Department in accordance with Section 9.04(b).

(ii) The Concessionaire will reasonably consider any changes or additions proposed by the Department to the proposed Life Cycle Maintenance Plan and will modify the Life Cycle Maintenance Plan to reflect those changes and additions which are consistent with the standards and requirements of this Agreement.

(iii) In the event of any Dispute relating to a Life Cycle Maintenance Plan, the Department and the Concessionaire will endeavor in good faith to resolve any such Dispute within 60 Days after it is provided to the Department. Any Disputes raised by the Department with respect to the Life Cycle Maintenance Plan must be based on whether it and the underlying assumptions are reasonable, realistic and consistent with Good Industry Practice, the Technical Requirements and Law. If no agreement is reached within such 60-Day period as to any such matter, either party may submit the Dispute to the dispute resolution procedures set forth in Article 21. Until resolution of any Dispute relating to a Life Cycle Maintenance Plan, the treatment of the disputed Tasks in the most recently-approved Life Cycle Maintenance Plan will remain in effect and govern the requirements relating to such Tasks. If there is no approved Life Cycle Maintenance Plan then in effect, the Concessionaire will proceed as directed by the Department until resolution of such Dispute.

(d) Inspection and Implementation.

(i) After the Service Commencement Date, the Concessionaire will conduct inspections of the physical condition of the Project Assets pursuant to the Technical Requirements. Every five years after the Service Commencement Date, the Concessionaire will conduct an assessment of the physical condition of the Project Assets pursuant to the Technical Requirements, and will prepare a comparative analysis of such conditions to the conditions as previously reported (or, with respect to any Project Enhancements, their condition upon completion thereof), such analysis to take into account any changes in Federal Requirements and changes to safety standards. The condition of each Asset will be assessed using the Department’s Maintenance Rating Program in accordance with the Technical Requirements. If any Asset is determined by the Concessionaire or the Department to fall below the applicable level or rating specified in the Technical Requirements for such Asset, the Concessionaire will, within 90 Days of such assessment, develop and submit to the Department a plan to restore such Asset to a condition that will enable the Asset to meet all applicable Performance Requirements, and such plan will also include a budget, timeline and identification of the funding sources (if known at the time) that will be utilized to restore such Asset.

(ii) The Department will be responsible at its sole cost and expense for inspection of bridges and structures on the Project Right of Way in accordance with the Technical Requirements. The Concessionaire will cooperate with the Department in its conduct of inspections and will use reasonable efforts to minimize any disruption to the Department’s conduct of such inspections. The Department and the Concessionaire will
use reasonable efforts to minimize any disruption to or impairment of the Work, the Project and the Department’s inspection activities.

(iii) If the Concessionaire fails to complete any of the Tasks in accordance with this Agreement and the applicable Life Cycle Maintenance Plan, the Department may demand by notice in writing that such Tasks be completed by the Concessionaire. If the Concessionaire has failed to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers such notice, the Department may, at its option, but is not obligated to, either (A) carry out such Task or correct such defective work using Department personnel, materials and equipment or (B) procure the services for such Task or corrective work by one or more contractors. If the Concessionaire fails to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers notice pursuant to this Section 9.04(d)(iii) and the Department elects to pursue its rights pursuant to Section 9.04(d)(iii)(A) or (B), then the Concessionaire will pay the Department’s Allocable Costs it incurs to complete such Task or corrective work, and its third-party costs to procure such contract(s).

(iv) Notwithstanding anything to the contrary in Section 9.04(d)(iii), the Concessionaire may, by written notice delivered to the Department within 30 Days of receipt of the Department’s notice of demand described in Section 9.04(d)(iii), object to any such demand by the Department on the basis that the Concessionaire has completed the Task(s) specified in the Department’s demand in accordance with this Agreement and the applicable Life Cycle Maintenance Plan or that such Task(s) are not then required in accordance with this Agreement or the applicable Life Cycle Maintenance Plan, which notice will give details of the grounds for such objection. Upon the giving of any such notice, the parties will endeavor to reach agreement as to any matters referred to in the notice. If no agreement is reached as to any such matter within 30 Days after the giving of such notice, either party may refer the Dispute to the dispute resolution procedures set forth in Article 21. Notwithstanding the foregoing, the Concessionaire will perform the Task as directed by the Department and the Department will be entitled to exercise its remedies for the Concessionaire’s failure to comply with such directive in accordance with this Agreement. If it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then such directive and any additional Work required by the Department will be treated as a Department Change pursuant to Section 14.02.

Section 9.05 Major Maintenance Reserve Fund

The Concessionaire will fund the Major Maintenance Reserve Fund in such amounts and in accordance with the terms as may be required by the Lenders.

Section 9.06 Police and Enforcement Services

(a) The Department will coordinate with the Virginia State Police to provide policing services, and to provide emergency services (fire and rescue), including traffic patrol and traffic law enforcement services, to be provided on the Project at a level of service equivalent to that
provided on comparable State Highways from time to time. All such foregoing services will be provided without any charge to the Concessionaire or the Project. For the avoidance of doubt, such services will not include any enforcement of HOV compliance. In addition, if reasonably requested by the Concessionaire, the Department will assist the Concessionaire in obtaining enhanced levels of police services for the control of traffic for construction or maintenance activities or as otherwise needed (and in each case, at the Concessionaire’s sole cost and expense). Notwithstanding such assistance, the Concessionaire will be solely responsible for obtaining such enhanced services and the Department does not guarantee that such services can be obtained.

(b) The Concessionaire may, at its sole cost and expense, engage the Virginia State Police to provide toll enforcement and HOV enforcement services (including the identification and apprehension of toll violators), and the Department will assist the Concessionaire in obtaining such services if so requested by the Concessionaire. The Concessionaire will not engage or permit the engagement of private security services to provide traffic patrol or traffic law enforcement services on the Project; provided, that the foregoing does not preclude the Concessionaire from engaging private security firms or employing other appropriate security devices, vehicle occupancy detection equipment or other automated technology to protect, collect and enforce the payment of Toll Revenues and to identify toll and/or HOV violators, subject to Law, and to enforce any private rights and civil remedies available to it respecting toll and/or HOV violations.

(c) Notwithstanding the foregoing, the Concessionaire will not permit any private security firm to stop vehicles, apprehend road users, or engage in any other direct enforcement activity on the Project Right of Way.

(d) The Department will not have any responsibility or liability to the Concessionaire resulting from or otherwise relating to the failure of the Virginia State Police or any other public agencies to provide policing services contemplated by this Section 9.06 or any of the acts or omissions of the Virginia State Police or such agencies with respect to such services.

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

Section 9.07 Maintenance by the Department.

(a) Except as otherwise provided herein, the Department will maintain, repair and, subject to and in accordance with the Department’s normal course of operations and activities as in effect from time to time, cause to be open and operational, in a manner consistent with access to State Highways, so as to permit access to the HOT Lanes by Permitted Vehicles, the ramps, bridges and roadways directly connecting to the HOT Lanes over which the Department has sole control. The foregoing does not restrict the Department’s right to operate existing or new facilities, to modify existing facilities, to construct new facilities, including Project Enhancements, and, subject to Section 12.02(d)(i) through (iii), to perform planned and
emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project.

(b) Except as set forth in the Technical Requirements, the Department will maintain and repair the Department Shared Assets, subject to and in accordance with the Technical Requirements and the Department’s normal course of operations and activities as in effect from time to time. Except as set forth in the Technical Requirements, the cost for maintenance and repair of the Department Shared Assets will be paid by the Department.

(c) The Department will be responsible, at its own cost and expense, for the maintenance, repair and replacement of the existing drainage system located within and outside of the Project Right of Way in accordance with the Technical Requirements, except to the extent such responsibility is allocated to the Concessionaire in accordance with the Technical Requirements.

(d) Activities undertaken by the Department pursuant to this Section 9.07 will not constitute a Compensation Event, unless they meet the criteria as provided in this Agreement.

Section 9.08 Annual Budget

(a) For each Agreement Year and partial Agreement Year from and after the Service Commencement Date, the Concessionaire will file with the Department an annual budget for the Project for such full or partial Agreement Year at least 60 Days prior to the start thereof (an “Annual Budget”). Each Annual Budget will be in a form reasonably acceptable to the Department and show in reasonable detail in respect of such full or partial Agreement Year:

(i) projected Gross Revenues;

(ii) projected Operating Costs, including all amounts payable to the Department;

(iii) projected maintenance expenses, including the costs of Major Maintenance activities to be performed pursuant to the Life Cycle Maintenance Plan;

(iv) projected debt service and other amounts payable with respect to Concessionaire Debt, including deposits to reserve funds held for benefit of the Project Lenders;

(v) projected Distributions; and

(vi) for each Agreement Year after the Concessionaire has achieved the Initial IRR to the Agreement Year in which the Concessionaire achieves the Highest Revenue Share IRR, the date on which the Concessionaire expects to achieve the Highest Revenue Share IRR.
(b) The Concessionaire will provide such other information as the Department may reasonably require in connection with its review of the Annual Budget, including: (i) any amendments to operating budgets pursuant to the O&M Agreement; and (ii) any budgets related to the Shared Facilities Agreement.

Section 9.09 Signage.

(a) The Concessionaire will submit a Signage Plan to the Department for its review and approval pursuant to the Technical Requirements. The Concessionaire will limit its signage to the Project Right of Way and any other real property or real property rights as set forth in Section 8.05.

(b) The Concessionaire agrees that it shall, at its sole cost, install, operate and maintain on connecting State Highways such signs solely notifying motorists of the access to the HOT Lanes, the amount of tolls and fines for toll violations, the applicable High Occupancy Requirement, and other relevant information, in accordance with applicable Law and the Technical Requirements.

(c) The Department will remain responsible, at its cost, for general directional signs on State Highways informing the public of the direction and distance to the HOT Lanes and other State Highways. During the Term, the Department will also cooperate with, and use its commercially reasonable efforts to cause other public agencies or entities to cooperate with, the Concessionaire to install, at the Concessionaire’s cost, additional signs along State Highways notifying motorists of the access to the HOT Lanes and any other communications relating to the HOT Lanes as are reasonably requested by the Concessionaire, subject to any obligation to obtain any necessary authorizations of any other Governmental Authority and in accordance with applicable Law. In connection with any such request, the Concessionaire will submit the proposed layout, location, type, size, color and content of all such traffic signs or other signs.

ARTICLE 10.

CONCESSIONAIRE PROJECT AND QUALITY MANAGEMENT; DEPARTMENT OVERSIGHT AND OTHER SERVICES

Section 10.01 Project and Quality Management

The Concessionaire will provide oversight and management of the Project to control the scope, quality, cost, and on-time delivery of the Work. If the Concessionaire is required to rectify any Non-Conforming Work in accordance with Section 8.11(b), the parties will review the Quality Management System Plan to assess and determine whether changes, including increased management and oversight efforts by the Concessionaire, to such plan are necessary to prevent such further Non-Conforming Work.
Section 10.02 Right to Oversee Work

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

(b) The Concessionaire will fully cooperate with the Department to facilitate its conduct of Oversight Services. In the course of performing Oversight Services, the Department will use reasonable efforts to minimize the effect and duration of any disruption to or impairment of the Work or the Project.

Section 10.03 Department Access and Inspection

The Department, the FHWA, and their respective authorized agents will have unrestricted access at all times to enter upon, inspect, sample, measure and physically test any part of the Project Assets or the Project Right of Way, as well as any materials, supplies, machinery and equipment to be incorporated into or used in construction, operation or maintenance of the Project. The Department will also have the right, upon reasonable advance written notice (except as provided in Section 18.07(b)) to the Concessionaire, to inspect financial or other records relating to the Project. Upon the Concessionaire’s request, the Department will provide the Concessionaire with the results of any such test or inspections subject to any protections from disclosure under applicable Law.

Section 10.04 Compensation for Oversight Services

(a) Except as otherwise expressly provided in this Agreement, including, without limitation, Section 10.04(b), Section 10.04(c), Section 10.05(h), Section 11.05(a) and Section 24.03, the Department will not be compensated for its Oversight Services, whether in respect of the design, inspection or permitting for the Project, any Project Enhancement or any Safety Compliance Orders.

(b) Notwithstanding Section 10.04(a), if at any time the Concessionaire has failed to perform any of its construction, operating or maintenance obligations in any material respect then, in addition to other remedies available pursuant to this Agreement and the other Project Agreements, the Department, with written notice to the Concessionaire given concurrently with the increase in the Department’s monitoring or as soon as practicable thereafter, is entitled to adequately and appropriately increase the level of its monitoring of the Project and the Concessionaire’s compliance with its construction, operation and maintenance obligations pursuant to this Agreement, until such time as the Concessionaire has demonstrated to the Department’s reasonable satisfaction that it will perform and is capable of performing its construction, operation and maintenance obligations pursuant to this Agreement. The Concessionaire will compensate the Department for all Allocable Costs incurred by the Department as a result of such increased level of monitoring from and after the date on which
such increased level of monitoring begins, provided, that if the increased monitoring is due to a delay in achieving Substantial Completion, Service Commencement or Final Acceptance, the Concessionaire will compensate the Department for such increased monitoring solely by payment of liquidated damages pursuant to Section 8.10. The Concessionaire’s total liability to the Department during the Construction Period in connection with any increased monitoring will not exceed $2,000,000 in the aggregate.

(c) If the Department increases its monitoring or oversight as permitted in this Agreement during the Operating Period, then the Department will give notice of such increased level of monitoring as provided in Section 10.04(b). Within 10 Days following the day on which increased monitoring activities begin, the Department will provide the Concessionaire with a budget for its increased oversight and/or monitoring activities which sets out its total proposed costs in reasonable detail. If there is a change in circumstances in the oversight activities or the events which precipitated them occurs following the submission of the Department’s initial budget, then the Department will provide a revised budget, which budget will detail any increased costs.

(d) The Concessionaire may submit a cure plan describing specific actions the Concessionaire will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject. Notwithstanding Section 10.04(c), if the Department accepts a cure plan, the Department shall not increase its monitoring or other Oversight Services unless the Concessionaire fails to diligently pursue such cure plan.

Section 10.05 Department Approvals

(a) This Section 10.05 sets forth procedures governing certain submittals or requests by the Concessionaire (or the Design-Build Contractor or the O&M Contractor) to the Department (including, but not limited to, plans, schedules, designs, Design Documentation and Construction Documentation) which require an approval, review, comment, consent, notification, determination, decision or other response (collectively, a “Response”) from the Department pursuant to this Agreement. All submittals or requests to the Department will be made in the form required by, and otherwise in conformity with, the requirements set forth in the Technical Requirements. Except as otherwise provided in this Agreement, the procedures set forth in this Section 10.05 will apply to any submittal or request by the Concessionaire relating to, or any required approval or disapproval by the Department of, the following: any proposed OSPS Improvement Plan pursuant to Section 5.08(b); the issuance of a Design Work Notice to Proceed pursuant to Section 8.03(a) or a Construction Notice to Proceed pursuant to Section 8.03(b); any submittal of Design Documentation and Construction Documentation relating to the Work pursuant to Section 8.04(a); the approval of the ROW Acquisition and Relocation Plan pursuant to Section 8.05(a); the determination of whether Substantial Completion has been achieved pursuant to Section 8.08(e); the determination of whether Final Acceptance has been achieved pursuant to Section 8.09(c); the determination of whether the conditions precedent for achieving Service Commencement have been achieved pursuant to Section 9.02(b); any Signage Plan pursuant to Section 9.09(a); data, reports and any proposed Remedial Action Plan pursuant to Section 16.01(b); insurance submittals pursuant to Section 17.02(e); and a Disbursement Request pursuant to the Public Funds Amount Payment Terms attached as Exhibit N.
(b) Except as otherwise set forth herein, any submittal, resubmittal or request to the Department will be deemed complete at 5:30 p.m. Eastern time on the seventh Day following its receipt by the Department unless, the Department notifies the Concessionaire in writing prior to 5:30 p.m. Eastern time on such seventh Day that such submittal, resubmittal or request is incomplete according to the standards set forth in the Technical Requirements and sets forth in reasonable detail the incomplete elements of the submittal, resubmittal or request.

(c) In any case in which a submittal or request is or has been deemed to be complete under Section 10.05(b), the Department will review and respond to such submittal or request as promptly as reasonably possible, and no later than 21 Days after the date on which the Concessionaire (or the Design-Build Contractor or the O&M Contractor) has delivered such submittal or request to the Department. The Department will respond within such 21-Day period by (i) approving, certifying or taking other appropriate action with respect to, the submittal or request, as applicable or (ii) disapproving such submittal or request and providing written notice to the Concessionaire specifying in reasonable detail the reasons for which it has disapproved the submittal or request. If the Department objects or disapproves any submittal or request in accordance with clause (ii) of the preceding sentence, the Concessionaire will resubmit the submittal or request as promptly as reasonably possible, and the Department will resume its review and respond to such submittal or request by approving or disapproving the submittal or request (provided that such submittal or request is complete or has been deemed to be complete under Section 10.05(b)) within 10 Days following its receipt of a resubmittal or request. The Department’s review of a resubmittal or request will be limited to the issue, condition or deficiency which gave rise to the Department’s disapproval and will not extend to other aspects for which a notice of disapproval was not previously provided to the Concessionaire unless the issue, condition or deficiency which gave rise to the Department’s disapproval reasonably relates to the Department’s disapproval for which notice was previously provided. The Concessionaire is in no way obligated to incorporate the Department’s comments unless necessary to comply with a specific requirement of this Agreement.

(d) The time periods specified in Section 10.05(c) will be extended for the duration of a Force Majeure Event that prevents the Department or the Concessionaire, as applicable, from performing under this Section 10.05.

(e) Unless otherwise provided in this Agreement, if the Department fails to respond to a complete submittal or request which has been timely submitted or resubmitted, as the case may be within the applicable time periods, as provided in this Section 10.05, the Department will be deemed to have approved, certified or taken other similar action with respect to, such submittal or request; provided that such deemed approval will not be deemed a waiver of the Department’s other rights or the Concessionaire’s other obligations pursuant to this Agreement, including compliance with the Technical Requirements, Governmental Approvals, Good Industry Practice and applicable Law. Notwithstanding the foregoing, the deemed approval provisions of this Section 10.05(e) will not apply to the issuance of a Design Work Notice to Proceed pursuant to Section 8.03(a) or a Construction Notice to Proceed pursuant to Section 8.03(b), the approval of the ROW Acquisition and Relocation Plan pursuant to Section 8.05(a), the determination of whether Substantial Completion has been achieved pursuant to Section...
8.08(e): the determination of whether Final Acceptance has been achieved pursuant to Section 8.09(c); the submission of any data, reports and any proposed Remedial Action Plan pursuant to Section 16.01(b); or a Disbursement Request pursuant to the Public Funds Amount Payment Terms attached as Exhibit N.

(f) Unless otherwise agreed by the parties, the Concessionaire is entitled to resolve any disapproval by the Department of a resubmittal in accordance with the dispute resolution procedures set forth in Article 21. If the Department reasonably believes that all or a portion of a resubmittal fails to comply with this Agreement, the Department may, in accordance with this Agreement, direct the Concessionaire to perform the Work in accordance with the Department’s instructions. In such event, the Concessionaire will diligently proceed with the Work in accordance with such directive, and may (i) dispute the Department’s directive in accordance with this Agreement and (ii) if it chooses, proceed with the dispute resolution procedures set forth in Article 21. If it is finally determined in accordance with such dispute resolution procedures that the Concessionaire’s submittal or resubmittal complied with this Agreement, the Work required under the Department’s directive will be treated as a Department Change.

(g) In all cases where Responses are required to be provided hereunder, such Responses will not be withheld or delayed unreasonably and such determinations will be made reasonably except in cases where a different standard is specified. In cases where sole discretion is specified with respect to a Response by the Department, the Response will not be subject to the dispute resolution procedures set forth in Article 21. Any failure of the Department to respond to a matter which is determined in the Department’s sole discretion (by way of example, Deviations pursuant to Section 14.03) within 21 Days after delivery of the Concessionaire’s request to the Department will be deemed disapproval by the Department. The Department will provide within ten days after a request by the Concessionaire its rationale, in reasonable detail, for any disapproval or deemed disapproval of any matter where the Department has sole discretion to approve or disapprove.

(h) Subject to Section 10.04, if the Concessionaire must submit a submittal or request to the Department for review and Response more than twice due to the Concessionaire’s failure to comply with the requirements of this Agreement, the Concessionaire will pay the Department for the Department’s Allocable Costs incurred thereafter in reviewing any portions of such submittal or request. If the Concessionaire must submit a submittal or request more than twice due to the Department’s failure to comply with the requirements of this Agreement, the Department will pay the Concessionaire for the Concessionaire’s Allocable Costs incurred thereafter in preparing or submitting any portions of such submittal or request.

Section 10.06 Limitations on the Concessionaire’s Right to Rely

(a) The Concessionaire expressly acknowledges and agrees that the Department’s rights, if any, under the Project Agreements:

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

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

(iii) to perform Oversight Services,

exist solely for the benefit and protection of the Department, do not create or impose upon the Department any standard or duty of care toward any Concessionaire Party, all of which are hereby disclaimed, may not be relied upon, nor may the Department’s exercise or failure to exercise any such rights be relied upon, by the Concessionaire in determining whether the Concessionaire has satisfied the standards and requirements set forth in this Agreement and may not be asserted, nor may the Department’s exercise or failure to exercise any such rights be asserted, against the Department by the Concessionaire as a defense, legal or equitable, to the Concessionaire’s obligation to fulfill such standards and requirements; provided, that the foregoing will not limit the Department’s liabilities or obligations pursuant to this Agreement.

(b) To the maximum extent permitted by Law, and subject to the provisions of this Agreement, the Concessionaire hereby releases and discharges the Department from any and all duty and obligation to cause permitting, Project Right of Way acquisition, Utility Relocation, construction, equipping, operations, maintenance, policing, renewal, replacement, traffic management or other management of or for the Project or the Project Right of Way, by the Department, to satisfy the standards and requirements set forth in the Project Agreements; provided, that the foregoing will not limit the Department’s liability or obligations under this Agreement. The Department will be entitled to remedies for Non-Conforming Work pursuant to Section 8.11(b).

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

(i) relieve the Concessionaire from performance of the Work or of its responsibility for the selection and the competent performance of its Contractors;

(ii) relieve the Concessionaire of any of its obligations or liabilities under the Project Agreements;

(iii) be deemed or construed to waive any of the Department’s rights and remedies under the Project Agreements; or

(iv) be deemed or construed as any kind of representation or warranty, express or implied, by the Department.
(d) Notwithstanding Section 10.06(a), (b) and (c) above: (i) any Notices to Proceed and certificates or notices of Substantial Completion, Service Commencement and Final Acceptance will be binding on the Department and the Concessionaire will be entitled to rely thereon; provided however, that the delivery of such notices and certificates will not constitute a waiver by the Department of any breach of this Agreement by the Concessionaire or relieve the Concessionaire of any of its obligations hereunder; (ii) the Concessionaire will be entitled to rely on specific approved written Deviations and interpretative engineering decisions the Department gives pursuant to this Agreement in accordance with the Technical Requirements, the Design-Build Contract or any Development Contract, and any Law; (iii) the Department is not relieved from any liability arising out of a knowing, intentional material misrepresentation under any written statement the Department delivers; and (iv) the Department is not relieved from its obligations under this Agreement or any Development Contract.

Section 10.07 Suspension of the Work

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

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

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

(iii) failure to provide proof of required insurance coverage or to provide or maintain the required Performance Security;

(iv) failure to carry out and comply with Directive Letters; and

(v) failure to satisfy any conditions to commencing performance of the applicable portion of the Work set forth in Article 8 or Section 9.01.

(b) The Department will lift the suspension order promptly after it is permitted by the terms of the court order or judgment, after the dangerous or unsafe condition is rectified, or after the Concessionaire fully cures and corrects the applicable breach or failure to perform.

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

(d) The issuance of a suspension order will not affect the Concessionaire’s rights to cure or correct any such incidents giving rise to the issuance of the suspension order in accordance with this Agreement.

ARTICLE 11.

NON-COMPLIANCE POINTS SYSTEM

Section 11.01 Non-Compliance Points System

(a) Exhibit W to this Agreement sets forth a table for the identification of certain Concessionaire breaches or failures to perform its obligations under this Agreement that may result in the assessment by the Department of Non-Compliance Points. The Non-Compliance Points system is used by the Department to measure the Concessionaire’s performance levels and the accumulation of Non-Compliance Points by the Concessionaire may trigger the remedies set forth or referenced in this Article 11. This Article 11 shall apply only during the Operating Period. The inclusion in Exhibit W of a breach or failure to perform shall not determine whether such breach or failure is material.

(b) The Department may exercise any of its remedies under this Article 11 without prejudice to any other rights or remedies it has under this Agreement.

(c) If the Department determines any breach or failure described in Exhibit W has occurred, the Department shall within five Days of its determination deliver to the Concessionaire written notice thereof describing the breach or failure in reasonable detail. Within five Days of receipt of the Department’s notice, the Concessionaire shall investigate the Department’s claim and provide a written report as to whether the breach or failure in performance has in fact occurred and describing any mitigating factors. Within 10 Days after receiving the Concessionaire’s report, the Department shall deliver to the Concessionaire a written determination setting forth the number of Non-Compliance Points, if any, the Department, in its sole discretion, has assessed to the Concessionaire.

Section 11.02 Assessment of Non-Compliance Points and Cure Periods

The Department may assess Non-Compliance Points as described in Section 11.03 and Section 11.04 subject to the following terms and conditions.

(a) The Non-Compliance Points system will apply commencing on the later of (i) the Service Commencement Date and (ii) the fifth anniversary of the “Service Commencement Date” as such term is defined in the Capital Beltway Comprehensive Agreement. In addition, there will be a phased introduction of the Non-Compliance Points system, and for the initial year that the Non-Compliance Points system is applicable, the thresholds for “Total Cumulative
Number of Uncured Points” specified on page 1 of Exhibit W will be increased by 50% for the first year, and over the period of the next five years such threshold will be reduced 10% per year such that the thresholds in Exhibit W apply.

(b) The Department will not assess points for the first instance of each breach or failure provided that the breach or failure is cured within the cure period stated in Exhibit W. However, the Department will provide notice to the Concessionaire that a breach or failure has occurred. Any subsequent instances of each breach or failure may be subject to the assessment of Non-Compliance Points.

(c) Exhibit W sets forth the maximum number of Non-Compliance Points the Department may assess for each breach or failure. The Department may, in its sole discretion, assess fewer Non-Compliance Points for a particular breach or failure based on the merits of the individual breach or failure.

(d) Where a single act or omission gives rise to more than one breach or failure as described in Exhibit W, the Department may assess Non-Compliance Points for only one breach or failure. In such circumstances, the Department may, in its sole discretion, assess Non-Compliance Points for the breach or failure with the highest maximum number of Non-Compliance Points shall apply.

(e) For breaches or failures classified as category A in Exhibit W, Non-Compliance Points shall be assessed only at the end of the applicable cure period if the Concessionaire has failed to cure within that time. Additional Non-Compliance Points may be assessed again at the end of each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Non-Compliance Points equals or exceeds the level described in Section 11.05(c).

(f) For breaches or failures classified as category B in Exhibit W, the Non-Compliance Points shall be assessed on the date of the written determination from the Department to the Concessionaire. Provided that the breach or failure is not then cured within the applicable cure period, Non-Compliance Points shall be assessed again at the end of the first and each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Non-Compliance Points equals or exceeds the level described in Section 11.05(c).

(g) For breaches or failures identified as category C in Exhibit W (no applicable cure period), the Non-Compliance Points shall be assessed on the date of the written determination from the Department to the Concessionaire.

(h) Any cure period specified in Exhibit W shall be extended day-for-day for any Delay Event that prevents performance of Work to cure a breach or failure.

(i) At every 10 year anniversary of the Agreement Date, or upon significant revision of the Technical Requirements, either party, by written notice to the other party at least 90 Days prior to such anniversary reserves the right to request a review of the Non-Compliance Points
system. Upon receiving the notice, both parties must review the existing Non-Compliance Point system in place and agree in writing to any revisions required to the system.

**Section 11.03 Notification of Cure**

When the Concessionaire determines it has cured any breach or failure for which the Department has assessed Non-Compliance Points, the Concessionaire shall deliver written notice to the Department. The Concessionaire’s written notice shall identify the breach or failure at issue and describe what steps were undertaken to cure it. The Department or its designee shall then promptly verify the cure through inspection or other means and provide to the Department a written certification of cure. The Department retains the right to verify independently that the breach or failure in performance has in fact been cured.

**Section 11.04 Accumulation of Non-Compliance Points**

(a) The total of uncured Non-Compliance Points assessed by the Department shall be monitored by the Department or its designee on an ongoing basis for the duration of the Operating Period.

(b) The cumulative total of cured and uncured Non-Compliance Points assessed by the Department shall be monitored in rolling 365 Day cycles from the time the breach has been cured for those breaches classified in categories A and B, and from the time the breach has occurred for those breaches classified in category C. At the end of each 365 Day cycle, the Non-Compliance Points assessed for that specific breach will be subtracted for the cumulative total number of Non-Compliance Points the Concessionaire has been assessed.

**Section 11.05 Impact of Non-Compliance Points**

(a) Increased Monitoring. If the Concessionaire is assessed 135 or more Non-Compliance Points during any 365 Day cycle or maintains 30 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.05, the Department may increase the level of monitoring of the Project in accordance with Section 10.04. The Concessionaire shall compensate the Department for its Allocable Costs incurred as a result of such increased level of monitoring. The Concessionaire may submit a cure plan describing specific actions the Concessionaire will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject.

(b) The Remedial Plan.

(i) If the Concessionaire is assessed 200 or more Non-Compliance Points during any 365 Day cycle or maintains 45 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.04, the Department may require the Concessionaire to prepare and submit a remedial plan for the Department’s approval. The remedial plan shall be delivered to the Department within 45 Days of its request. The remedial plan shall set forth a schedule
and describe specific actions the Concessionaire will undertake to improve its performance as demonstrated by its incurring no additional Non-Compliance Points and by reducing the total number of uncured Non-Compliance Points it has accumulated to date. Such actions may include but are not limited to improvements to Concessionaire’s quality management practices, plans and procedures; changes in its organizational and management structures; increased monitoring and inspections; changes in key personnel; and the replacement of subcontractors.

(ii) If, after 180 Days following the implementation of the remedial plan, the Concessionaire can demonstrate that: (1) the remedial plan has reduced the number and frequency of Non-Compliance Points assessed as compared to the period prior to the implementation of the remedial plan; (2) the Concessionaire is complying in all material respects with the course of action described in the remedial plan; and (3) the Concessionaire has no uncured Non-Compliance Points, then the total number of Non-Compliance Points assessed over the course of the 180 Day period shall be reduced by 50%. If the rolling 365 Day cycle described in Section 11.04(b) ends at any time during the 180 Day period described herein, the total number of Non-Compliance Points the Concessionaire has cured during that 365 Day cycle shall carry over to the next 365 Day cycle. However, if the total number of Non-Compliance Points assessed over the course of the 180 Day period is reduced by 50% as described above, the total number of previously cured Non-Compliance Points that were carried over also shall be subtracted from the Concessionaire’s cumulative total number of assessed Non-Compliance Points.

(c) Default. If the Concessionaire: (1) fails to deliver to the Department the remedial plan within 45 Days of the Department’s request; or (2) fails to comply with the course of action set forth in the remedial plan and incurs a total of 245 Non-Compliance Points during any 365 Day cycle or maintains 68 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.04(a), the Department may notify the Concessionaire in writing that such failure is a breach of a material obligation hereunder, in which event such failure shall become a Concessionaire Default under Section 19.01(b) unless cured following such notice within the time period specified in Section 19.01(b).

Section 11.06 Disputes Regarding the Assessment of Non-Compliance Points

(a) The Concessionaire may object to the assessment of Non-Compliance Points or the amount of Non-Compliance Points assessed by delivering to the Department written notice of its objection within 10 Days of receipt of the Department’s written determination assessing the Non-Compliance Points at issue. Such notice shall set forth with specificity the grounds for the Concessionaire’s objection.

(b) The Department will reasonably consider the Concessionaire’s objections and Representatives of the Department and the Concessionaire will meet to discuss the matter within 30 Days after the Concessionaire has provided its written objection. If, at the conclusion of this 30 Day period, the Concessionaire still objects to the Department’s decision, it may pursue dispute resolution under Article 21.
(c) If for any reason the Concessionaire fails to deliver its written notice of objection within the time period specified in Section 11.06(a), the Concessionaire shall have waived its right to challenge the Department’s assessment of Non-Compliance Points.

ARTICLE 12.

PROJECT ENHANCEMENTS AND SAFETY COMPLIANCE ORDERS

Section 12.01 Project Enhancements by the Concessionaire

The Concessionaire will have the right, at its sole cost and expense, at any time after the Service Commencement Date, to design, develop, construct, operate and maintain Concessionaire Project Enhancements within the Project Right of Way, including any fundamental change in the dimensions, character, quality, location or position of all or any part of the Project; provided, that the Concessionaire will not undertake any such Project Enhancements unless all aspects thereof are approved in writing by the Department in its sole discretion, and the Concessionaire has entered into a Development Contract with the Department with respect to such Concessionaire Project Enhancement.

Section 12.02 Project Enhancements by the Department

(a) The Department will have the right from time to time after the Service Commencement Date, at its sole cost and expense, to design, develop, construct, operate and maintain Department Project Enhancements. The Department will have the right to design, develop, construct, operate and maintain Department Project Enhancements through one or more of the following mechanisms, as the Department selects from time to time in its sole discretion:

(i) use by the Department of its own personnel, materials and equipment;

(ii) contracting with third parties through requests for proposals, competitive bids, negotiations or any other lawful procurement process; and

(iii) authorizing and directing the Concessionaire, at the Department’s sole cost and expense, to undertake the Department Project Enhancements, through contracting for necessary traffic and revenue studies and all necessary planning, design, engineering, permitting, financial, right-of-way acquisition services, Utility Relocation, construction, installation, project management, operation, maintenance, repair and other work and services;

provided, that the Department will give the Concessionaire at least 60 Days’ written notice prior to initiating any procurement process referred to in clause (ii) above, during which time the Concessionaire will have the right, but not the obligation, to agree in writing to undertake the Department Project Enhancement on such terms and conditions as the Department and the Concessionaire will mutually agree upon; provided further, that if the Department and the Concessionaire fail to agree upon such terms and conditions within such 60 Day period, the Department will be entitled to proceed with any of the mechanisms set forth in clauses (i), (ii)
(b) If the Department authorizes and directs the Concessionaire to undertake a Department Project Enhancement pursuant to Section 12.02(a)(iii), then, in cooperation with the Department, as applicable, and subject to (i) the review and written approval by the Department in its sole discretion and (ii) without limiting the Concessionaire’s right to claim additional Concessionaire Damages, the Department making available to the Concessionaire sufficient funds, through monthly progress payments for work performed and costs incurred (plus an amount not to exceed 10% of such costs to pay the Concessionaire for reasonable and documented costs actually incurred to administer the work), including without limitation the costs of obtaining any Governmental Approvals necessitated by such Department Project Enhancement, in order to perform the work required to design, construct, operate and maintain such Department Project Enhancement, the Concessionaire will implement such Project Enhancement in accordance with the terms and provisions of this Agreement, and the Project Enhancement will be deemed a part of the Project and will become subject to all the terms and provisions of this Agreement as of the date the Concessionaire is required to assume such responsibility pursuant to this Section 12.02(b).

(c) The Department will have the right to enter upon the Project and the relevant rights of way for any purpose relating to Department Project Enhancements under this Section 12.02 to the extent reasonably necessary.

(d) The Department will have the right at any time (and without liability to the Concessionaire for any damages it may suffer, except as otherwise expressly provided in this Agreement) to perform planned and emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project; provided that

(i) the Department shall use reasonable commercial efforts to keep the Concessionaire informed of planned maintenance, renewal and replacement and repair activities which can reasonably be foreseen to impact activities on the Project;

(ii) the Department shall provide to the Concessionaire copies of and other information concerning the Department’s then current maintenance, renewal and replacement and repair program, upon the Concessionaire’s reasonable request; and

(iii) to the extent it relates to Department Project Enhancements, the provisions of Section 12.02 shall govern the Department’s liability to the Concessionaire therefor.

**Section 12.03 Safety Compliance Orders**

(a) The Department may, but is not obligated to, issue Safety Compliance Orders to the Concessionaire at any time after the Substantial Completion Date; provided, that no Safety Compliance Order may in any event order or direct the Concessionaire to do any act in violation of any Law. Compliance with a Safety Compliance Order by the Concessionaire will not be
deemed a default by the Concessionaire under the provisions of this Agreement or any other VDOT Project Agreement.

(b) The Department will use good faith efforts to inform the Concessionaire at the earliest practicable time of any circumstance or information relating to the Project which in the Department’s reasonable judgment is likely to result in a Safety Compliance Order. Except in the case of an Emergency, the Department will consult with the Concessionaire, prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts and the availability of Concessionaire resources to fund the Safety Compliance Work. The Department may, in its discretion, monitor and inspect the Project Assets at any time and from time to time for the purposes of determining whether any circumstances exist that warrant issuance of a Safety Compliance Order and giving the Department and the Concessionaire reports and recommendations related to such matters.

(c) If the Department issues a Safety Compliance Order, the Concessionaire will proceed, at its sole cost and expense, with the necessary environmental, design and construction Work to carry out the Safety Compliance Order as follows:

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

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

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

Section 12.04 Development of Other Facilities

(a) Except for the right of the Concessionaire to receive compensation set forth in Section 12.02, Section 12.04(d) (with respect to disruptions to the construction of the Project) Section 12.05 and Section 12.06(e) (with respect to disruptions to the construction of the Project), the State Parties will have the unlimited right, each in its sole discretion, at any time and without liability, to finance, develop, approve, construct, expand, improve, modify, upgrade, add capacity to, reconstruct, rehabilitate, restore, renew and replace any existing and new transportation or other facilities other than the Project (including, without limitation, free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, HOT/HOV lanes,
light rail, heavy rail, high-speed rail, freight rail and bus lanes) and exercise all of its authority to advise and recommend on transportation planning, development and funding, and to otherwise improve the GP Lanes and other roadways and structures within or adjacent to the I-95 Corridor (collectively, the “Department Projects”) outside the HOT Lanes, and whether nearby or otherwise located as to affect the Project, its operation and maintenance (including the costs and expenses thereof), its vehicular traffic and/or its revenues, provided, that:

(i) the Department will use diligent efforts to keep the Concessionaire informed of planned maintenance, renewal and replacement and repair activities of the Department Projects, which can reasonably be foreseen to impact the Work or traffic on the HOT Lanes; and

(ii) the Department will provide to the Concessionaire copies of and other information concerning the Department’s then current maintenance, renewal and replacement and repair program of the Department Projects, upon the Concessionaire’s reasonable request.

(b) The Department Projects include those facilities (i) owned or operated by the State Parties, including those owned or operated by a private entity pursuant to a contract with a State Party; (ii) owned or operated by a joint powers authority or similar entity to which a State Party is a member; (iii) owned or operated by any other Governmental Authority pursuant to a contract with a State Party, including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities and (iv) owned or operated by any other Governmental Authority (including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities) with respect to which a State Party has contributed funds, in-kind contributions or other financial or administrative support. The foregoing rights include the ability to institute, increase or decrease tolls or other fees and charges on such facilities or modify, change or institute new or different operation and maintenance procedures.

(c) The State Parties will have the right, without liability, to make discretionary and non-discretionary distributions of Federal and other funds for any transportation projects, programs and planning, and to exercise all of its authority to advise and recommend on transportation planning, development and funding on any project of its choosing.

(d) In no event will the taking of any action described in this Section 12.04 by a State Party (i) constitute a default by the Department pursuant to this Agreement or (ii) entitle the Concessionaire to Concessionaire Damages or other relief, except to the extent provided in (A) Section 12.02 with respect to any such existing and new transportation or other facilities that constitute Department Project Enhancements and (B) Section 12.05 with respect to Alternative Facilities; provided however, that if the construction activities associated with a Department Project directly cause a material disruption to the construction of the Project, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement; provided further however, that the Concessionaire will not be entitled to Concessionaire Damages or other relief if such material disruption is caused by a Concessionaire Party.
Section 12.05 Alternative Facilities.

(a) Additional Lanes.

(i) If the Department determines that Additional Lanes are in the State’s best interests, the Department will consult with the Concessionaire as to an appropriate strategy to implement such Additional Lanes. Prior to undertaking construction of Additional Lanes, the Department will give the Concessionaire the first right to submit a proposal to construct such Additional Lanes as new HOT Lanes and HOV Lanes at the Concessionaire’s sole cost as a Concessionaire Project Enhancement, so long as the Concessionaire demonstrates that (A) it has or can obtain sufficient funding (whether debt, equity, other sources of funds or combination thereof) for such Concessionaire Project Enhancement, and (B) it has or can obtain (with appropriate assistance from the Department) all required Governmental Approvals for such Concessionaire Project Enhancement.

(ii) The Concessionaire’s proposal to construct Additional Lanes as new HOT Lanes pursuant to a Concessionaire Project Enhancement will contain the information specified by the Department in writing and delivered to the Concessionaire. The Concessionaire’s failure to submit such a proposal within 120 Days of its receipt of the Department’s specifications as to the contents of the Concessionaire’s proposal will constitute a waiver of the Concessionaire’s right to submit a proposal pursuant to this Section 12.05. If a valid proposal is submitted by the Concessionaire, the Department will evaluate the Concessionaire’s proposal in accordance with the Department’s specifications within 90 Days of its submission. If the Concessionaire determines not to pursue the construction of such Additional Lanes as a Concessionaire Project Enhancement or the Department does not approve such Concessionaire Project Enhancement after review in accordance with the Department’s specifications, the Department may add Additional Lanes as a Department Project; and except as provided in clause (iv), such Additional Lanes will constitute a Compensation Event.

(iii) The Department will coordinate the activities described in Section 12.05(a) with the Concessionaire so as to minimize to the extent reasonably feasible the disruption to the Concessionaire’s construction, operation and maintenance of the Project and the generation of Toll Revenues.

(iv) Without limiting the applicability of clause (ii) above, the construction of Additional Lanes by or on behalf of the Department will not constitute a Compensation Event if the Highest Revenue Share IRR has been reached as of the date on which Commencement of Use of the Additional Lanes begins.

(b) Route One Improvements. The Route One Improvements will be treated as a Compensation Event unless the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Route One Improvements.
(c) **Occoquan Bridge Improvements.** The Occoquan Bridge Improvements will be treated as a Compensation Event unless the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Occoquan Bridge Improvements.

(d) **Southern HOT Lanes.** The Southern HOT Lanes will be treated as a Compensation Event unless (i) the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Southern HOT Lanes or (ii) the Concessionaire develops and constructs the Southern HOT Lanes as a Concessionaire Project Enhancement.

(e) **Procedures.**

(i) This **Section 12.05(e)** sets forth the Concessionaire’s sole and exclusive rights and remedies with respect to Alternative Facilities, and supersedes any provisions of this Agreement to the contrary; provided however, that if the construction activities associated with an Alternative Facility directly cause a material disruption to the construction of the Project Assets, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement. Such rights and remedies are subject to **Section 12.05(e)(iii).**

(ii) The Concessionaire Damages owing from the Department to the Concessionaire on account of an Alternative Facility will be equal to the Concessionaire Damages, if any, attributable to the Alternative Facility, but only to the extent that any such amount of any such reduction has not been previously recognized under **Section 14.04.** The foregoing Concessionaire Damages will be determined in the same manner, and subject to the same conditions and limitations, as for a Compensation Event under **Section 14.01.**

(iii) The Concessionaire acknowledges that each of CTB and the Department has a paramount public interest and duty to develop and operate whatever Department Projects it deems to be in the best interests of the State, and that the compensation to which the Concessionaire is entitled on account of Alternative Facilities is a fair and equitable remedy. Accordingly, the Concessionaire will not have, and irrevocably waives and relinquishes, any and all rights to institute, seek or obtain any injunctive relief or pursue any action, order or decree to restrain, preclude, prohibit or interfere with CTB’s or the Department’s rights to plan, finance, develop, operate, maintain, toll or not toll, repair, improve, modify, upgrade, reconstruct, rehabilitate, restore, renew or replace Alternative Facilities; provided, that the foregoing will not preclude the Concessionaire from enforcing its right to submit proposals for Additional Lanes and the Northern HOT Lanes pursuant to **Section 12.05(a) and Section 12.06(a),** respectively, its rights to compensation under this **Section 12.05,** or claiming any relief in respect of Compensation Events or Delay Events, if appropriate. The filing of any such action by the Concessionaire seeking to restrain, preclude, prohibit or interfere with CTB’s or the Department’s rights will automatically entitle CTB or the Department, as applicable, to recover all costs and expenses, including attorneys fees, of defending such action and any appeals.
Section 12.06 Northern HOT Lanes

(a) Concessionaire Project Enhancement - Concessionaire's Sole Cost.

(i) If the Department determines to develop the Northern HOT Lanes or if the Concessionaire proposes to develop, construct, operate and maintain Northern HOT Lanes, the Department and the Concessionaire will consult as to an appropriate strategy to implement the Northern HOT Lanes. The Concessionaire will have the first right to submit a proposal to the Department to develop, construct, operate and maintain the Northern HOT Lanes at the Concessionaire’s sole cost as a Concessionaire Project Enhancement, so long as the Concessionaire demonstrates that (i) it has or can obtain sufficient funding (whether debt, equity, or combination thereof) for the development, construction, operation and maintenance of the Northern HOT Lanes, (ii) it has or can obtain (with appropriate assistance from the Department) all required Governmental Approvals for the development, construction, operation and maintenance of the Northern HOT Lanes and (iii) neither the Department nor any other agency of instrumentality of the State will be required to make a contribution of public funds or provide any other sort of financial support or credit in connection with the development, construction, operation and maintenance of the Northern HOT Lanes, other than customary approvals and non-financial support from an issuer of bonds that will be used to finance the Northern HOT Lanes.

(ii) The Concessionaire’s proposal to develop, construct, operate and maintain the Northern HOT Lanes as a Concessionaire Project Enhancement will contain the information specified by the Department in writing and delivered to the Concessionaire. The Concessionaire’s failure to submit such a proposal within 120 Days of its receipt of the Department’s specifications of the contents of the Concessionaire’s proposal will constitute a waiver of the Concessionaire’s first right to submit a proposal pursuant to this Section 12.06. If the Concessionaire submits a valid proposal, the Department will evaluate the Concessionaire’s proposal in accordance with the Department’s specifications within 90 Days of its submission.

(b) Concessionaire Project Enhancement - Department Contribution. If the Concessionaire or the Department determine that the Department (or any other agency or instrumentality of the State) would be required to make a contribution of public funds or provide any other sort of financial support or credit in connection with the development and construction of the Northern HOT Lanes, the Concessionaire shall have the first right to submit a proposal to operate and maintain the Northern HOT Lanes as a Concessionaire Project Enhancement. In such event, the Concessionaire and the Department shall cooperate in the solicitation of proposals to develop and construct the Northern HOT Lanes through competitive processes in accordance with Law. The acceptance of any proposal to develop, construct, operate and maintain the Northern HOT Lanes shall be at the Department’s sole discretion.

(c) Department Project. If the Concessionaire determines not to pursue the development, construction, operation and maintenance of the Northern HOT Lanes as a Concessionaire Project Enhancement or the Department does not approve such Concessionaire
Project Enhancement after review in accordance with the Department’s specifications, the Department may develop, construct, operate and maintain the Northern HOT Lanes as a Department Project.

(d) The development, construction, operation and maintenance of the Northern HOT Lanes will not be a Delay Event or a Compensation Event, and the Concessionaire acknowledges and agrees that the Department may, in its sole discretion, develop additional general purpose lanes or HOV lanes in the area between the intersection of Eads Street and Interstate 395 and the current northern terminus of the I-95 Corridor, which is approximately one mile north of Route 648 (Edsall Road); provided however, that if the construction activities associated with the Northern HOT Lanes directly cause a material disruption to the construction of the Project, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement; provided further however, that the Concessionaire will not be entitled to Concessionaire Damages or other relief if such material disruption is caused by a Concessionaire Party.

ARTICLE 13.

DELAY EVENTS

Section 13.01 Delay Event Notice and Determination

(a) If the Concessionaire is affected by a Delay Event, it will give written notice to the Department within 30 Days following the date on which the Concessionaire first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Delay Event, (provided, that in the case of the same Delay Event being a continuing cause of delay, only one notice will be necessary) (a “Delay Event Notice”). Such Delay Event Notice will include (i) a detailed description of the Delay Event, (ii) details of the circumstances from which the Delay Event arises and (iii) an estimate of the duration of the delay in the performance of obligations pursuant to this Agreement attributable to such Delay Event and information in support thereof, if known at that time. The Concessionaire will also provide such further information relating to the Delay Event as the Department may reasonably require. The Concessionaire will bear the burden of proving the occurrence of a Delay Event and the resulting impacts.

(b) If for any reason the Concessionaire fails to deliver a Delay Event Notice within such 30-Day period, the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or right to time extensions or any other relief with respect to such Delay Event pursuant to this Agreement or any Project Agreement.

(c) Upon the occurrence of a Delay Event, the Concessionaire will promptly undertake efforts to mitigate the effects of such Delay Event, including all steps that would generally be taken in accordance with Good Industry Practice. The Concessionaire will promptly deliver to the Department an explanation of the measures being undertaken to mitigate the delay and other consequences of the Delay Event. The Concessionaire will notify the
Department within 30 Days following the date on which it first became aware (or should have become aware, using all reasonable due diligence) that such a Delay Event has ceased.

(d) Notwithstanding the occurrence of a Delay Event, the Concessionaire will continue its performance and observance pursuant to this Agreement of all of its obligations and covenants to be performed to the extent that it is reasonably able to do so and will use its reasonable efforts to minimize the effect and duration of the Delay Event. Without limiting the foregoing, the occurrence of a Delay Event will not excuse the Concessionaire from timely payment of monetary obligations pursuant to this Agreement, from compliance with Law, or from compliance with the Technical Requirements, except temporary inability to comply with the Technical Requirements as a direct result of the Delay Event.

(e) Subject to the Concessionaire giving the notice required in Section 13.01(a), a Delay Event will excuse the Concessionaire from whatever performance is prevented or delayed by the Delay Event referred to in such notice to the extent set forth in Section 13.02 and Section 13.03.

Section 13.02 Delay Events During the Construction Period

A Delay Event occurring during the Construction Period will excuse the Concessionaire from performance of its obligations to perform the Work pursuant to this Agreement but only to the extent that such obligations are directly affected by such Delay Event. In addition, during the Construction Period, extensions of milestones and/or activities identified on the Baseline Schedule for Delay Events affecting the Work will be made based on Time Impact Analysis, using the then current Baseline Schedule and taking into account impacts of the Delay Events on Critical Path items, in accordance with the Technical Requirements, and will extend the Guaranteed Substantial Completion Date, the Final Acceptance Deadline and the Long Stop Date. For avoidance of doubt, the Long Stop Date may be extended in accordance with this Agreement by reason of a Delay Event that occurs during the period after the Guaranteed Substantial Completion Date. If the Department and the Concessionaire cannot agree upon the extension, then either party will be entitled to refer the matter to the dispute resolution procedures in Article 21.

Section 13.03 Delay Events After Service Commencement

A Delay Event occurring after Service Commencement will only excuse the Concessionaire from performance of its obligations to perform O&M Work pursuant to this Agreement directly affected by such Delay Event.
ARTICLE 14.

COMPENSATION EVENTS; DEPARTMENT CHANGES; DEVIATIONS; NET COST SAVINGS

Section 14.01 Compensation Events

(a) Compensation Event Notice.

(i) If the Concessionaire is affected by a Compensation Event, it will give written notice to the Department within 30 Days following the date on which the Concessionaire first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Compensation Event (a “Compensation Event Notice”); provided, that, in the case of a Department Project Enhancement, a Compensation Event Notice must be given within 30 days following the Commencement of Use of such Department Project Enhancement. The Compensation Event Notice will set forth (A) the Compensation Event and its date of occurrence in reasonable detail, (B) the amount claimed as Concessionaire Damages and (C) details of the calculation thereof including a written analysis and calculation of the estimated Net Cost Impact, if any, and estimated Net Revenue Impact, if known at that time; provided that, if the amount of Concessionaire Damages and details of the calculation thereof are not available within the 30-Day notice period required herein, the Concessionaire may submit an estimate of the amount, or if known, the actual amount claimed as Concessionaire Damages and details of the calculation thereof no later than 60 Days from submission of the Compensation Event Notice; provided however, the Concessionaire may update the amount of claimed Concessionaire Damages and details thereof every 30 Days.

(ii) If, for any reason, the Concessionaire fails to deliver such written Compensation Event Notice within the foregoing time period, the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or right to Concessionaire Damages or other adverse effects on Gross Revenues or on costs, expenses and liabilities attributable to such Compensation Event.

(iii) After the Concessionaire submits a Compensation Event Notice, the Department may, but is not required to, obtain, at its sole cost, (A) a comprehensive report as to the Concessionaire’s estimate of the Net Cost Impact attributable to the Compensation Event and (B) from a traffic and revenue consultant a traffic and revenue study, prepared in accordance with Good Industry Practice, analyzing and calculating the estimated Net Revenue Impact attributable to the Compensation Event. Within 90 Days after receiving a Compensation Event Notice and the supporting documentation required by Section 14.01(a)(i), the Department will provide to the Concessionaire a copy of such reports as it has elected to obtain. If the Department disagrees with the entitlement to or amount of Concessionaire Damages claimed by the Concessionaire, the Concessionaire and Department will commence good faith negotiations to resolve the Dispute within 120 Days after the delivery of the Compensation Event Notice. If the Dispute cannot be
resolved within such 120 Days, either party may submit the Dispute for resolution pursuant to Article 21.

(b) Concessionaire Damages Determination.

(i) Concessionaire Damages with respect to any Compensation Event will be calculated based on the sum of (A) any adverse Net Cost Impact and (B) any adverse Net Revenue Impact for each year that there is an impact attributable to such Compensation Event; provided, that, subject to Section 14.01(c), any Net Cost Savings and positive Net Revenue Impact attributable to such Compensation Event will be used to decrease the amount of Concessionaire Damages. The calculation of Concessionaire Damages will be based on the difference in the projected cost and revenue related to the Project immediately prior to the occurrence of the Compensation Event and the projected cost and revenue related to the Project after taking into account the impact of the Compensation Event.

(ii) Following the calculations pursuant to Section 14.01(b)(i), the Concessionaire will incorporate such calculations into the proposed Base Case Financial Model Update and will provide such proposed Base Case Financial Model Update to the Department pursuant to Article 6.

(iii) The Concessionaire Damages will be net of all applicable insurance proceeds payable to the Concessionaire or its Contractors associated with the Compensation Event (or that would have been payable to the Concessionaire or its Contractors but for the failure by the Concessionaire or its Contractors to comply with the insurance requirements set forth in Section 14.01(b)(v) and Article 17), except as any payment of such insurance proceeds is affected by the bankruptcy or insolvency of the provider of such insurance, and will include all costs of asserting a Claim for such insurance proceeds and any increased insurance premium resulting from any such Claim; provided, that any increased insurance premium resulting from such Claim is certified in writing by the insurance provider of the Concessionaire or its Contractor, as applicable, prior to payment by the Department.

(iv) The Concessionaire will conduct all discussions and negotiations with the Department to determine any Concessionaire Damages and will share with the Department all data, documents and information pertaining thereto, on an Open Book Basis. As part of such negotiations, the parties will continue to refine and exchange, on an Open Book Basis, plans, drawings, configurations and other information related to the Compensation Event, traffic and revenue data, information, analyses and studies and financial modeling and quantifications of projected Net Cost Impacts, Net Revenue Impacts or Net Cost Savings, if any.

(v) The Concessionaire will take all steps reasonably necessary to mitigate the amount of the Concessionaire Damages attributable to, and other consequences of, any Compensation Event, including all steps that would generally be taken in accordance
with Good Industry Practice, including filing a timely claim for insurance and pursuing such claims.

(vi) If the Concessionaire and the Department are unable to agree upon the amount of the Concessionaire Damages within 120 Days after the delivery of the Compensation Event Notice, then either party, by written notice to the other party, may terminate the negotiations and request the Dispute be resolved in accordance with Article 21; provided, that the Department will proceed to make payment to the Concessionaire of the undisputed portion of the Concessionaire Damages in accordance with Section 14.01(b) without regard to the dispute resolution procedures.

(vii) The Concessionaire will not be entitled to Concessionaire Damages which are de minimis.

(c) Compensation Event Payment. Following a determination of the Concessionaire Damages pursuant to Section 14.01(b), the Department will compensate the Concessionaire for such Concessionaire Damages in such manner as agreed upon by the parties in writing or as may be determined through the dispute resolution procedures set forth in Article 21; provided, that:

(i) in the case of any lump sum payment of the Concessionaire Damages or any other payment schedule that differs from the projected timing of the Concessionaire Damages, the net present value of the Concessionaire Damages will be determined using the then appropriate risk adjusted discount rate(s), as agreed between the Department and the Concessionaire;

(ii) in the case of any payment method chosen other than an up-front lump sum payment or a payment that is based on the projected timing and amounts of the Concessionaire Damages, the payment method will yield an amount that will be equal to the present value of a lump sum payment, using appropriate risk adjusted discount rate(s) as agreed by the parties;

(iii) the amount and timing of payment of Concessionaire Damages related to a Compensation Event will take into account the ability of the Concessionaire, first, to obtain funding in relation to such Concessionaire Damages in accordance with Section 14.01(d) and, second, to have funds available in such time and in such amounts as are required to make current payments to third parties in respect of any portion of Net Cost Impact related to such Compensation Event; and

(iv) any Net Cost Savings or positive Net Revenue Impact attributable to such Compensation Event not included in the determination of Concessionaire Damages under the provisions of this Section 14.01 will be included in the Permit Fee calculated pursuant to the Permit Fee calculation, as agreed between the Department and the Concessionaire.

(d) Concessionaire Funding of Concessionaire Damages. If requested by the Department, the Concessionaire will use commercially reasonable efforts to obtain funding for a portion or the full amount of Concessionaire Damages; provided, however, that the
Concessionaire will not be obligated to obtain such funding if the Concessionaire, in its reasonable discretion, determines that obtaining such funding will diminish the Project Value, or to the extent such funding, combined with any payments from the Department, will not make funds available in such time and in such amounts as are required to make current payments to third parties as they are due or will become due in respect of any portion of Net Cost Impact included as part of such Concessionaire Damages. If the Concessionaire is able to obtain funding for all or part of the Concessionaire Damages, the Concessionaire will submit a funding proposal for the Department’s review and approval. Such funding proposal will identify the terms and conditions required to secure funding for such Concessionaire Damages, including any proposed payments by the Department. The Department will reject or accept the funding proposal within 30 Days of receipt of the funding proposal. If the funding proposal is accepted by the Department, the Department will issue a Change Order to implement the funding proposal and, to the extent such funding proposal secures financing for less than 100% of the Concessionaire Damages, the Change Order will provide funding for the remainder thereof on terms and conditions mutually agreed by the parties.

(e) Sole Remedy and Release of Claims.

(i) Without limiting the Concessionaire’s rights with respect to non-monetary relief for Delay Events, the Concessionaire Damages as determined according to this Section 14.01 will represent the sole right to compensation and damages for the adverse effects of a Compensation Event.

(ii) As a condition precedent to the Department’s obligation to compensate any portion of the Concessionaire Damages, following a determination of the Concessionaire Damages, the Concessionaire will execute a full, unconditional, irrevocable release, in form reasonably acceptable to the Department, of any Claims, Losses or other rights to compensation or other monetary relief associated with such Compensation Event, except for (A) the Claim and right to the subject Concessionaire Damages, (B) the Concessionaire’s right to non-monetary relief for a Delay Event and (C) the right to terminate this Agreement in accordance with Article 20 and to receive any applicable termination compensation.

(f) Additional Provisions for Certain Compensation Events.

(i) For the Compensation Event described in clause (k) of the definition thereof, the Concessionaire will be entitled to recover the Net Cost Impact for such Compensation Event; provided, however, that:

(A) in no event will the Concessionaire be entitled to submit a Claim if the Net Cost Impact of such Compensation Event does not equal or exceed $10 million per occurrence (“Claim Threshold”);

(B) if such Compensation Event meets the Claim Threshold, the Department will be solely responsible for the Net Cost Impact in excess of $10 million for such Compensation Event; provided, however, that the Concessionaire will be solely
responsible for the Net Cost Impact up to $10 million per occurrence for the first two Compensation Events that meet the Claim Threshold; and

(C) the Department will be responsible for the Net Cost Impact for such Compensation Events after the first two such Compensation Events occur that meet the Claim Threshold.

For the avoidance of doubt, the Concessionaire will be solely responsible for such Compensation Events with a Net Cost Impact under $10 million per occurrence.

(ii) For the Compensation Event described in clause (i) of the definition thereof, the Concessionaire will be entitled to recover the Net Cost Impact for such Compensation Event, provided, however, that:

(A) the Concessionaire will be solely responsible for the Net Cost Impact up to $5 million in the aggregate for such Compensation Event;

(B) the Department will be solely responsible for the Net Cost Impact in excess of $5 million but less than or equal to $10 million for such Compensation Event; and

(C) the parties will share evenly the Net Cost Impact in excess of $10 million for such Compensation Event

The provisions of this Section 14.01(f)(ii) apply to each event and not in the aggregate.

Section 14.02 Department Changes

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

(i) is not in compliance with Law;

(ii) would contravene an existing Governmental Approval and such contravention cannot be corrected by the issuance of a further or revised Governmental Approval;

(iii) would cause an insured risk to become uninsurable; or

(iv) would give rise to a material and adverse health or safety issue.
(b) Request for Change Proposal.

   (i) If the Department desires to initiate a Department Change, then the Department will issue a Request for Change Proposal. The Request for Change Proposal will set forth the nature, extent and details of the proposed Department Change.

   (ii) Within 21 Days following Concessionaire’s receipt of the Request for Change Proposal, the Concessionaire will provide the Department with a preliminary written response, and within a reasonable time thereafter (not to exceed 30 Days or such other timeframe agreed upon between the Concessionaire and the Department), with a definitive written response (a “Change Proposal”), as to whether, in the Concessionaire’s opinion, the Department Change constitutes a Compensation Event, and if so, (A) a detailed assessment of the Net Revenue Impacts and Net Cost Impacts, to the extent known at that time, (B) the effect of the proposed Department Change on the Concessionaire’s performance of its obligations pursuant to this Agreement, to the extent known at the time, (C) the proposed Base Case Financial Model Update and (D) a TIA if applicable.

   (iii) Within 30 Days following the delivery of the Change Proposal, the Concessionaire and the Department will exercise good faith efforts to negotiate a mutually acceptable Change Order.

   (iv) The Department will pay the Concessionaire’s Allocable Costs for preparing a Change Proposal and conducting preliminary work to respond to a Request for Change Proposal at the Department’s request. Upon payment of such Allocable Costs, the Department will own all Work Product included in the Change Proposal.

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

   (i) a Change Order setting forth, among other things, the adjusted scope of the Work and adjustments to the Baseline Schedule and the Technical Requirements, if applicable, will have been mutually agreed upon between the Department and the Concessionaire and issued by the Department;

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

   (iii) all necessary Governmental Approvals to commence the Work required to implement the Department Change have been obtained.
(d) **Disputed Work.**

(i) If the Department and the Concessionaire agree that the Work in question constitutes a Department Change and are unable to reach an agreement on a Change Order, the Department may deliver to the Concessionaire a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question, notwithstanding such disagreement. Such Directive Letter will include any changes to the Technical Requirements, if applicable, necessary to proceed with the Work covered by the Directive Letter.

(ii) If the parties disagree whether the Work in question constitutes a Department Change, the Department will have the right to issue a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question, and the Concessionaire will proceed with such work. Such Directive Letter will include any changes to the Technical Requirements necessary to proceed with the Work covered by the Directive Letter.

(iii) Upon receipt of a Directive Letter under (i) or (ii) above, the Concessionaire will implement and perform the Work in question as directed by the Department and the Department will make payments to the Concessionaire for such Work performed pursuant to Section 14.02(e).

(iv) To the extent there are any Disputes related to any Directive Letter issued under Section 14.02(d), such Disputes will be subject to the dispute resolution procedures set forth in Article 21.

(e) **Payments for Directive Letter Work.** If the Department issues a Directive Letter to the Concessionaire pursuant to Section 14.02(d), the Department will make payments to the Concessionaire on a monthly basis for the Work in question for the reasonable Allocable Costs of the Work in question, subject to subsequent adjustment through the dispute resolution procedures set forth in Article 21.

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

**Section 14.03 Concessionaire Requests for Deviations**

(a) The Concessionaire may request the Department to approve, in the Department’s sole discretion, Deviations by submitting to the Department a written change request in a form approved by the Department. At a minimum, the following information will be submitted with each such change request:

(i) a statement that the request is submitted pursuant to this Section 14.03(a);
(ii) a statement concerning the basis for the request, benefits to the Department or the Project and an itemization of the contract items and requirements affected by the request;

(iii) a detailed estimate of the time and/or cost savings and impacts on Gross Revenues;

(iv) proposed specifications and recommendations as to the manner in which the requested changes are to be accomplished; and

(v) the time by which the request must be approved so as to obtain the maximum cost-effectiveness.

(b) The Department may consider and approve or disapprove, in its sole discretion, any such request, and the Concessionaire will bear the burden of persuading the Department that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice and achieves the Department’s applicable safety standards and criteria. No Deviation will exist or be effective unless and until approval thereof is expressly provided in writing by the Department. Approval of a submission containing a Deviation will not constitute approval of the Deviation unless and until the Department expressly and specifically approves the Deviation in writing pursuant to the terms of this Section 14.03(b). The Department’s decision will not be subject to the dispute resolution procedures of Article 21. If not previously communicated, the Department will provide within 10 Days after a request by the Concessionaire its rationale, in reasonable detail, for any disapproval of a Deviation proposed by the Concessionaire.

(c) Unless otherwise agreed, the Concessionaire will be solely responsible for payment of any increased costs, for any losses of Gross Revenues, for all Allocable Costs and for any schedule delays or other impacts resulting from the implementation of a Deviation requested by the Concessionaire that has been approved by the Department.

Section 14.04 Net Cost Savings or Positive Net Revenue Impact

(a) Whenever it believes a Net Cost Saving or positive Net Revenue Impact exists or will arise from a Compensation Event, a Deviation, or a Department waiver of Non-Conforming Work, the Department at its election may, and the Concessionaire will, deliver to the other party written notice thereof. The notice will set forth (i) the Compensation Event and its date of occurrence in reasonable detail, the proposed or approved Deviation, or the Non-Conforming Work, as the case may be, (ii) a preliminary estimate, if then known, of the amount of the Net Cost Saving or positive Net Revenue Impact and (iii) a brief, preliminary written analysis and calculation thereof. Such notice will be brought within 30 Days after a claim for Concessionaire Damages or, if no claim is brought by the Concessionaire for Concessionaire Damages, within 30 Days after the occurrence of the Compensation Event or, in the case of a Project Enhancement, within 30 Days after the Commencement of Use of the Project Enhancement.
(b) If the Concessionaire gives such a notice to the Department, the parties will follow the terms and procedures set forth in Section 14.01 as if they applied to the determination of the Net Cost Saving or positive Net Revenue Impact.

(c) Following a determination of the Net Cost Saving or positive Net Revenue Impact by mutual agreement or the dispute resolution procedures set forth in Article 21, the Department will decide on the percentage share of each that it desires as compensation, in any event not to exceed 50% of the applicable Net Cost Savings and/or positive Net Revenue Impact. The Concessionaire will compensate the Department in an amount equal to the selected percentage in the manner provided for in Section 14.01(c); provided that when Concessionaire Damages and Net Cost Saving or positive Net Revenue Impact are payable in the same time period, such amounts shall be netted to the extent possible. The parties will select one or any combination of the following methods of compensation:

(i) through monthly payments of the selected percentage of the Net Cost Saving or positive Net Revenue Impact in accordance with a written payment schedule determined by mutual agreement or through the dispute resolution procedures set forth in Article 21;

(ii) by a lump sum payment of the selected percentage, payable as determined by mutual agreement or through the dispute resolution procedures set forth in Article 21; or

(iii) in such other manner as agreed upon by the parties in writing.

ARTICLE 15.

INDEMNIFICATION

Section 15.01 Indemnities of the Concessionaire

In addition to the Concessionaire’s indemnity obligations as set forth elsewhere in this Agreement, the Concessionaire will indemnify, defend, and hold harmless a State Indemnitee from and against any Losses actually suffered or incurred by such State Indemnitee (except to the extent such Losses are solely caused by the misconduct, negligence or other culpable act, error or omission of a State Indemnitee), due to Third-Party Claims that are based upon:

(a) any actual or alleged failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement or a Project Agreement or, any actual or alleged breach by the Concessionaire of its representations or warranties set forth herein or therein;

(b) any actual or alleged misconduct, negligence or other culpable act, error or omission of a Concessionaire Party in connection with the Project;
(c) any actual or alleged patent or copyright infringement or other actual or alleged improper appropriation or use by a Concessionaire Party of trade secrets, patents, proprietary information, know-how, trade marked or service marked materials, equipment, devices or processes, copyright rights or inventions in connection with the Project;

(d) any actual or alleged inverse condemnation, trespass, nuisance or similar taking of or harm to real property committed or caused by a Concessionaire Party in connection with the Project arising from any actual or alleged (i) failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement; (ii) breach by Concessionaire of its representations or warranties set forth in this Agreement or (iii) misconduct, negligence or other culpable act, error or omission of a Concessionaire Party; provided, however, that the Concessionaire will not be required to indemnify, defend or hold harmless a State Indemnitee from and against any Losses actually suffered or incurred by such State Indemnitee due to Third-Party Claims that are based upon any actual inverse condemnation arising from the establishment of the Project Right of Way as identified in the NEPA Documents and any other real property or real property rights outside the Project Right of Way acquired pursuant to Section 8.05(b);

(e) any actual or alleged violation of any Federal or state securities or similar law by any Concessionaire Party, or the Concessionaire’s failure to comply with any requirement necessary to preserve the tax exempt status of interest paid on the PABs;

(f) any actual or alleged Tax attributable to any Transfer of the Concessionaire’s Interest or any part thereof; or

(g) any actual or alleged claim for brokerage commissions, fees or other compensation by any Person who acted on behalf of the Concessionaire, its Affiliates or their respective Representatives in connection with this Agreement or a Project Agreement, any Transfer of the Concessionaire’s Interest or any part thereof.

Section 15.02 Defense and Indemnification Procedures

(a) In the event that any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against the Department, it will as promptly as practicable notify the Concessionaire in writing of such Claim, and such notice will include a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim; provided, that any failure to give such prompt notice will not constitute a waiver of any rights of the Department, except to the extent that the rights of the Concessionaire are actually and materially prejudiced thereby. If any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against a State Indemnitee other than the Department, a failure by such State Indemnitee to give the Concessionaire prompt notice in writing of such Claim together with a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim, will constitute a waiver of any rights of such State Indemnitee to indemnification to the extent, and only to the extent, that the rights of the Concessionaire are actually and materially prejudiced thereby.
(b) The Concessionaire will be entitled and obligated to appoint counsel of its choice at the expense of the Concessionaire to represent a State Indemnitee in any action for which indemnification is sought (in which case the Concessionaire will not thereafter be responsible for the fees and expenses of any separate counsel retained by that State Indemnitee except as set forth below); provided, that such counsel will be satisfactory to such State Indemnitee. Notwithstanding the Concessionaire’s appointment of counsel to represent a State Indemnitee in any action, such State Indemnitee will have the right to employ separate counsel, and the Concessionaire will bear the reasonable fees, costs and expenses of such separate counsel, if:

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

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

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

(iv) the Concessionaire authorizes the State Indemnitee to employ separate counsel at the Concessionaire’s expense.

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

ARTICLE 16.

HAZARDOUS SUBSTANCES

Section 16.01 General Obligations

(a) The Concessionaire will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and/or disposal of any Hazardous Substances the presence of which constitutes a Hazardous Environmental Condition that are discovered on, in or under the Project Right of Way on which the Work is performed, after the earlier to occur of (i) the issuance of an LNTP (but limited to the portion of the Project Right of Way on which the LNTP Work is performed pursuant to such LNTP), (ii) issuance of a Construction Notice to Proceed, or (iii) the Service Commencement of the Project in accordance with this Agreement.
(b) After the earlier to occur of (i) the issuance of an LNTP (but limited to the portion of the Project Right of Way on which the LNTP Work is performed pursuant to such LNTP), (ii) the issuance of the Construction Notice to Proceed, or (iii) the Service Commencement of the Project, if the Concessionaire encounters any Hazardous Environmental Condition that must be managed, treated, handled, stored, monitored, removed, transported or disposed of (collectively, “Remedial Actions”), then the Concessionaire will promptly notify the Department. In the case of Hazardous Environmental Conditions that are attributable to Known Pre-Existing Hazardous Substances, the Concessionaire will thereafter proceed with such Remedial Actions in accordance with the Concessionaire’s Environmental Management Plan. In the case of all other Hazardous Environmental Conditions and to the extent not covered by the Environmental Management Plan, the Concessionaire will develop a Remedial Action Plan setting out the scope of the Remedial Actions that the Concessionaire proposes to take in relation to the relevant Hazardous Environmental Condition, such actions to include, but not be limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Substances and submitting copies of such data and reports to the Department for its review and approval, (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Substances (iii) preparing and obtaining Governmental Approvals for remedial action plans, including Department approval, (iv) carrying out the Remedial Action Plan, including, as necessary, disposal of the Hazardous Substances and (v) timely informing the Department of all such actions.

(c) Before any Remedial Actions are taken that would inhibit the Department’s ability to ascertain the nature and extent of the Hazardous Environmental Condition, the Concessionaire will afford the Department the opportunity to inspect areas and locations that require Remedial Actions; provided, that in the case of a sudden release of any Hazardous Substances, the Concessionaire may take all reasonable actions necessary to stabilize and contain the release without prior notice or inspection, but will promptly notify the Department of the sudden release and its location.

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

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

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

**Section 16.02 Pre-Existing Hazardous Substances**

(a) The Department will pay, to the extent permitted by Law, the Concessionaire for the Concessionaire’s Allocable Costs for Remedial Actions with respect to any Unknown Pre-Existing Hazardous Substances and Third-Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition. To the extent the Concessionaire recovers costs from any available reimbursement program or third parties with respect to Unknown Pre-Existing Hazardous Substances or Third-Party Hazardous Substances, the Concessionaire will pay such costs to the Department, less the Allocable Costs incurred by the Concessionaire in seeking recovery in accordance with Section 16.01(e). The Concessionaire will furnish to the Department documentation supporting the amount recovered from any reimbursement program or third parties and the Allocable Costs incurred by the Concessionaire in pursuing such recovery.

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

(c) At all times during the Term, the Concessionaire will provide cost estimates with respect to such Remedial Actions which may be paid by the Department, for the Department’s review and approval prior to proceeding with any such Remedial Actions, provided, that in the case of a sudden release of any Hazardous Substances, the Concessionaire may take all reasonable actions necessary to stabilize and contain the release without prior submission of such cost estimates. If the Department has not responded to a request for such approval pursuant to this Section 16.02(c) within 21 Days after the Department’s acknowledgement of receipt (or in the case of an emergency a reasonably appropriate shorter period), the request will be deemed to be approved, except to the extent matters deviate from applicable Technical Requirements, or Law.

**Section 16.03 Concessionaire Indemnifications Regarding Hazardous Substances**

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

(i) Hazardous Substances introduced to or brought onto the Project Right of Way by a Concessionaire Party;

(ii) failure of any Concessionaire Party to comply with any requirement of this Agreement or any other Project Agreement relating to Hazardous Substances (including any failure to perform any Remedial Action required in accordance with Section 16.01) or to otherwise comply with applicable Environmental Laws and Governmental Approvals; or

(iii) the exacerbation, release, spreading, migration, or toxicity of Hazardous Substances due to the negligence, recklessness, or willful misconduct of a Concessionaire Party.

(b) The Concessionaire will defend such Third-Party Claims in accordance with Section 15.02.

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

Section 16.04 Generator Status

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

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

ARTICLE 17.

INSURANCE; PERFORMANCE SECURITY

Section 17.01 Insurance Coverage Required

(a) Required Insurance for the Construction Period. The Concessionaire will provide and maintain at its own expense, or cause the Design-Build Contractor to provide and maintain,
for the Construction Period the insurance coverages specified in Part 1 of the Insurance Requirements attached as Exhibit Y.

(b) **Required Insurance for Operating Period.** The Concessionaire will provide and maintain at its own expense, or cause the O&M Contractor to provide and maintain, for the Operating Period and for any time period following the Term’s expiration if the Concessionaire is required to return and perform any additional work, the insurance coverages specified in Part 2 of the Insurance Requirements and the Technical Requirements.

(c) **Railroad Protective Liability Insurance.** The Concessionaire will provide and maintain at its own expense, or cause to be provided and maintained, during the Term, railroad protective liability insurance as specified in the Insurance Requirements and the Technical Requirements or as may be required by any railroad in connection with Work across, under or adjacent to the railroad’s tracks or railroad right-of-way.

**Section 17.02 General Requirements Applicable to Insurance**

The insurances which the Concessionaire is required to maintain or cause to be maintained under Section 17.01:

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

(b) except for professional liability insurance, worker’s compensation insurance and employer’s liability insurance, the Department will be named as an additional insured on a primary, non-contributory basis;

(c) will not limit the Concessionaire’s liabilities and obligations pursuant to this Agreement, including the Concessionaire’s indemnification obligations;

(d) will be maintained with insurers that at the time coverage commences are authorized to do business in the State and have a current policyholder’s management and financial size category rating of not less than “A-: VIII” according to A.M. Best’s Financial Strength Rating and Financial Size Category, except as otherwise approved by the Department;

(e) will be on terms specified herein or otherwise approved by the Department (such approval not to be unreasonably withheld);

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

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

(h) other than for workers compensation insurance, employer’s liability insurance, automobile liability insurance, property and business interruption insurance, professional liability insurance and contractor pollution liability insurance, will be effected on a severability of interest basis for the purposes of which the insurer accepts the term “insured” as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall policy limit not being increased as a result);

(i) other than for professional liability insurance, worker’s compensation insurance, employer’s liability insurance and property and business interruption insurance, will include cross-liability clauses allowing one insured to bring a claim against another insured party;

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

(k) other than for workers compensation insurance, employer’s liability insurance, automobile liability insurance, professional liability insurance and contractor pollution liability insurance, will contain a provision under which the insurer agrees that the failure of one insured to observe and fulfill the terms of the policy will not prejudice the coverage of the other insureds;

(l) other than for workers compensation insurance, employer’s liability insurance, commercial general liability insurance, excess liability insurance, contractor pollution liability insurance and automobile liability insurance, have each policy endorsed to contain a standard mortgagee clause to the effect that the Department and the other insureds will not be prejudiced by an unintended and/or inadvertent error, omission or misdescription of the risk interest in property insured under the policies, incorrect declaration of values, failure to advise insurers of any change of risk interest or property insured or failure to comply with a statutory requirement;

(m) will not include defense costs within the limits of coverage or permit erosion of coverage limits by defense costs, except that defense costs may be included within the limits of coverage of professional and contractor pollution liability policies; and

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

Section 17.03 Proof of Coverage

The Concessionaire will deliver to the Department true and correct copies of policies, material forms, endorsements and premium indications of each insurance policy certified by the Concessionaire’s insurance broker (or as appropriate the Design-Build Contractor’s, the Lead Engineering Contractor’s or the O&M Contractor’s broker) to be true and correct copies of such policies, forms, endorsements and premium indications, as a condition to receiving the applicable notices to proceed set forth in this Agreement, and annually thereafter no later than
ten Days prior to policy renewal or replacement. The Concessionaire will also deliver to the Department duplicate originals or copies of each Project-specific insurance policy and endorsements for the Project coverage of each other insurance policy certified by the Concessionaire’s insurance broker (or as appropriate the Design-Build Contractor’s, the Lead Engineering Contractor’s or the O&M Contractor’s broker) to be true and correct copies of the originals no later than 60 Days after receiving the applicable notices to proceed set forth in this Agreement and annually thereafter no later than 60 Days after policy renewal or replacement, and also whenever reasonably requested by the Department.

Section 17.04 Adjustments in Coverage Amounts

(a) All insurance coverage limits stipulated in Section 17.01(b), as well as deductibles and self-insured retentions, will be reviewed every three years and adjusted as appropriate, in line with such amounts that would be insured by a prudent business similar to, and undertaking similar activities to, the Concessionaire; provided, that no such review or adjustments will be required with respect to insurance coverage required for the Design-Build Work.

(b) In determining increases in limits and adjustments to deductibles or self-insured retentions, the parties will take into account (A) Claims and Loss experience for the Project, provided, that premium increases due to adverse Claims experience will not be a basis for justifying increased deductibles or self-insured retentions; (B) the condition of the Project, (C) the safety compliance and performance record for the Project; (D) then-prevailing Good Industry Practice for insuring comparable transportation projects; and (E) the provisions regarding unavailability of increased coverage set forth in Section 17.05.

(c) In connection with such review, the Concessionaire will deliver to the Department evidence that such insurance is in effect, together with the Concessionaire’s certification that such insurance is in line with amounts that would be insured by such a prudent business.

(d) Any Dispute regarding increases in limits or adjustments to deductibles or self-insured retentions will be resolved according to the dispute resolution procedures under Article 21.

Section 17.05 Unavailability of Insurance

(a) If any insurance required to be maintained pursuant to this Article 17 (including the limits, deductibles or any other terms under policies for such insurance) ceases to be available on a commercially reasonable basis, the Concessionaire will provide written notice to the Department accompanied by a letter from the Concessionaire’s insurance advisor stating that such insurance is unavailable anywhere in the global market on a commercially reasonable basis. Such notice will be given not later than 30 Days prior to the scheduled date for renewal of any such policy. Except to the extent attributable to the Concessionaire, or any Concessionaire Party upon receipt of such notice by the Department, the Concessionaire and the Department will immediately enter into good faith negotiations regarding the matters set forth in Section 17.05(c) and (d) below.
(b) The Concessionaire will not be excused from satisfying the insurance requirements of this Article 17 merely because premiums for such insurance are higher than anticipated. To establish that the required coverages (or required terms of such coverages, including insurance policy limits) are not available on commercially reasonable terms, the Concessionaire will bear the burden of proving either that (i) the same is not available at all in the global insurance and reinsurance markets or (ii) the premiums for the same have so materially increased over those previously paid for the same coverage that a reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are not justified by the risk protection afforded. For the purpose of clause (ii), the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry.

(c) In the event that the Concessionaire and the Department cannot reach a resolution acceptable to both parties within ten Days, the Concessionaire and the Department will make arrangements for the formation of an insurance panel consisting of the Concessionaire’s insurance advisor (or broker), the Department or its insurance advisor (or broker) and an independent insurance expert from a nationally recognized insurance brokerage firm, chosen by the Concessionaire and reasonably acceptable to the Department. Such independent expert will conduct a separate review of the relevant insurance requirements of this Article 17 and the Technical Requirements and the market for such insurance at the time, giving due consideration to the representations of both insurance advisors, and upon conclusion of such review will issue a written report stating whether such insurance is available or unavailable on a commercially reasonable basis.

(d) If the insurance expert concludes that such insurance is not available on a commercially reasonable basis, the insurance expert will provide a written recommendation (which will include the amount and type of insurance which is available upon a commercially reasonable basis) not less than 15 Days before the date for renewal of such insurance. The Concessionaire will, prior to the expiration of the insurance then in effect, obtain the insurance required by this Article 17 as adjusted in accordance with such recommendation.

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

Section 17.06 Failure to Obtain Insurance Coverage

(a) If in any instance the Concessionaire has not performed its obligations respecting insurance coverage set forth in this Agreement (as may be adjusted in accordance with Section 17.05) or is unable to enforce and collect any such insurance for failure to assert Claims in accordance with the terms of the insurance policies, then for purposes of determining the Concessionaire’s liability and the limits thereon or determining reductions in compensation due from the Department to the Concessionaire on account of available insurance, the Concessionaire will be treated as if it has elected to self-insure up to the full amount of insurance coverage which
would have been available had the Concessionaire performed such obligations and not committed such failure.

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

Section 17.07 Restoration; Insurance Proceeds

(a) If all or any part of any of the Project Assets will be destroyed or damaged during the Term in whole or in part by fire or other casualty of any kind or nature (including any casualty for which insurance was not obtained or obtainable), ordinary or extraordinary, foreseen or unforeseen, the Concessionaire will:

(i) give the Department notice thereof promptly after the Concessionaire receives actual notice of such casualty

(ii) except (A) in the case of destruction or damage caused by a Compensation Event (in which case the provisions of Section 14.01 will apply) or (B) as otherwise provided in Section 20.03, at its sole cost and expense (whether or not insurance proceeds, if any, are equal to the estimated cost of repairs, alterations, restorations, replacement and rebuilding (the “Casualty Cost”)), proceed diligently to restore the Project to its pre-casualty condition;

(iii) deposit all insurance proceeds received by the Concessionaire in connection with any restoration with a Depositary (such insurance proceeds, together with any interest earned thereon, the “Restoration Funds”); provided, that the procedures of this Section 17.07(a)(iii) will only apply to casualty events for which the cost of restoration exceeds $5,000,000, adjusted annually by the percentage increase in CPI.

(b) Subject to Section 17.07(a)(ii), if the Concessionaire (i) fails or neglects to commence the diligent restoration of the Project or the portion thereof so damaged or destroyed, (ii) having so commenced such restoration, fails to diligently complete the same in accordance with the terms of this Agreement or (iii) prior to the completion of any such restoration, this Agreement expires or terminates in accordance with the terms of this Agreement, the Department may, but will not be required to, complete such restoration at the Concessionaire’s expense and will be entitled to be paid out of the Restoration Funds for the relevant restoration costs incurred by the Department. Subject to Section 17.07(a)(ii), in any case where this Agreement will expire or be terminated prior to the completion of the restoration, the Concessionaire will (A) account to the Department for all amounts spent in connection with any restoration which was undertaken, (B) immediately pay over or cause the Depositary to pay over to the Department the remainder, if any, of the Restoration Funds received by the Concessionaire prior to such termination or cancellation and (C) pay over or cause the Depositary to pay over to the Department, within five Business Days after receipt thereof, any Restoration Funds received by the Concessionaire or the
Depositary subsequent to such termination or cancellation. The Concessionaire’s obligations under this Section 17.07(b) will survive the expiration or termination of this Agreement.

(c) Subject to the satisfaction by the Concessionaire of all of the terms and conditions of this Section 17.07, the Concessionaire will cause the Depositary, with prior written notice to the Department, to pay to the Concessionaire from time to time, any Restoration Funds, but not more than the amount actually collected by the Depositary upon the loss, together with any interest earned thereon, to be utilized by the Concessionaire solely for the restoration, such payments to be made as follows:

(i) prior to commencing any restoration, the Concessionaire will furnish to the Department for its approval the estimated cost, estimated schedule and detailed plan for the completion of the restoration, each prepared by an architect or engineer;

(ii) the Restoration Funds will be paid to the Concessionaire in installments as the restoration progresses, subject to Section 17.07(c)(iii), based upon requisitions to be submitted by the Concessionaire to the Depositary, with a copy to the Department, in compliance with Section 17.07(d), showing the cost of labor and materials purchased for incorporation in the restoration, or incorporated therein since the previous requisition, or the amounts payable or paid to the Contractor, as the case may be, and due and payable or paid by the Concessionaire; provided, that if any Lien caused by a Concessionaire Party is filed against the Project or any part thereof in connection with the restoration (other than a Permitted Encumbrances (but not including clause (c) of the definition thereof)), the Concessionaire will not be entitled to receive any further installment until such Lien is satisfied or discharged (by bonding or otherwise); provided further, that notwithstanding the foregoing, but subject to the provisions of Section 17.07(c)(iii), the existence of any such Lien will not preclude the Concessionaire from receiving any installment of Restoration Funds so long as such Lien will be discharged with funds from such installment and at the time the Concessionaire receives such installment the Concessionaire delivers to the Department and the Depositary a release of such Lien executed by the holder of such Lien and in recordable form;

(iii) the amount of each installment to be paid to the Concessionaire will be the aggregate amount of Casualty Costs theretofore incurred by the Concessionaire minus the aggregate amount of Restoration Funds theretofore paid to the Concessionaire in connection therewith; provided, that all disbursements to the Concessionaire will be made based upon an architect’s or engineer’s certificate for payment in accordance with industry standards, and disbursements may be made for advance deposits for materials and Contractors to the extent that such disbursements are customary in the industry and that the unapplied portion of the funds held by the Depositary, together with other funds available to the Concessionaire for such Restoration, as certified by the Concessionaire, are sufficient to complete the restoration; and

(iv) except as provided in Section 17.07(b), upon completion of and payment for the restoration by the Concessionaire, subject to the rights of any Collateral Agent, the Depositary will pay the balance of the Restoration Funds, if any, to the Concessionaire;
provided, that if the insurance proceeds are insufficient to pay for the restoration (or if there will be no insurance proceeds), the Concessionaire will nevertheless be required to make the restoration and provide the deficiency in funds necessary to complete the restoration as provided in Section 17.07(a)(iii).

(d) The following will be conditions precedent to each payment made to the Concessionaire as provided in Section 17.07(c):

(i) the Concessionaire will have furnished the Department with estimates of costs and schedule and a detailed plan for the completion of the restoration, as provided for in Section 17.07(c)(i);

(ii) the Concessionaire will have furnished the Department a certificate stating that the materials and other items which are the subject of the requisition have been delivered to the Project (except with respect to requisitions for advance deposits permitted under Section 17.07(c)(iii)), free and clear of all Liens (other than Permitted Encumbrances), and no unsatisfied or unbonded mechanic’s or other Liens have been claimed, except for any Lien that will be discharged, by bonding or otherwise, with funds to be received pursuant to such requisition (provided, that a release of such Lien is delivered to the Depositary in accordance with Section 17.07(c)(ii));

(iii) the restoration will be carried out under the supervision of the relevant architect or engineer, who is licensed in the State and has met all of the requirements of the Virginia Department of Professional and Occupational Regulation applicable to an architect or engineer and who may be a licensed employee of the Concessionaire or a Contractor, and there will be submitted to the Depositary and the Department the certificate of such architect or engineer stating that:

(A) the sum then requested to be withdrawn either has been paid by the Concessionaire or is due and payable to Contractors, engineers, architects or other Persons (whose names and addresses will be stated), who have rendered or furnished services or materials for the work and giving a brief description of such services and materials and the principal subdivisions or categories thereof and the several amounts so paid or due to each of such Persons in respect thereof, and stating in reasonable detail the progress of the work up to the date of such certificate;

(B) no part of such expenditures has been made the basis, in any previous requisition (whether paid or pending), for the withdrawal of Restoration Funds or has been made out of the Restoration Funds received by the Concessionaire;

(C) the sum then requested does not exceed the value of the services and materials described in the certificate;

(D) other than amounts for disbursements for advance deposits for materials and Contractors, the work relating to such requisition has been performed in accordance with this Agreement;
(E) the balance of the Restoration Funds held by the Depositary or available from other sources will be sufficient upon completion of the restoration to pay for the same in full, and stating in reasonable detail an estimate of the cost of such completion; and

(F) in the case of the final payment to the Concessionaire, the restoration has been completed in accordance with this Agreement.

(e) If the Concessionaire obtains Performance Bonds or performance Letters of Credit related to a restoration (which the Concessionaire may or may not obtain in its discretion), the Concessionaire will name the Department and the Concessionaire and the Collateral Agent, as their interests may appear, as additional obligees or transferee beneficiaries (as applicable), and will deliver copies of any such bonds or letters of credit to the Department promptly upon obtaining them. The Department will only have the right to exercise remedies under any such bonds or letters of credit so long as the Concessionaire or a Lender is not pursuing remedies thereunder.

(f) The requirements of this Section 17.07 are for the benefit only of the Department, and no Contractor or other Person will have or acquire any claim against the Department as a result of any failure of the Department actually to undertake or complete any restoration as provided in this Section 17.07 or to obtain the evidence, certifications and other documentation provided for herein.

(g) Restoration Funds deposited with a Depositary will be invested and reinvested in direct obligations of and obligations fully guaranteed by, the United States of America or any agency or instrumentality of the United States of America, the obligations of which are backed by the full faith and credit of the United States of America, or in other “permitted investments” under the Project Financing Agreements, and all interest earned on such investments will be added to the Restoration Funds.

(h) The Department acknowledges and agrees that any Restoration Funds not applied to a restoration as provided in this Section 17.07 will be subject to the Lien or Liens of any Collateral Agent.

Section 17.08 Performance Security

(a) Performance Security – Equity Funding Guaranties. The Concessionaire will cause each Equity Member to provide an equity funding guaranty from each of the Fluor Guarantor and the Transurban Guarantor (each, an “Equity Funding Guaranty”) which guarantees the funding of capital contributions of the Equity Members in accordance with the terms of the Equity Funding Agreements. Subject to the provisions of the Direct Agreement, the Project Financing Agreements will include a provision granting the Department the right to direct the Collateral Agent to draw upon the applicable Equity Funding Guaranty with respect to any amounts that the relevant Equity Member has failed to fund when due and payable (whether at the scheduled date or upon acceleration upon an event of default under the Project Financing
Agreements), and that the proceeds of such draw will be deposited in a project account as designated by the Collateral Agent in accordance with the Project Financing Agreements.

(b) Performance Security – Design-Build Letter of Credit.

(i) The Concessionaire will require the Design-Build Contractor to furnish a Letter of Credit (the “Design-Build Letter of Credit”) in an amount not less than seven and one-half percent (7.5%) of the price of the Design-Build Contract. The Design-Build Letter of Credit will provide that it may be transferred by the Concessionaire to the Department, as beneficiary, with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the Design-Build Contract.

(ii) Upon the Concessionaire’s receipt from the Department of the Substantial Completion Certificate, the Design-Build Letter of Credit may be reduced to an amount not less than three percent (3%) of the price of the Design-Build Contract. If the Punch List has not been completed within 60 Days after the Final Acceptance Deadline, the Concessionaire agrees to draw on the Design-Build Letter of Credit at the written direction of the Department and to use the proceeds of such drawing to provide for the prompt completion of the items on the Punch List.

(c) Performance Security - Design-Build Work Guarantee. Concurrently with Financial Close or, if earlier, the commencement of Work under the Design-Build Contract, the Concessionaire will cause to be delivered to the Department, an executed copy of a guaranty agreement of the Fluor Guarantor, in substantially the form set forth in Exhibit F (the “Design-Build Work Guarantee”), in which the Fluor Guarantor guarantees the performance of the Design-Build Contractor’s obligations under the Design-Build Contract. In addition to and notwithstanding the Design-Build Work Guarantee required to be delivered pursuant to the preceding sentence, the Concessionaire will ensure that the Design-Build Contract will include customary provisions limiting the Design-Build Contractor’s liability to not less than 40% of the aggregate dollar value of the Work to be performed thereunder.

(d) Additional Requirements

(i) Unless otherwise specified in this Agreement, a draw on any Performance Security will not be conditioned on prior resort to any other security of, or provided for the benefit of, any Concessionaire Party. If the Department receives proceeds of a draw on any Performance Security in excess of the relevant obligation, the Department will promptly refund the excess to the Concessionaire (or to its designee) after all relevant obligations are satisfied in full.

(ii) The Concessionaire will obtain and furnish all Performance Security and replacements thereof at its sole cost and expense, and will pay all charges imposed in connection with the Department’s presentation of sight drafts and drawing against any Performance Security or replacements thereof.
In the event the Department makes a permitted assignment of its rights and interests under this Agreement, the Concessionaire will cooperate so that concurrently with the effectiveness of such assignment, either replacement Performance Security for, or appropriate amendments to, the outstanding Performance Security will be delivered to the assignee naming the assignee as replacement beneficiary, at no cost to the Concessionaire.

The obligations of the Concessionaire during the Term to reimburse the issuer for draws under any Performance Security may be secured by a Financing Assignment if it encumbers the entire Concessionaire’s Interest.

Applicability to Project Enhancements and Major Maintenance. The Concessionaire will require its contractors to furnish the Major Maintenance Performance Security with respect to Project Enhancements and Major Maintenance during the Term if and to the extent required by the Project Financing Agreements or, if there are no Project Financing Agreements, as may be reasonably required by the Department. The Major Maintenance Performance Security will name the Department a permitted assignee or transferee beneficiary (as applicable), with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the O&M Contract.

ARTICLE 18.

OWNERSHIP AND ACCESS TO RECORDS

Section 18.01 Maintenance of Records

The Concessionaire will maintain or cause to be maintained proper books, records and accounts in which complete and correct entries will be made of its transactions in accordance with GAAP or any other generally accepted accounting standards which are acceptable to the Department. Such books and records will be maintained at a location situated within the contiguous United States of America as designated by the Concessionaire by delivery of notice of such location to the Department. Further, the Concessionaire will maintain or cause to be maintained such books, records and accounts in accordance with applicable Law, including Laws applicable to the Project as a result of the costs of the Project being financed in part with State funds, federal-aid funds and State bond proceeds.

Section 18.02 Public Records

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

(b) If the Concessionaire believes that any Work Product or any document subject to transmittal to or review by the Department under the terms of this Agreement or a Project Agreement contains proprietary or confidential information or trade secrets that are exempt or protected from disclosure pursuant to Law, the Concessionaire will use its reasonable efforts to identify such information prior to such transmittal or review and the Concessionaire and the Department will confer on appropriate means of ensuring compliance with such Law prior to transmittal or review. Upon the written request of either party, the Concessionaire and the Department will mutually develop a protocol for the transmittal, review and disclosure of Work Product or other documents produced or obtained by the Concessionaire so as to avoid violations of any Law and to protect, consistent with the requirements of Law, appropriate information from disclosure.

Section 18.03 Ownership of Work Product

(a) All Work Product (including records thereof in software form), including reports, studies, data, information, logs, records and similar terms, which is prepared or procured by or on behalf of the Department or its other contractors, whether before or after the Agreement Date, will be and remain the exclusive property of the Department; provided, that the Department will make available to the Concessionaire, without charge, and without representation or warranty of any kind, any documents in the possession of the Department relating to the planning, design, engineering and permitting of the Project and any Project Enhancement that the Concessionaire elects to or is directed to carry out.

(b) Prior to the expiration or earlier termination of this Agreement, all Work Product prepared by or on behalf of the Concessionaire will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of this Agreement for any reason, including termination by the Concessionaire for a Department Default, (i) the Concessionaire will promptly turn over to the Department a copy of all Work Product the Concessionaire owns and (ii) subject to Section 18.04, all such Work Product will be considered the sole and exclusive property of the Department (other than Proprietary Work Product, with respect to which the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license in connection with the Project), without compensation due the Concessionaire or any other party. The Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any Proprietary Work Product, subject to Section 18.02. The Concessionaire will continue to
have a full and complete right to use any and all duplicates or other originals of such Proprietary Work Product in any manner it chooses.

Section 18.04 Ownership of Proprietary Intellectual Property

(a) All Proprietary Intellectual Property of the Concessionaire will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of, or any assignment by the Concessionaire of its rights under, this Agreement for any reason whatsoever, the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire solely in connection with the Project. The Department will not at any time sell any such Proprietary Intellectual Property or use or allow any party to use any such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project (except as permitted on other State Highways in accordance with Section 18.04(b)). Subject to Section 18.02, the Department will not disclose any Proprietary Intellectual Property of the Concessionaire (other than to its concessionaires, Contractors, employees, attorneys and agents in connection with the development and operation of the Project who agree to be bound by any confidentiality obligations of the Department relating thereto), and the Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such Proprietary Intellectual Property.

(b) The Department will have the right to purchase from the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire on any other tolled State Highway owned and operated by the Department or other State agency on commercially reasonable terms. The Concessionaire will continue to have the full and complete right to use, sell or license to other Persons any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

(c) With respect to any Proprietary Intellectual Property owned by a Person other than the Concessionaire or the Department, the Concessionaire will obtain from such owner, concurrently with execution of any Contract or purchase order with such owner, both for the Concessionaire and the Department, nonexclusive, nontransferable, irrevocable, fully paid up (other than with respect to ongoing maintenance and support fees) licenses to use such Proprietary Intellectual Property solely in connection with the Project, of at least identical scope, purpose, duration and applicability as the licenses granted by Section 18.04(a); provided, that the foregoing requirement will not apply to standard, pre-specified manufacturer licenses of mass-marketed products (including software products) or equipment where the license cannot be extended to the Department using commercially reasonable efforts or to other licenses of products or equipment where the products or equipment are not reasonably necessary for the operation or maintenance of the Project. The Concessionaire will use commercially reasonable efforts to obtain from such owner a right in favor of the Department to purchase from such owner’s Proprietary Intellectual Property on any other tolled State Highway owned and operated by the Department or other State agency on commercially reasonable terms. The limitations on sale
and disclosure by the Department set forth in Section 18.04(a) will also apply to the Department’s licenses in such Proprietary Intellectual Property.

(d) The Concessionaire Marks may appear on some of the Project Assets, including supplies, materials, stationery and similar consumable items at the Project on the last Day of the Term. The parties agree that the Concessionaire will remain the owner or licensee, as applicable, of the Concessionaire Marks at the end of the Term, and the Concessionaire may remove, at its expense, the Concessionaire Marks prior to the end of the Term. If the Concessionaire fails to do so, the Department will be entitled to remove the Concessionaire Marks and, in such case, the Department will be entitled to payment of its Allocable Costs in so doing from the Concessionaire. The Department acknowledges and agrees that it will have no right, title, interest or license in the Concessionaire Marks.

(e) On or before the Agreement Date, the Department will grant to the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use any Proprietary Intellectual Property of the Department that has been developed for the Project, solely in connection with the development, construction, operation, maintenance and other incidental activities of the Project. The Concessionaire will not at any time sell such Proprietary Intellectual Property or use or allow any party to use such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project. On or before the Agreement Date, the Department will also assign in favor of the Concessionaire the Department’s rights with respect to any license by the Department’s software suppliers (to the extent permitted by, and subject to the terms of, such license) for the use of any Proprietary Intellectual Property for the Project, together with an assignment of the Department’s rights under any escrow for the Source Code and Source Code Documentation relating to such Proprietary Intellectual Property, which assignments will be reasonably satisfactory to the Concessionaire. The Concessionaire will not disclose any such Proprietary Intellectual Property (other than to its Contractors, employees, attorneys, agents and Affiliates in connection with the Project who agree to be bound by any confidentiality obligations of the Concessionaire relating thereto), and the Concessionaire will enter into a confidentiality agreement reasonably requested by the Department with respect to any such Proprietary Intellectual Property. The Department will continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

Section 18.05 Escrow Documents

(a) General. Prior to the Agreement Date, the Concessionaire, the Department and the Escrow Agent will have executed and delivered the Escrow Agreement to implement the provisions of this Section 18.05, and the Concessionaire will have submitted to the Department for its review and approval the following materials (collectively, the “Escrow Documents”): one copy of all documentary information generated with respect to (i) the expected costs of the Work (which uses the estimating methodology actually used by the Design-Build Contractor) available to the Concessionaire under the Design-Build Contract (the “Construction Escrow Documents”) and (ii) the components of, and formulae for, the Initial Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model, including, without limitation, forecast revenue and expected non-financial costs of the Project during the Term included in the Initial
(b) **Format and Contents.**

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

(ii) The Escrow Documents will be submitted in English and clearly itemize the estimated costs of performing each item of the Project, including financing, administrative and related costs. Cost items will be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review.

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

(iv) The Construction Escrow Documents will identify all costs. If detailed costs are not available to the Concessionaire, estimated unit costs are acceptable without a detailed cost estimate, *provided*, that labor, equipment, materials and subcontracts, as applicable, are specified, and *provided further*, that indirect costs, contingencies, and mark-up, as applicable, are allocated.

(c) **Submittal.**

(i) The Concessionaire will submit the Escrow Documents in sealed containers, the Construction Escrow Documents in one and the Financing Escrow Documents in another, to the Department, which containers have been clearly marked on the outside with the Concessionaire’s name, reference to the Project, and the words “I-95
HOV/HOT Lanes Project Construction Escrow Documents” or “I-95 HOV/HOT Lanes Project Financing Escrow Documents” as applicable.

(ii) On or before the Agreement Date, representatives of the Department, assisted by members of the Concessionaire’s staff who are knowledgeable in how the Escrow Documents were prepared, will have examined, organized and inventoried the Escrow Documents. This examination was to ensure that the Escrow Documents are legible and complete. It did not include review of, and does not constitute approval of proposed construction methods, estimating assumptions, or interpretations of any Project Agreements, including the Design-Build Contract. Such examination will not alter any condition or term of any Project Agreement.

(iii) Timely submission of complete Escrow Documents as of the Agreement Date is an essential element of the Concessionaire’s responsibility and a prerequisite to the execution and delivery of this Agreement by the Department.

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

(d) Updating of the Escrow Documents. Upon each update of the Initial Base Case Financial Model, Adjusted Financial Model and Base Case Financial Model Update in accordance with this Agreement (other than any such update that does not change the Financial Formulas or forecast assumptions), such update will be submitted by the Concessionaire to the Escrow Agent promptly and in any event within seven Days after an update has not been disputed or any such dispute has been resolved for inclusion as part of the Financing Escrow Documents. For the avoidance of doubt, previous undisputed versions of the Escrow Documents will remain in escrow with the Escrow Agent.

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

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

The Concessionaire will bear the cost for storing the Escrow Documents
(f) Examination.

(i) Subject to the terms of the Escrow Agreement, the Escrow Documents may be examined by the Department and the Concessionaire at any time deemed necessary by the Department or the Concessionaire and the Department may delegate review of the Escrow Documents to members of its staff or to Consultants; provided, that, unless a Consultant is bound by a confidentiality agreement or other obligations to keep the Escrow Documents confidential, each such Consultant will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such examination. No other person will have access to the Escrow Documents. The Department will provide advance notice of any such examination to the Design-Build Contractor, and the Design-Build Contractor will have the right to be present during an examination of the Construction Escrow Documents; provided, however, that such right will not in any way limit the Department’s right to review the Construction Escrow Documents if the Design-Build Contractor does not attend such examination. Notwithstanding the foregoing, the Escrow Documents and information contained therein may be used:

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

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

   (C) in any dispute resolution procedure commenced hereunder.

(ii) Access to the documents will take place in the presence of duly designated representatives of both the Department and the Concessionaire, except that, if the Concessionaire refuses to be present or to cooperate in any other way in the review of the documents, the Department may upon notice to the Concessionaire, review such documents without the Concessionaire being present.

(g) Ownership. The Escrow Documents are, and will always remain, the property of the Concessionaire, subject to joint review by the Department and the Concessionaire, as provided herein. The Department stipulates and expressly acknowledges that the Escrow Documents constitute trade secrets. This acknowledgement is based on the Department’s express understanding that the information contained in the Escrow Documents is not known outside the Concessionaire’s business, is known only to a limited extent and only by a limited number of employees of the Concessionaire, is safeguarded while in the Concessionaire’s possession, is extremely valuable to the Concessionaire and could be extremely valuable to the Concessionaire’s competitors by virtue of its reflecting Concessionaire’s contemplated techniques of design and construction. The Department further acknowledges that the Concessionaire expended substantial sums of money in developing the information included in the Escrow Documents and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. The Department further acknowledges that the Escrow Documents and the information contained therein are made available to the Department
only because such action is an express prerequisite to the execution and delivery of this Agreement. The Department further acknowledges that the Escrow Documents include a compilation of the information used in the Concessionaire’s business, intended to give the Concessionaire an opportunity to obtain an advantage over competitors who do not know of or use the contents of the documentation.

(h) Final Disposition and Return of Escrow Documents. The Construction Escrow Documents will be returned to the Concessionaire upon the earlier to occur of (i) completion of the Design-Build Work, including tender of final payment and resolution of all claims or disputes arising under the Design-Build Contract or (ii) termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement. The remaining Escrow Documents will be returned upon termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement.

Section 18.06 Source Code Escrow

(a) The Department and the Concessionaire acknowledge that the Concessionaire and/or the Concessionaire’s Software suppliers may not wish to disclose directly to the Department at the time of installation the Source Code and Source Code Documentation which is Proprietary Intellectual Property of the Concessionaire and/or the Concessionaire’s software suppliers, as public disclosure could deprive the Concessionaire and/or the Concessionaire’s software suppliers of commercial value, but that the Department must be ensured access to such Source Code and Source Code Documentation in either of the following circumstances:

(i) in the case of Source Code and Source Code Documentation that is a Contractor’s Proprietary Intellectual Property, if this Agreement is terminated for Concessionaire Default or upon assignment by Concessionaire of its rights pursuant to this Agreement, the Department assumes the contract or subcontract with such Software supplier, and either (A) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Software supplier occurs or (B) the Software supplier fails or ceases to provide services as necessary to permit continued use of the software by the Department as contemplated by this Agreement; or

(ii) in the case of Source Code and Source Code Documentation that is the Concessionaire’s Proprietary Intellectual Property, (A) this Agreement is terminated for Concessionaire Default, (B) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Concessionaire occurs or (C) the Concessionaire fails or ceases to provide services as necessary to permit continued use of the software by the Department as contemplated by this Agreement.

(b) By no later than the Service Commencement Date, the Department and the Concessionaire will establish one or more escrows (the “Source Code Escrows”) with the Escrow Agent on terms and conditions reasonably acceptable to the Department and to the Concessionaire into which such Source Code and Source Code Documentation will be escrowed, including all relevant commentary, explanations and other documentation, as well as instructions
to compile such Source Code and Source Code Documentation and all modifications, additions or substitutions made to such Source Code and Source Code Documentation.

(c) The escrow provided for herein will survive any termination of this Agreement regardless of the reason.

(d) The Concessionaire will pay the reasonable costs and expenses of the Escrow Agent related to the Source Code Escrows.

Section 18.07 Inspection and Audit Rights

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

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

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

(d) In addition, the Concessionaire, at its expense, will cause a reputable independent auditor to annually audit its books and records relating to the Project, according to GAAP or any other generally accepted accounting standards, which are acceptable to the Department. The
Concessionaire will cause the independent auditor to deliver the audit report to the FHWA and the Department promptly after it is completed, but in any event within 120 Days of the end of each of the Concessionaire’s fiscal years.

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

(f) No audit rights will extend to the make-up of any lump sum amount or unit price or rate under the Design-Build Contract once such amount, price or rate has been agreed.

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

ARTICLE 19.

DEFAULTS AND REMEDIES

Section 19.01 Concessionaire Defaults

The occurrence of any one or more of the following events during the Term will constitute a “Concessionaire Default” pursuant to this Agreement:

(a) any representation or warranty made by the Concessionaire herein or in any other Project Agreement to which the Concessionaire and the Department are parties is false or misleading in any respect on the date made and a material adverse effect upon the Project or the Department’s rights or obligations under the Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof, with cure regarded as complete only when the adverse effects are remedied;

(b) the Concessionaire fails to comply with, perform or observe any other material obligation, covenant, agreement, term or condition in this Agreement or any Project Agreement to which the Department and the Concessionaire are parties (provided, that a debarment pursuant
to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a Concessionaire Default, which failure materially and adversely affects the Department’s rights or obligations under this Agreement or any other VDOT Project Agreement, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; provided, that the maximum cure period may be extended one time for any such failure to a final date if (i) at least 30 Days prior to the end of the maximum 180-Day cure period, the Concessionaire delivers a written work plan to the Department outlining the actions by which the Concessionaire will cure such failure and setting forth a final date by which the Concessionaire will cure such failure and (ii) the Department approves such work plan within 30 Days in its reasonable discretion; provided, that in all cases and regardless of the duration of the cure period, (A) the Concessionaire is proceeding with all due diligence to cure or cause to be cured such failure, (B) the failure is capable of being cured within a reasonable period of time, and (C) such failure is in fact cured within such period of time; provided further, that this Section 19.01(b) will not apply to events covered by other provisions of this Section 19.01; and provided, further, that any failure to comply with, perform or observe any obligation that is covered by the Non-Compliance Points system will constitute a Concessionaire Default only as provided in Section 11.05(c):

(c) the Concessionaire fails to pay to the Department when due any undisputed amount in excess of $100,000, adjusted annually by the percentage increase in CPI, payable to the Department pursuant to this Agreement or any other VDOT Project Agreement or to deposit funds to any reserve account in the amount and within the time period required by this Agreement, and such failure, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof;

(d) other than a Permitted Closure, the Concessionaire closes all or part of the HOT Lanes to traffic, at any time following Service Commencement, other than in accordance with the terms of this Agreement, and such closure continues without cure for a period of ten Days following the date the Department delivers to the Concessionaire written notice thereof;

(e) (i) the Concessionaire fails to achieve Substantial Completion of the Project by the Long Stop Date, as such date may be extended pursuant to this Agreement or (ii) in the case where a new Long Stop Date has been established pursuant to Section 8.15 hereof, the Concessionaire fails to diligently implement the Substantial Completion Recovery Plan;

(f) the Concessionaire fails to maintain, or to cause to be maintained, in effect the insurance, guarantees, letters of credit or other performance security as and when required pursuant to this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same and such failure continues without cure for a period of ten Business Days following the date the Department delivers to the Concessionaire written notice thereof;
(g) this Agreement or all or any portion of the Concessionaire’s Interest is Transferred, or there occurs a Change in Control, in contravention of Section 25.01;

(h) after exhaustion of all rights of appeal, (i) there occurs any suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the Concessionaire, any affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905 or successor regulation of similar import), or Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor whose work is not completed, from bidding, proposing or contracting with any Federal or State department or agency or (ii) the Concessionaire, Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor who have ongoing Work, or any of their respective officers, directors, or Administering Employees have been convicted of, or plead guilty or nolo contendere to, a violation of Law for fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the State, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail); provided, that a debarment pursuant to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a Concessionaire Default. If the offending Person is an officer, director or Administering Employee, cure will be regarded as complete when the Concessionaire proves that such Person has been removed from any position or ability to manage, direct or control the decisions of the Concessionaire, Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor (as applicable) or to perform Work; and if the Person debarred or suspended or subject to an agreement for voluntary exclusion is an affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905 or successor regulation of similar import), Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor, cure will be regarded as complete when the Concessionaire replaces such Person in accordance with this Agreement;

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

(j) within 90 Days after the commencement of any proceeding against the Concessionaire or any Concessionaire Financial Party seeking any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar Law, such proceeding has not been dismissed, or, within 90 Days after the appointment, without the consent or acquiescence of such Concessionaire or Concessionaire Financial Party, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of such Concessionaire or Concessionaire Financial Party or of all or any substantial part of its properties
or of the Project or any interest therein, such appointment has not been vacated or stayed on appeal or otherwise, or, within 90 Days after the expiration of any such stay, such appointment has not been vacated;

   (k) a levy under execution or attachment has been made against all or any part of the Project or any interest therein (including the Concessionaire’s Interest) as a result of any Lien (other than a Lien relating to permitted Concessionaire Debt) created, incurred, assumed or suffered to exist by the Concessionaire or any Person claiming through it, and such execution or attachment has not been vacated, removed or stayed by court order, bonding or otherwise within a period of 60 Days, unless such levy resulted from actions or omissions of the Department or its Representatives; and

   (l) after the sixth full month following the Service Commencement Date, the Concessionaire (i) fails to deliver an OSPS Improvement Plan meeting the requirements set forth in Section 5.08(b) at the time specified in Section 5.08(b) and such failure continues without cure for a period of 30 Days following the date on which the Department delivers to the Concessionaire notice of such failure, or (ii) fails to use commercially reasonable efforts to comply with any of the provisions set forth in an OSPS Improvement Plan submitted pursuant to Section 5.08(b), and such failure to use commercially reasonable efforts continues without cure for a period of 30 Days following the date on which the Department delivers notice of such failure to the Concessionaire.

Section 19.02 Department Remedies upon Concessionaire Default

Upon the occurrence of a Concessionaire Default, the Department may, subject to the provisions of the Direct Agreement, do any or all of the following as the Department, in its sole discretion, will determine:

   (a) the Department may terminate this Agreement and any other Project Agreements to which the Department and the Concessionaire are both parties, to the extent provided in Section 20.05;

   (b) if the Concessionaire Default is by reason of the failure to pay any undisputed monies to a third party, the Department may (but will have no obligation to) make payment on behalf of the Concessionaire of such monies, and any amount so paid by the Department will be payable by the Concessionaire to the Department within five Days after demand, including accrued interest at the Bank Rate from the date such payment is made by the Department to the repayment date; provided, that (i) the Department will not incur any liability to the Concessionaire for any act or omission of the Department or any other Person in the course of remediing or attempting to remedy any Concessionaire Default and (ii) the Department’s cure of any Concessionaire Default will not waive or affect the Department’s rights against the Concessionaire by reason of the Concessionaire Default;

   (c) the Department may cure the Concessionaire Default (but this will not obligate the Department to cure or attempt to cure a Concessionaire Default or, after having commenced to cure or attempted to cure a Concessionaire Default, to continue to do so), and all costs and
expenses reasonably incurred by the Department in curing or attempting to cure the Concessionaire Default, including the Department’s Allocable Costs, will be payable by the Concessionaire to the Department within five Days of demand, including accrued interest at the Bank Rate from the date such costs or expenses were incurred to the repayment date; provided, that (i) the Department will not incur any liability to the Concessionaire, and the Concessionaire hereby irrevocably waives and releases any liability of the Department to the Concessionaire, for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default and (ii) the Department’s cure of any Concessionaire Default will not waive or affect the Department’s rights against the Concessionaire by reason of the Concessionaire Default;

(d) except as provided in Section 19.02(e) below, the Department will not incur any liability to the Concessionaire for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default, and the Department’s cure of any Concessionaire Default will not affect the Department’s rights against the Concessionaire by reason of the Concessionaire Default.

(e) without notice and without awaiting lapse of the period to cure, in the event of a Concessionaire Default under Section 19.01(d) (closure of all or any part of the Project or any lane in violation of this Agreement), or any failure to perform a Safety Compliance Order and the Concessionaire Default or failure to perform the Safety Compliance Order results in or prolongs an Emergency or danger to persons or property, the Department may enter and take control of the Project or applicable portion thereof to the extent the Department finds it necessary to rectify the closure, Emergency or danger, and may suspend construction Work and/or close or cause to be closed the portion of the Project affected by the Emergency or danger, until such time as such breach or failure is cured, or the Department terminates this Agreement. In the event of such action by the Department, the Department may, subject to Law, distrain against any of the materials and equipment purchased exclusively for the Project that are situated on the Project and the Concessionaire waives any statutory protections and exemptions in connection therewith. Further, the Concessionaire will pay to the Department on demand the Department’s Allocable Costs in connection with the exercise of the Department’s rights pursuant to this Section 19.02(e). So long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a breach or failure, such action will not be deemed unlawful or a breach of this Agreement, will not expose the Department to any liability to the Concessionaire and will not entitle the Concessionaire to any other remedy, it being acknowledged that the Department has a high priority, paramount public interest in providing and maintaining continuous public access to the Project Assets and in protecting public and worker safety. The foregoing will not, however, protect the Department from the Concessionaire’s lawful Claims for recovery for third party bodily injury or property damage arising out of any such Department action, if and to the extent (i) (A) the Department was mistaken in believing such a breach or failure occurred, or (B) such injury or property damage was caused by the Department’s gross negligence, recklessness or willful misconduct, and (ii) the third party liability is not insured and not required to be insured pursuant to this Agreement. Immediately following rectification of such breach or failure, as determined by the Department,
acting reasonably, the Department will relinquish control and possession of the Project or applicable portion thereof back to the Concessionaire; and

(f) the Department may exercise any of its other rights and remedies provided for hereunder or the other Project Agreements or at law or in equity, except where a specific remedy is expressly provided for herein.

**Section 19.03 Financial Close Liquidated Damages**

No liquidated damages will be assessed for failure to achieve Financial Close by the Financial Close Deadline.

**Section 19.04 Department Default**

The occurrence of any one or more of the following events during the Term will constitute a “Department Default” pursuant to this Agreement:

(a) any representation or warranty made by the Department herein or in any other Project Agreement to which the Department and the Concessionaire are parties is false or misleading in any respect on the date made and a material adverse effect upon the Project or the Concessionaire’s rights or obligations under such Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Concessionaire delivers to the Department written notice thereof, with cure regarded as complete only when the adverse effects are remedied;

(b) the Department fails to comply with, perform or observe any material obligation, covenant, agreement, term or condition in this Agreement or any other Project Agreement to which it is a party, which failure materially adversely affects the Concessionaire’s Interest, and such failure continues without cure for a period of 90 Days following the date the Concessionaire delivers to the Department written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; provided, that in the latter case, (i) the Department is proceeding with all due diligence to cure or cause to be cured such failure, (ii) the failure is capable of being cured within a reasonable period of time and (iii) such failure is in fact cured within such period of time; or

(c) subject to Section 25.19, the Department fails to pay to the Concessionaire when due any undisputed amount in excess of $100,000, adjusted annually by the percentage increase in CPI, payable to the Concessionaire pursuant to this Agreement, and such failure continues without cure for a period of 90 Days following the date on which the Concessionaire delivers to the Department written notice thereof.

**Section 19.05 Concessionaire Remedies upon Department Default**

(a) Upon the occurrence of a Department Default pursuant to this Agreement, the Concessionaire may by notice to the Department declare the Department to be in default and
may, subject to the provisions of Section 19.05(b), do any or all of the following as the Concessionaire, in its discretion, will determine:

(i) the Concessionaire may terminate this Agreement and any Project Agreements to which the Concessionaire and the Department are both parties, to the extent provided in Section 20.04; and

(ii) the Concessionaire may exercise any of its other rights and remedies provided for under this Agreement or at Law, subject to any limitations thereon set forth in this Agreement, including Section 25.09 and Section 25.19.

(b) If the Department’s failure constitutes a Delay Event or Compensation Event, the Concessionaire’s sole recourse will be to seek remedies pursuant to Article 13 and Article 14.

ARTICLE 20.

TERMINATION; HANDBACK

Section 20.01 Termination Upon Expiration of Term

Unless earlier terminated in accordance with the terms of this Article 20, all the rights and obligations of the parties hereunder will cease and terminate, without notice or demand, on the last Day of the Term. Not later than 180 Days preceding the end of the Term, the Concessionaire and the Department will develop a plan (the “Transition Plan”) to assure the orderly transition of the Project to the Department or its designee (which Transition Plan is in addition to the adjustments and changes to the Life Cycle Maintenance Plan under Section 20.02). The parties will then diligently implement the Transition Plan in accordance with the Technical Requirements.

Section 20.02 Handback Obligations and Reserve

(a) Upon the end of the Term, the Concessionaire shall hand-back the Project to the Department, at no charge to the Department, with asset condition having a remaining life of the greater of: (i) five years; or (ii) life within its normal lifecycle (collectively referred to as the “Handback Requirements”). In addition, if requested by the Department, the Concessionaire will dismantle the HOT Lanes toll system as required to convert the HOT Lanes back to HOV Lanes; provided that the Department shall notify the Concessionaire at least one year prior to the end of the Term if the HOT Lanes are to be converted back to HOV Lanes. Any such dismantling of the HOT Lanes toll system shall be at Concessionaire’s sole cost and expense.

(b) Beginning 20 years prior to the expiration of the Term and every five years thereafter, the Concessionaire and the Department will jointly conduct inspections of the Project Assets, for the purposes of jointly (i) determining and verifying the condition of all Project Assets and their residual lives, and (ii) determining, revising and updating the Life Cycle Maintenance Plan to reflect the Handback Requirements.
(c) Beginning five years prior to the expiration of the Term, the Concessionaire and the Department will jointly conduct annual inspections of the Project Assets to ensure that the Handback Requirements will be met.

(d) The Concessionaire shall diligently perform and complete all work contained in the Life Cycle Maintenance Plan prior to reversion of the Project back to the Department, based on the required adjustments and changes to the Life Cycle Maintenance Plan resulting from the inspections and analysis under Section 20.02(b) and (c). The Concessionaire shall complete all such work prior to the end of the Term.

(e) Starting five years prior to the expiration of the Term, the Concessionaire shall post to the Department a ten-year irrevocable Letter of Credit or a Performance Bond for a period of five years after expiration of the Term in an amount equal to 50% of the nominal lifecycle cost expended in the previous five years of the Term pursuant to the most recent Life Cycle Maintenance Plan approved by the Department. This Letter of Credit or Performance Bond may be drawn upon by the Department only in the event that subsequent to termination or expiration of the Term, the Project Assets are found to fail to address the Handback Requirements and in the amount required to address such failures up to the full amount of the Letter of Credit or Performance Bond.

(f) The Department will determine whether the Project Assets meet the Handback Requirements based on routine inspections up to five years after termination or expiration of the Term (“Handback Period”). If the Concessionaire disagrees with the Department’s determination of the condition of the Project Assets during the Handback Period, the Concessionaire may, at its own expense, retain an engineer to inspect the facility and review the findings of the Department. Resolution of any disagreement will be subject to the dispute resolution procedures set forth in Article 21.

Section 20.03 Termination for a Significant Force Majeure Event

(a) If a Significant Force Majeure Event occurs, then

   (i) the Concessionaire may elect to terminate this Agreement unless the Department elects, within 14 Days following receipt of the Concessionaire’s written notice of election to terminate, to treat the Significant Force Majeure Event as a Compensation Event; and

   (ii) the Department may elect to terminate this Agreement unless the Concessionaire elects, within 60 Days following the Significant Force Majeure Event, to restore any resulting damage or destruction at the Concessionaire’s sole cost and expense and furnishes a restoration plan acceptable to the Department with respect to such damage or destruction;

provided, that a party will exercise its right to terminate this Agreement pursuant to this Section 20.03(a) by delivering to the other party written notice of its election to terminate this Agreement (“Significant Force Majeure Termination Notice”).
(b) If the Concessionaire has elected to restore the Project in accordance with Section 20.03(a)(ii), it will promptly carry out the restoration of the Project in accordance with the terms of this Agreement and the restoration plan approved by the Department.

(c) If this Agreement is terminated pursuant to Section 20.03(a), the Department will pay to the Concessionaire the Significant Force Majeure Termination Amount.

Section 20.04 Termination for Failure to Achieve Financial Close; Termination Based on Excess Interest Rate Fluctuation

(a) Failure to Achieve Financial Close by Financial Close Deadline. If the Concessionaire fails to achieve Financial Close by the Financial Close Deadline, either party may, at its sole discretion, elect to terminate this Agreement and any other Project Agreement to which it is a party. If a party elects to terminate pursuant to this Section 20.04(a), such party will provide written notice of termination to the other party, and such termination will be effective immediately upon delivery of such notice. In the event of such termination, the Department will pay the Concessionaire the Non-Financial Close Termination Amount.

(b) Liability Upon Termination. In the event of any termination under this Section 20.04, the Department will have no liability to the Concessionaire under this Agreement or any other Project Agreement other than the Non-Financial Close Termination Amount, and the Concessionaire will not be entitled to any Concessionaire Damages.

Section 20.05 Termination for Concessionaire Default

(a) Subject to the provisions of the Direct Agreement, at any time after the occurrence and during the continuance of a Concessionaire Default, the Department is entitled to terminate this Agreement and any other Project Agreement to which the Department and the Concessionaire are both parties.

(b) If the Department elects to terminate pursuant to this Section 20.05, the Department will deliver to the Concessionaire and the Collateral Agent written notice of its election to terminate, which termination will take effect not less than 60 Days after the delivery of such notice.

(c) In the event of termination pursuant to this Section 20.05, the Department will pay to the Concessionaire in accordance with Section 25.19, the Concessionaire Default Termination Amount.

(d) A termination by the Department for Concessionaire Default or any other termination of this Agreement by the Department which is later determined by the court of proper jurisdiction to be wrongful or in violation of this Agreement will be deemed to have been a termination for Department Default pursuant to Section 20.06 for the sole purpose of calculating the compensation owed to the Concessionaire by the Department.
Section 20.06 Termination for Department Default

(a) Subject to the provisions of this Section 20.06, the Concessionaire is entitled to terminate this Agreement and any other Project Agreement to which the Concessionaire and the Department are both parties in the event of a Department Default.

(b) If the Concessionaire elects to terminate pursuant to this Section 20.06, the Concessionaire will deliver to the Department a written notice of intent to terminate this Agreement. Upon receipt of such notice of intent to terminate, the Department will be entitled to cure such Department Default by providing the Concessionaire with a written work plan within the 90-Day period after the Department receives the written notice of intent to terminate. The work plan will outline the actions by which the Department will ensure future compliance with the obligation, covenant, agreement, term or condition in this Agreement that the Department failed to perform or observe. The work plan will be subject to the Concessionaire’s written approval (which approval will not be unreasonably withheld, delayed or conditioned).

(c) If (i) the Department fails to provide the Concessionaire with the work plan required pursuant to Section 20.06(b) or (ii) the Department fails to comply in any material respect with the work plan approved by the Concessionaire pursuant to Section 20.06(b) and in the case of this clause (ii), such failure continues without cure for 60 Days following the date the Concessionaire delivers to the Department written notice thereof, the Concessionaire may terminate this Agreement by delivering to the Department written notice of its election to terminate, which termination will take effect not less than 30 Days after the delivery of such notice.

(d) In the event of a termination pursuant to this Section 20.06, the Department will pay to the Concessionaire the Department Default Termination Amount.

Section 20.07 Other Termination

(a) If this Agreement is terminated by the Department or the State prior to the end of the Term, other than pursuant to Sections 19.02, 20.03, 20.04, 20.05 or 20.06, or is canceled, rescinded or voided during the Term, subject to Section 25.19, the Department will pay to the Concessionaire the Other Termination Amount. A termination as contemplated by this Section 20.07 shall not be effective unless and until Project Value has been determined pursuant to Section 20.11.

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

Section 20.08 Concessionaire Actions Upon Termination

(a) On delivery of notice of termination of this Agreement or the Concessionaire’s rights hereunder for any reason prior to the expiration of the Term, the provisions of this Section 20.08 will apply. The Concessionaire will timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due
to the Concessionaire or the Department on account of termination. In connection with the expiration of the Term, certain provisions of this Section 20.08, as specified, will apply.

(b) The Concessionaire will conduct all discussions and negotiations to determine the amount of any termination compensation, and will share with the Department all data, documents and information pertaining thereto, on an Open Book Basis.

(c) Except as otherwise specified in this Agreement, within 30 Days after receipt of a notice of termination, or, if applicable, not later than 120 Days before expiration of the Term, the Concessionaire will meet and confer with the Department for the purpose of developing an interim transition plan for the orderly transition of Work, demobilization and transfer to the Department of control of the Project and Project Right of Way. The parties will use diligent efforts to complete preparation of the interim transition plan within 15 Days after the date the Concessionaire receives the notice of termination or, if applicable, not later than 15 Days before expiration of the Term. The parties will use diligent efforts to complete a final transition plan within 30 Days after such date. The transition plan will be in form and substance acceptable to the Department in its good faith discretion and will include and be consistent with the other provisions and procedures set forth in this Section 20.08, all of which procedures the Concessionaire will promptly follow, regardless of any delay in preparation or acceptance of the transition plan.

(d) Upon receipt of a notice of termination, or, if applicable, before expiration of the Term, the Concessionaire will take all action that may be necessary, or that the Department may reasonably direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, parts, supplies and other property. For the avoidance of doubt, during the period from its receipt of a notice of termination until the expiration of the Term, the Concessionaire will continue to perform its obligations and be entitled to receive Toll Revenues pursuant to this Agreement.

(e) The Concessionaire will deliver to the Department on the date of expiration of the Term or on the effective date of any earlier termination:

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

(ii) possession and control of the Project and Project Assets (other than the Department Shared Assets), free and clear of any and all Liens created, incurred or suffered by the Concessionaire, any Concessionaire Party or any Affiliate or anyone claiming under any of them; provided, that release of the Liens of the Lenders will be subject to payment of termination compensation owing by the Department;
(iii) all other intangible personal property used or owned by the Concessionaire and relating to or derived from the Project and the Work; and

(iv) a notice of termination of this Agreement and the Concessionaire’s Interest, in the form reasonably required by the Department, executed and acknowledged by the Concessionaire.

(f) If, as of the date on which the notice of termination is delivered, the Concessionaire has not completed construction of all or part of the Project, the Department may, subject to the provisions of the Direct Agreement, elect, by written notice to the Concessionaire and the Design-Build Contractor delivered within 90 Days after the date on which the notice of termination is delivered, to continue in effect the Design-Build Contract or to require the termination of such agreement. If the Department does not deliver written notice of election within such time period, the Department will be deemed to elect to require termination of the Design-Build Contract. If the Department elects to continue the Design-Build Contract in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire’s right, title and interest in and to the Design-Build Contract, and the Department will assume in writing the Concessionaire’s obligations thereunder that arise from and after the end of the Term. If the Department elects (or is deemed to elect) to require termination of the Design-Build Contract, then the Concessionaire will:

(i) unless the Department has granted Replacement Agreements to a Lender or its Substituted Concessionaire, take such steps as are necessary to terminate the Design-Build Contract, including notifying the Design-Build Contractor that the Design-Build Contract is being terminated and that the Design-Build Contractor is to immediately stop work and stop and cancel orders for materials, services or facilities unless otherwise authorized in writing by the Department;

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

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

(iv) subject to the prior written approval of the Department, settle all outstanding liabilities and all Claims arising out of the Design-Build Contract;

(v) cause the Design-Build Contractor to execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Design-Build Contractor’s right, title and interest in and to (A) all third party agreements and permits, except Contracts for performance of the Design-Build Work; provided, that the Department assumes in writing all of the Design-Build Contractor’s obligations thereunder that arise after the effective date of termination
and (B) all assignable warranties and Claims held by the Design-Build Contractor against other Contractors and other third parties in connection with the Project or the Work; provided that the Design-Build Contractor will be entitled to retain its rights and remedies with respect to Work performed prior to the effective date of termination; and

(vi) carry out such other directions as the Department may give for suspension or termination of Work performed under the Design-Build Contract.

(g) If, as of the date notice of termination is delivered, the Concessionaire has entered into any other Contract for the design, construction, permitting, installation and equipping of the Project, the Department will elect, by written notice to the Concessionaire, to continue in effect such Contract or to require its termination. If the Department elects to continue the Contract in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire’s right, title and interest in and to the Contract, and the Department will assume in writing the Concessionaire’s obligations thereunder that arise from and after the effective date of termination. If the Department elects to require termination of the Contract, then the Concessionaire will take actions comparable to those set forth in Section 20.08(f) with respect to the Contract.

(h) If, as of the date notice of termination is delivered, the Concessionaire has entered into any operations or maintenance Contract, the Department will elect, by written notice to the Concessionaire, to continue it in effect or require its termination; provided, that if a Lender is entitled to Replacement Agreements following termination, the Department will not elect to terminate any such Contract until the Lender’s right to Replacement Agreements expires without exercise. If the Department elects to continue any such Contract in effect, then on or about the effective date of termination (or promptly after any later election to terminate) the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire’s right, title and interest in and to the Contract, and the Department will assume in writing the Concessionaire’s obligations thereunder that arise from and after the effective date of termination.

Section 20.09 Liability After Termination; Consequences of Termination

(a) If this Agreement is terminated by reason of a Concessionaire Default or a Department Default or any other Project Agreement is terminated for default thereunder, such termination will not excuse the defaulting party from any liability arising out of such default as provided in the Project Agreements. If any outstanding Claim of the Concessionaire against the Department that is independent of the event of termination and determination of the termination compensation is resolved prior to payment of the termination compensation (if any), the parties will adjust the termination compensation by the amount of the unpaid award, if any, on the Claim. Notwithstanding the foregoing, any termination of this Agreement will automatically extinguish any Claim of the Concessionaire to payment of Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination; provided, however, that (i) Claims for
any such Net Cost Impacts that cannot reasonably be avoided by the Concessionaire will not be extinguished, and (ii) the foregoing will not limit any Claim of the Concessionaire for interest on unpaid amounts owing or to become owing by the Department as provided herein.

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

(c) The Department will, as of the effective date of termination of this Agreement or the Concessionaire’s rights hereunder, whether due to expiration or earlier termination of the Term, assume full responsibility for the Project or, if Substantial Completion has not been achieved or other Work has otherwise not been completed as of such date, be permitted to assume full responsibility for such outstanding Work, and as of such date, the Concessionaire will have no liability or responsibility for such Work, as the case may be, occurring after such date; provided, that the Department and the Concessionaire will remain fully responsible for all of their respective obligations or liabilities pursuant to this Agreement or any other Project Agreement arising before the effective date of termination and those obligations pursuant to this Agreement or other Project Agreements which survive termination.

(d) Each of the Concessionaire and the Department will be liable for all costs, expenses and other amounts for which it is liable or responsible hereunder incurred up to the effective date of termination of this Agreement or the Concessionaire’s rights hereunder, whether due to expiration or earlier termination of the Term, and the Concessionaire will not be liable for any costs, expenses and amounts incurred in connection with the Project or the Work on and after such date, except to the extent such costs, expenses and amounts are properly included in the measure of any damages due to the Department arising from a default by the Concessionaire pursuant to this Agreement. The amount of any termination compensation is subject to reduction and offset for such damages.

(e) Regardless of the Department’s prior actual or constructive knowledge thereof, no contract or agreement to which the Concessionaire is a party (unless the Department is also a party thereto) as of the effective date of termination will bind the Department, unless the Department elects to assume such contract or agreement in writing. Except in the case of the Department’s express written assumption, no such contract or agreement will entitle the contracting party to continue performance of work or services respecting the Project following the effective date of termination, or to any Claim, legal or equitable, against the Department.

(f) As of the effective date of termination of this Agreement, whether due to expiration or earlier termination of the Term, the Permit and all of the Concessionaire’s Interest will automatically terminate and expire, and all Liens created, permitted or suffered by the Concessionaire will be automatically extinguished, provided however, that the foregoing will not prohibit the Concessionaire from assigning its right to receive termination payments to the Lenders.
Section 20.10 Exclusive Termination Remedies

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

(b) Article 19 and this Article 20 set forth the entire and exclusive provisions and rights of the Department and the Concessionaire regarding termination of this Agreement, and any and all other rights at law or in equity to terminate or to payment of compensation upon termination are hereby waived to the maximum extent permitted by Law. The parties hereto agree that, upon any termination of this Agreement, the payments provided herein will constitute the Concessionaire’s sole compensation (and the Concessionaire shall have no further liability to the Department except as otherwise provided herein) pursuant to this Agreement and in the event the Department or any designee or licensee of the Department imposes tolls for travel on the Project after termination of this Agreement, neither the Concessionaire nor any beneficiary or Lender as a result of a Financing Assignment will be entitled to any further compensation in respect thereof. In furtherance of the foregoing, the parties hereto agree that the provisions of Section 56-568B of the Code of Virginia will not apply to the Project after the termination of this Agreement.

Section 20.11 Determination of Project Value

(a) In the event the Department owes the Concessionaire an amount calculated by reference to the Project Value, Project Value will be determined according to the following procedures:

   (i) within 30 Days after a party requests the appointment of an appraiser, the Department and the Concessionaire will confer in good faith to mutually appoint an independent third-party appraiser to determine the Project Value by written appraisal. This appraiser must be nationally recognized and experienced in appraising similar assets;

   (ii) if the parties are unable to agree upon such a single appraiser within such 30-Day period, then within ten Days thereafter the Department and the Concessionaire will each appoint an independent third-party appraiser and both such appraisers will be instructed jointly to select, within 15 Days after they are appointed, a third independent third-party appraiser who is nationally recognized and experienced in appraising similar assets to make the appraisal referred to above;

   (iii) if the appraisers appointed by the parties are unable to appoint an independent third-party appraiser under Section 20.11(a)(ii) within 60 Days after a party has requested the appointment of an appraiser under Section 20.11(a)(i), then either party may petition the Circuit Court for the City of Richmond to appoint an independent third-party appraiser having such reputation and experience;
(iv) each party will pay the costs of its own appraiser. The Department and the Concessionaire will pay in equal shares the reasonable costs and expenses of the third independent appraiser;

(v) each party will diligently cooperate with the appraiser, including promptly providing the appraiser with data and information regarding the Project, Project Right of Way, asset condition, historical cost and revenue data, and other information the appraiser may request that is in the possession of or reasonably available to the party. Each party will provide the appraiser with access to the party’s books and records regarding the Project on an Open Book Basis; and

(vi) once appointed, the independent third-party appraiser will conduct an appraisal of the Project Value and deliver to both parties a draft appraisal report and draft valuation. The appraisal will determine Project Value as of the effective date of termination of the Agreement, based on the then condition of the Project (but without regard to any damage or loss resulting from a Department Default). The appraiser will appraise Project Value by taking into account the terms and conditions of this Agreement, projected cash flows and projected costs of the Project for the remainder of the projected Term had this Agreement not been terminated, as determined by the appraiser. For the avoidance of doubt, the calculation of Project Value is the sum of the fair market value of the projected Distributions for the remainder of the Term without taking into consideration any terminations pursuant to Article 20 and the fair market value of any Concessionaire Debt outstanding as of the date of the calculation, and will include Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination. In conducting the appraisal, and before issuing a draft appraisal report, the independent appraiser will afford reasonable and comparable opportunity to each party to provide the appraiser with information, data, analysis and reasons supporting each party’s view on the Project Value. The parties will have 15 Days after receipt of the draft appraisal report to comment thereon. After the opportunity to comment has expired, the independent third-party appraiser will consider and evaluate all comments, prepare a final appraisal report stating the Project Value, and deliver the final appraisal report to both parties.

(b) If either party disagrees with the Project Value, either party may invoke the dispute resolution procedures set forth in Article 21, by delivery of notice to the other party within 60 Days following receipt of the appraiser’s report. Failure to invoke the dispute resolution procedures within such time period will conclusively constitute acceptance of the Project Value.
ARTICLE 21.

DISPUTE RESOLUTION

Section 21.01 General

(a) The parties will attempt to resolve any Disputes arising out of this Agreement at the Project level through good faith negotiations between designated representatives. The Department, the Concessionaire, the Design-Build Contractor, all subcontractors and the FHWA are firmly committed to the following principles:

(i) trust and open communications are encouraged and expected by all participants;

(ii) all of the participants move quickly to address and resolve issues at the lowest possible level by approaching problems from the perspectives and needs of all of the participants involved;

(iii) all of the participants have identified common goals and respect each other’s individual goals and values; and

(iv) all of the participants create an atmosphere conducive to cooperation and teamwork in finding better solutions to potential problems and issues at hand.

(b) If the Dispute cannot be resolved at the Project level in accordance with Section 21.01(a) above, then either party will have the right to submit the Dispute to the Steering Committee for resolution. The Steering Committee will convene a meeting within ten Days of notification by either party of any unresolved Dispute. After the meeting has convened, the Steering Committee will have seven Days to resolve the Dispute.

(c) If the Steering Committee has not resolved the Dispute pursuant to Section 21.01(a)(i), then either party may request non-binding mediation of the Dispute or any other form of alternative dispute resolution process that is mutually acceptable to both parties. If the Dispute has not been resolved within 60 Days after the initiation of mediation proceedings or, if both parties do not agree to mediation, the other form of alternative dispute resolution process, either party will have the right to proceed in accordance with Section 21.02. The first face-to-face meeting between the mediator and both parties will be deemed to be the initiation of mediation.

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

Section 21.02 Litigation; Venue

(a) All litigation between the parties arising out of or pertaining to this Agreement or its breach will be filed, heard and decided in the Circuit Court for the City of Richmond, Virginia, Division I, which will have exclusive jurisdiction and venue.
(b) As permitted by Section 56-569 of the Code of Virginia, the parties agree that any requirement that the State Corporation Commission issue a declaratory judgment regarding a material default (as defined in Section 56-568 of the Code of Virginia) pursuant to such Section 56-569, as a prerequisite to exercising any remedy set forth in this Agreement or such Section 56-569, will not apply to this Agreement.

(c) Satisfaction of the procedures set forth in Section 21.01 will be a condition precedent to instituting a legal action in court; provided, that if the Department determines, in its sole discretion, that a Dispute involves an issue that poses an immediate and serious threat to the public health, safety and welfare, the Department will be entitled to take whatever steps it deems appropriate and to initiate litigation of the matter in court without first submitting the Dispute to the dispute resolution procedures of this Agreement.

Section 21.03 Conduct During Pendency of Dispute

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

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

Section 21.04 Costs of Dispute Resolution

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

(b) The fees and costs of any mediator will be borne equally by each party.

ARTICLE 22.

RESERVED RIGHTS

Section 22.01 Exclusions from the Concessionaire’s Interest

The Concessionaire’s rights and interests in the Project have been granted to the Concessionaire under the Permit in order to enable it to accomplish the Project Purposes. Subject to Section 22.04, the Concessionaire’s rights and interests consist only of those expressly granted by this Agreement and other Project Agreements and specifically exclude all Reserved Rights.

Section 22.02 Department Reservation of Rights

(a) The Department may, at any time at its sole cost and expense, devote, use or take advantage of the Reserved Rights for any public purpose without any financial participation.
whatsoever by the Concessionaire. The Department hereby reserves to itself all ownership, development, maintenance, repair, replacement, operation, use and enjoyment of, and access to, the Reserved Rights. The Department will owe no compensation or damages on account of its exercise of Reserved Rights, unless such exercise qualifies as a Compensation Event.

(b) In addition to any rights it has, the Department reserves (for itself and its representatives, as well as others claiming by, through or under the Department) the right and will have the right to enter the Project Assets and each and every part thereof at all reasonable times in the following circumstances:

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

(ii) in the event of any circumstance or event that is reasonably believed by the Department to have caused an impairment to the continuous operation of the HOT Lanes as a public highway, and if the Department in its discretion determines that the Concessionaire is not then taking all necessary steps to respond to or to rectify such circumstance or event, to take, at such times as the Department determines necessary in its discretion and with notice to the Concessionaire if practicable under the circumstances, such actions as the Department determines may be necessary to respond to or to rectify such circumstance or event or to restore the operation of the Project, and all costs and expenses incurred by the Department in connection with or related to such actions will be paid by the Concessionaire.

(c) The Concessionaire acknowledges and agrees that all rights to own, lease, sell, assign, transfer, utilize, develop or take advantage of the Reserved Rights are hereby reserved to the Department, and the Concessionaire will not engage in any activity infringing upon the Reserved Rights.

Section 22.03 Disgorgement

If a Concessionaire Default concerns a breach of the provisions of Section 22.01 or Section 22.02, in addition to any other remedies pursuant to this Agreement, the Department will be entitled to disgorgement of all profits from the prohibited activity and to sole title to and ownership of the prohibited assets and improvements.
Section 22.04 Alternate Treatment of Reserved Rights

Notwithstanding Section 22.01 and Section 22.02, the Department may elect in its sole discretion to treat any development of improvements respecting Reserved Rights that it undertakes as Project Enhancements, in which case all of the provisions of Section 12.02 will apply.

Section 22.05 Naming Rights

(a) The Department hereby grants the Concessionaire the naming rights for the Project, subject to (i) approval of any such name by the Department, which approval will not be unreasonably withheld, conditioned or delayed, and (ii) compliance with Law and Governmental Approvals. The Concessionaire will request the Department’s approval of a name for the Project in writing and no such approval will be effective unless and until provided in writing by the Department; provided, that the failure of the Department to respond in writing to such request within 21 Days following receipt of the Concessionaire’s request will be deemed the Department’s approval thereof. The Concessionaire may sub-license any such rights to the O&M Contractor.

(b) If the Concessionaire changes the name of the HOT Lanes, the Concessionaire will pay the Department for the cost of changing names on signs maintained by the Department pursuant to the Technical Requirements.

(c) For purposes of the Permit Fee calculation, any revenues received by the Concessionaire with respect to the naming rights granted to the Concessionaire under this Section 22.05 will be treated as Gross Revenues.

ARTICLE 23.

REPRESENTATIONS, WARRANTIES AND FINDINGS

Section 23.01 Department Representations and Warranties

The Department hereby represents and warrants to the Concessionaire as follows:

(a) the Department is an agency of the State and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with, and subject to the terms and conditions of this Agreement and other Project Agreements to which the Department is a party;

(b) each person executing this Agreement or any other Project Agreement on behalf of the Department to which the Department is a party has been or at such time will be duly authorized to execute each such document on behalf of the Department;

(c) neither the execution and delivery by the Department of this Agreement and the other Project Agreements executed concurrently herewith to which the Department is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will
result in a default under or violation of (i) any other agreements or instruments to which it is a
party or by which it is bound or (ii) to its knowledge, any Law, where such violation will have a
material adverse effect on the ability of the Department to perform its obligations under this
Agreement;

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

(e) as of the Agreement Date, no agreement, contract, option, commitment or other
right exists which binds, or which in the future may become binding on, the Department to sell,
transfer, convey, dispose of or encumber the Project. The Department has not granted or
assigned any interest in Gross Revenues to any other party other than the Concessionaire
pursuant to this Agreement;

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

(g) the Department has taken or caused to be taken all requisite action to authorize the
execution and delivery of, and the performance of its obligations under, this Agreement and the
other Project Agreements to which the Department is a party;

(h) the Department is in material compliance with all Laws and Governmental
Approvals applicable to its obligations in connection with this Agreement; and

(i) other than with respect to portions of the Project Right of Way not yet acquired as
of the Agreement Date, the Department has good and sufficient title and interest to the Project
Right of Way, free and clear of all Liens or other exceptions to title, except Permitted
Encumbrances.

Section 23.02 Concessionaire Representations and Warranties

The Concessionaire hereby represents and warrants to the Department as follows:

(a) the Concessionaire is a duly organized limited liability company created under the
laws of the State of Delaware, is qualified to conduct business in the State, has the requisite
power and all required licenses to carry on its present and proposed activities, and has full power,
right and authority to execute and perform each and all of its obligations under the Project
Agreements;
(b) as of the Agreement Date, the membership interests in the Concessionaire are owned in 90% holdings by DRIVe USA Investments LLC and 10% holdings by Fluor and no other Person has a membership interest in the Concessionaire;

(c) the Concessionaire has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Concessionaire is a party;

(d) each person executing this Agreement or any other Project Agreement on behalf of the Concessionaire has been or will at such time be duly authorized to execute each such document on behalf of the Concessionaire;

(e) this Agreement and each Project Agreement to which the Concessionaire or a Concessionaire Financial Party is a party have been duly authorized, executed and delivered by the Concessionaire or the Concessionaire Financial Party and constitutes a valid and legally binding obligation of the Concessionaire or the Concessionaire Financial Party (as the case may be), enforceable against it in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;

(f) neither the execution and delivery by the Concessionaire of this Agreement and the other Project Agreements to which the Concessionaire is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or a violation of (i) the governing instruments of the Concessionaire or any other agreements or instruments to which it is a party or by which it is bound or (ii) to its knowledge, any Law, where such violation will have a material adverse effect on the ability of the Concessionaire to perform its obligations under this Agreement;

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

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

(i) none of the Concessionaire, any affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905), or the Design-Build Contractor or their affiliates (as so defined) is suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any Federal or State department or agency;
(j) to the best of the Concessionaire’s knowledge after diligent inquiry, no event which, with the passage of time or the giving of notice, would constitute a Concessionaire Default has occurred;

(k) to the best of the Concessionaire’s knowledge after diligent inquiry, no event which, with the passage of time or the giving of notice, would constitute a Delay Event or a Compensation Event under this Agreement has occurred;

(l) the Initial Base Case Financial Model (i) was prepared by or on the Concessionaire’s behalf in good faith, (ii) fully discloses all Financial Model Formulas, and all cost, revenue and other financial assumptions and projections that the Concessionaire used or is using in making its decision to enter into this Agreement, (iii) fully discloses all Financial Model Formulas disclosed to the Lenders under the Project Financing Agreements and (iv) as of the Agreement Date, represents the projections that the Concessionaire believes in good faith are realistic and reasonable for the Project; provided, that such projections are based upon a number of estimates and assumptions and are subject to significant business, economic and competitive uncertainties and contingencies and that, accordingly, no representation or warranty is made that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results;

(m) on or before the Agreement Date, the Concessionaire has delivered to the Department an audit report and an opinion of the Financial Model Auditor addressed to the Department to the effect that the Initial Base Case Financial Model and the Financial Model Formulas reflect the terms of this Agreement and that the Financial Model Formulas and the Initial Base Case Financial Model are suitable for use herein in connection with Compensation Events, Delay Events and early termination procedures, and covering such other matters as may have been reasonably requested by the Department, all in form and substance acceptable to the Department; and

(n) All Early Work performed by Fluor and Transurban prior to the Agreement Date was performed in accordance with (i) Law; (ii) Governmental Approvals; and (iii) prudent industry practices, methods, techniques and standards and using the degree of care that would be expected to be exercised by a prudent, skilled and experienced developer engaged in the same kinds of undertakings and under the same or similar circumstances, conditions, scope and limitations (including limitations on access to the Project Right of Way and limitations agreed with the Department as to the scope of the work to be undertaken prior to the Agreement Date) as those applying to such work.

Section 23.03 Department’s Findings Under the Act

The Department, as the Responsible Public Entity with respect to the Project, makes the following findings:

(a) the actions taken by the Department pursuant to the Act facilitate the development, design, construction, management, operation and maintenance of the Project and the timely development of any Project Enhancements, and such public need may not be wholly
satisfied by existing methods of procurement in which qualifying transportation facilities are
developed and/or operated;

(b) there is a public need to construct and operate a qualifying transportation facility
(as defined in Section 56-557 of the Code of Virginia) of the type of the Project;

(c) the Permit granted hereunder authorizing the Concessionaire to develop, design,
construct, manage and operate and maintain the Project, including the development of any
Project Enhancements, may result in their availability to the public in a more timely, more
efficient and less costly fashion, thereby serving the public safety and welfare;

(d) the Project, its interconnections with existing transportation facilities, and the
Concessionaire’s plans for the development, design, construction, operation and maintenance of
the Project are reasonable and compatible with the State transportation plan and with local
comprehensive plans;

(e) the estimated cost of developing, designing, constructing, operating and
maintaining the Project is reasonable in relation to similar transportation facilities;

(f) the Concessionaire’s plans will result in the timely construction and operation and
maintenance of the Project and in the development of any Project Enhancements;

(g) the Department will continue to have fee title or good and valid interest to the
Project and the Project will remain open for use by members of the public as a public road upon
payment of the applicable tolls;

(h) through this Agreement, the Department intends to encourage investment in the
State by the Concessionaire to facilitate the development, construction, operation and
maintenance of the Project and the development of any Project Enhancements; and

(i) the terms and conditions of this Agreement serve the public purpose of the Act.

ARTICLE 24.

CONTRACTING PRACTICES AND PUBLIC WELFARE CONSIDERATIONS

Section 24.01 Obligation to Refrain from Discrimination

The Concessionaire covenants and agrees that it will not discriminate and it will require
all Contractors not to discriminate against any person, or group of persons, on account of age,
sex, marital status, race, creed, color, national origin, religion or the presence of any sensory,
mental or physical handicap in the permitting, design, acquisition, construction, maintenance,
operation or management of the Project, nor will the Concessionaire establish or permit any such
practice or practices of discrimination or segregation with reference to the selection, use, hiring,
firing, promotion or termination of employees, Contractors, and vendors or with reference to the
use, occupancy or enjoyment of or access to or toll rates charged for use of the Project; provided,
that the prohibition against discrimination on the basis of sensory, mental or physical handicap
Section 24.02 Contracting

(a) General. The Concessionaire may perform the Work through use of its own personnel, materials and equipment, or by contracting to Persons with the expertise, qualifications, experience, competence, skills and know-how to perform the responsibilities being contracted in accordance with all Law, all Governmental Approvals, and the terms, conditions and standards set forth in this Agreement.

(b) Design-Build Contractor. The Concessionaire has entered into the Design-Build Contract. Notwithstanding its use of the Design-Build Contractor, the Concessionaire remains responsible for the Design-Build Work during the Term in accordance with this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement or removal of the Design-Build Contractor.

(c) Shared Facilities Agreement. The Concessionaire has entered into the Shared Facilities Agreement with CBE for the use of the Express Operations Center. In connection therewith, the Concessionaire agrees to provide to the Department copies of all notices received or given by the Concessionaire pursuant to the Shared Facilities Agreement, unless otherwise mutually agreed to by the parties.

(d) O&M Contractor.

(i) Subject to the Department’s approval, which will not be unreasonably withheld, the Concessionaire may contract with one or more separate O&M Contractors with the expertise, qualifications, experience, competence, skills and know-how to perform the operations and maintenance obligations of the Concessionaire in accordance with this Agreement; provided, that the Department’s approval will not be required with respect to any Contractor with respect to the O&M Work (other than the O&M Contractor) (A) whose Contract price is less than $4 million adjusted annually by the percentage increase in CPI and (B) is prequalified with the Department in accordance with the Department’s Rules Governing Prequalification Privileges. Notwithstanding its use of an O&M Contractor, the Concessionaire remains ultimately responsible for the operation and maintenance of the Project during the Term in accordance with this Agreement. The O&M Contractor will be subject at all times to the direction and control of the Concessionaire, and any delegation to an O&M Contractor does not relieve the Concessionaire of any of its obligations, duties or liability pursuant to this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement, removal or resignation of an O&M Contractor. Subject to the Direct Agreement, any agreement between the Concessionaire and any O&M Contractor will by its terms terminate, without penalty, at the election of the Department upon five Days’ notice to such O&M Contractor upon the termination of this Agreement. The O&M Contractor will have no interest in or rights pursuant to this Agreement or the Project.
(ii) Each O&M Contractor and its Contract will comply with this Section 24.02. In addition, the material terms of the proposed Contract of the O&M Contractor must be consistent with the corresponding duties and obligations of the Concessionaire pursuant to this Agreement and the other Project Agreements.

(iii) The O&M Contractor and its Affiliates may contract to receive or recover overhead costs (“O&M Overhead Costs”) that are consistent with Part 31 of the Federal Acquisition Regulation principles and will provide the Department with a report on these costs. Any such O&M Overhead Costs will not include excluded costs of the nature described in subsection (b) of the definition of Operating Costs and will include only those costs that provide a direct and measurable benefit to the Project when compared with projects of similar scope and complexity. Any O&M Overhead Costs charged by an Affiliate of the O&M Contractor will be arms-length and commercially reasonable.

(e) Replacement of Design-Build Contractor or O&M Contractor. Before entering into any Contract replacing the initial Design-Build Contractor or O&M Contractor, as applicable, the Concessionaire will submit a true and complete copy of the proposed Contract for the Department’s review and approval, subject to the following:

(i) the Department may disapprove such proposed Contract if such Contract or the Work to be performed thereunder does not comply, or is inconsistent, in any material respect with the applicable requirements of this Agreement; and

(ii) the Department may disapprove, in its sole discretion, of the replacement Contractor after taking into account the following factors:

(A) the financial strength and integrity of the proposed Contractor, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;

(B) the capitalization of the proposed Contractor or any parent guarantor, as applicable;

(C) the experience of the proposed Contractor and each of its direct Contractors in constructing or operating toll roads or highways and performing other projects;

(D) the presence of any actions, suits or proceedings, at law or in equity, or before any Governmental Authority, pending or, to the best of such Contractor’s knowledge, threatened against such Contractor, that would or could reasonably be expected to have a material adverse effect on its ability to perform its obligations under the Contract;

(E) the background of the proposed Contractor, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees
and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person’s past or present performance on other projects); and

(F) the Contractor’s compliance with any of the other provisions of this Section 24.02.

(f) Each Contract for the performance of the Work that the Concessionaire executes at a minimum:

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

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

(iii) will require the Contractor to carry out its scope of work in accordance with Law, the Technical Requirements, all Governmental Approvals, Good Industry Practice and the terms, conditions and standards set forth in this Agreement;

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

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

(vi) will include express requirements that, if the Department succeeds to the Concessionaire’s rights under the subject Contract (by assignment or otherwise), then the relevant Contractor agrees that it will (A) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer, service provider), (B) permit audit thereof by the Concessionaire, and provide progress reports to the Concessionaire appropriate for the type of Contract it is performing sufficient to enable the Concessionaire to provide the reports it is required to furnish the Department pursuant to this Agreement and (C) allow the Department, to assume the benefit of the Concessionaire’s Contract rights and the work performed thereunder, with liability only for those remaining obligations accruing after the date of assumption, but excluding any monetary claims or obligations that the Concessionaire may have against such Contractor that existed prior to the Department’s assumption of such Contract;
(vii) will not be assignable by the Contractor without the Concessionaire’s prior written consent; provided, that the foregoing will not limit permitted subcontracting of the Work;

(viii) will expressly require the Contractor to participate in meetings between the Concessionaire and the Department, upon the Department’s reasonable request, concerning matters pertaining to such Contractor or its work; provided, that all direction to such Contractor will be provided by the Concessionaire; and provided further, that nothing in this Section 24.02(f)(viii) will limit the authority of the Department to give such direction or take such action which in the opinion of the Department is necessary to remove an immediate and present threat to the safety of life or property;

(ix) will expressly provide that all Liens and claims of any Contractors at any time will not attach to any interest of the Department in the Project or the Project Right of Way; and

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

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

(h) The Concessionaire will include provisions in each Contract for the performance of the Work that the Concessionaire executes requiring the Contractor: (i) to maintain all licenses required by Law; (ii) if the Department makes a direct payment under such Contract, to comply with the requirements of the eVA Business to Government Vendor System or its successor; and (iii) to include in Contracts for the performance of the Work that such Contractor executes the provisions set forth in this Section 24.02(h).

(i) The Concessionaire will include provisions in each Contract for the performance of the Work that the Concessionaire executes (i) naming the Department as a third-party beneficiary of all Contractor representations and warranties contained in such Contract and (ii) requiring the Contractor to include in Contracts for the performance of the Work that such Contractor executes to name the Department as a third-party beneficiary of all Contractor representations and warranties contained in such Contract; provided, that the Department will have the right to exercise its rights under such representations and warranties only so long as the Concessionaire, the Contractor or a Lender is not pursuing remedies thereunder.
(j) The Concessionaire will not contract any part of the Design-Build Work or the O&M Work to a Contractor who is not prequalified with the Department in accordance with the Department’s Rules Governing Prequalification Privileges, unless otherwise indicated in this Agreement. This restriction does not apply to contract specialty items, consultants, manufacturers, suppliers, haulers or snow removal service providers.

(k) The appointment of Contractors will not relieve the Concessionaire of its responsibility hereunder or for the quality of work, materials and services provided by it. The Concessionaire will at all times be held fully responsible to the Department for the acts and omissions of its Contractors and persons employed by them and no Contract entered into by the Concessionaire will impose any obligation or liability upon the Department to any such Contractor or any of its employees. Further, absent the Department’s express written consent, no Contract or delegation of Work thereunder will affect the obligation of the Concessionaire to directly communicate with the Department and to oversee the Work of the Contractor. Nothing in this Agreement will create any contractual relationship between the Department and a Contractor.

(l) The Concessionaire will not enter into or materially amend an Affiliate Contract without notice to and consent of the Department, which consent will not be unreasonably withheld or delayed if the Contract is entered into in the ordinary course of business and the Concessionaire demonstrates to the Department’s satisfaction that the Affiliate Contract is on overall terms no less favorable or unfavorable to the Concessionaire than terms the Concessionaire could obtain in an arm’s-length transaction for comparable services with a Person that is not an Affiliate of the Concessionaire; provided, that no consent will be required for (i) reasonable overhead sharing fees and reimbursement of third-party costs payable to an Affiliate for legal, accounting, tax, computer and other centralized management services provided to the Concessionaire in lieu of the Concessionaire having its own employees for such functions; or (ii) the joint ownership of assets or property used for the operation or maintenance of the Project and other projects owned or operated by Affiliates of the Concessionaire so long as the cost of such assets and properties are reasonably shared and documented.

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

(n) Upon entering into a Contract for the Design-Build Work or O&M Work in excess of $100,000, the Concessionaire will provide the Department with a copy of such Contract and, if such Contract is with an Affiliate of the Concessionaire, a list of all Contracts in effect to which such Affiliate is a party and under which all or a substantial portion of the Affiliate’s responsibilities or obligations under its Contract are delegated to its Contractor. The Concessionaire will allow the Department ready access to all Contracts and records regarding Contracts, including amendments and supplements to Contracts and guarantees thereof.

(o) As soon as the Concessionaire identifies a potential Contractor for a potential Contract described in the first sentence of Section 24.02(n), but in no event later than five Days after Contract execution, the Concessionaire will notify the Department in writing of the name, address, phone number and authorized representative of such Contractor.

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

(a) Disadvantaged Business Enterprise (DBE).

(i) General.

(A) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the DBE program, where applicable.

(B) The Concessionaire and each Contractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Concessionaire and each Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the Concessionaire and each Contractor to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as set forth in Section 24.03(a)(v).

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, in an effort to comply with 49 CFR Part 26, the Department has established a goal of 10% for DBE participation.
(B) The Department and the Concessionaire agree to manage the foregoing goals as follows:

(1) the Concessionaire will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Concessionaire’s approach to meeting the DBE participation goals set forth in this Section 24.03(a);

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

(3) the Concessionaire will be responsible for either achieving or making Good Faith Efforts to achieve the goal of 10% for DBE participation by providing maximum contracting opportunities for DBE businesses;

(4) the Concessionaire will provide to the Department each calendar quarter documentation of all executed Contracts and payments to DBE businesses;

(5) the Concessionaire will have the opportunity to establish DBE sub-contracting work packages; and

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

(C) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the applicable DBE objectives. The Department will assist the Concessionaire in meeting the Design-Build Work goals by offering assistance to include the following items:

(1) the parties will jointly conduct outreach meetings for DBE firms;

(2) the Department will identify to the Concessionaire DBE firms that are eligible to bid on the specific bid item groups; and

(3) the Department will provide access to technical and managerial assistance to eligible DBE firms, including in part, through the VDOT/GEC Civil Rights Team and the Business Opportunity Workforce Development Center based upon available funds.
(D) The Concessionaire acknowledges that the Department’s assistance and cooperation will not eliminate or reduce the Concessionaire’s responsibility to achieve the Design-Build Work goals for DBE participation or demonstrate Good Faith Efforts. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the Project. The Concessionaire is expected to meet the goal or demonstrate that Good Faith Efforts have been made. The Concessionaire will submit quarterly reports of Good Faith Efforts documentation, and, DBE payments on form C-63 to the Department Representative.

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

(iii) O&M Work. During performance of the O&M Work, when contracting for such work the Concessionaire will encourage the participation of DBE firms in the Project. The Concessionaire will set annual goals and make Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The annual and long-term participation DBE goals for the Concessionaire in contracting for the O&M Work is 2%.

(iv) DBE Reporting and Assessment.

(A) The Concessionaire will report quarterly, within 15 Days after each calendar quarter ends, to the Chief of Administration on the Concessionaire’s efforts to (1) satisfy the DBE goals set forth in this Section 24.03(a) or (2) demonstrate Good Faith Efforts to accomplish the DBE goals set forth in this Section 24.03(a).

(B) The Chief of Administration will assess, confirm and communicate to the Concessionaire within 30 Days after receiving each quarterly report whether the Concessionaire has (1) satisfied the DBE goals, (2) demonstrated Good Faith Efforts, or (3) failed to satisfy the requirements of clause (1) and (2) of this Section 24.03(a)(iv)(B).

(v) Failure to Demonstrate DBE Good Faith Efforts Related to Design-Build Work.

(A) If the Chief of Administration notifies the Concessionaire pursuant to Section 24.03(a)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work
for a quarterly period, the Concessionaire will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals.

(B) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for two consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(a)(iv), the Concessionaire will prepare and submit, at the Concessionaire’s sole cost and expense, a DBE Performance Improvement Plan for the Department’s review and approval. The DBE Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of clause (1) and (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work. The Concessionaire will submit the DBE Performance Improvement Plan within 15 Days after receiving notice from the Chief of Administration pursuant to Section 24.03(a)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B). The Concessionaire will pay the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire’s compliance with the DBE Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work.

(C) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(a)(iv), the Department may debar or disqualify the Key Members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.03(a)(v).

(D) If the Chief of Administration determines at any time that the Concessionaire has satisfied the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work performed to date with respect to the applicable calendar quarter, then any prior determinations by the Chief of Administration of the Concessionaire’s failure to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and the Concessionaire’s failure to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals will be disregarded, the Concessionaire will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure to satisfy the requirements of clause (1)
of Section 24.03(a)(iv)(B) and a failure to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals will be pursuant to the provisions set forth in Section 24.03(a)(v)(A).

(E) Any decision or action taken by the Chief of Administration or the Department pursuant to Section 24.03(a) is subject to the dispute resolution procedures set forth in Article 21.

(b) Small, Women-Owned and Minority Business (SWaM).

(i) General.

(A) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the SWaM program, where applicable.

(B) The Concessionaire shall not and will not permit its Contractors to discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Concessionaire shall carry out applicable requirements of Executive Order 33 (2006), in the award and administration of this Agreement and the award and administration of subcontracts pursuant to this Agreement.

(C) Failure by the Concessionaire to carry out the requirements in this Section 24.03(b) relating to SWaM participation will subject the Concessionaire to only the remedies set forth in Section 24.03(b)(v) and shall not result in a Concessionaire Default.

(D) If debarment occurs as a result of the Department's exercise of such remedies, such debarment shall not result in a Concessionaire Default.

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, in an effort to support Executive Order 33 (2006), the Department has established a goal of 19% for SWaM participation.

(B) The Department and the Concessionaire agree to manage the foregoing goals as follows:

(1) the Concessionaire will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Concessionaire’s approach to meeting the SWaM participation goals set forth in this Section 24.03(b);

(2) the Concessionaire will have dedicated resources to the SWaM inclusion program to ensure compliance with Executive Order 33 (2006), the DBE/SWaM Plan, nondiscrimination provisions, technical assistance
activities, communication of subcontracting and generate reports specific to SWaM utilization;

(3) the Concessionaire will be responsible for either achieving or making Good Faith Efforts to achieve the goal of 19% for SWaM participation by providing maximum contracting opportunities for SWaM businesses;

(4) the Concessionaire will provide to the Department each calendar quarter documentation of all executed Contracts and payments to SWaM businesses;

(5) the Concessionaire will have the opportunity to establish SWaM-only statement of work packages; and

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

(C) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the applicable SWaM objectives. The Department will assist the Concessionaire in meeting the Design-Build Work goals by offering assistance to include the following items:

(1) the parties will jointly conduct outreach meetings for SWaM firms;

(2) the Department will identify to the Concessionaire SWaM firms that are eligible to bid on the specific bid item groups; and

(3) the Department will provide access to technical and managerial assistance to eligible SWaM firms, including in part, through the VDOT/GEC Civil Rights Team and the Business Opportunity Workforce Development Center based upon available funds.

(D) The Concessionaire acknowledges that the Department’s assistance and cooperation will not eliminate or reduce the Concessionaire’s responsibility to achieve the Design-Build Work goals for SWaM participation or demonstrate Good Faith Efforts. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the Project. The Concessionaire is expected to meet the goal or demonstrate that Good Faith Efforts have been made. The Concessionaire will submit quarterly reports of Good Faith Efforts documentation, and, SWaM payments on form C-63 to the Department Representative.
When there is a contract goal for the Design-Build Work, the Concessionaire and the Concessionaire Parties must make Good Faith Efforts to meet the goal either through obtaining enough SWaM participation or documenting the Good Faith Efforts it made to do so. The Department must seriously consider the Concessionaire’s documentation of Good Faith Efforts. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for the Concessionaire.

(iii) O&M Work. During performance of the O&M Work, when contracting for such work the Concessionaire will encourage the participation of SWaM firms in the Project. The Concessionaire will set annual goals and make Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The Concessionaire will provide its participation on such matters to the Department Representative, and the Department may include those participation rates, as appropriately adjusted, with its own towards the State’s long-term goal established pursuant to the Office of the Governor’s Executive Order 33 (2006). The annual and long-term participation SWaM goal for the Concessionaire in contracting for the O&M Work is 4%.

(iv) SWaM Reporting and Assessment.

(A) The Concessionaire will report quarterly, within 15 Days after each calendar quarter ends, to the Chief of Administration on the Concessionaire’s efforts to (A) satisfy the SWaM goals set forth in this Section 24.03(b) or (B) demonstrate Good Faith Efforts to accomplish the SWaM goals set forth in this Section 24.03(b).

(B) The Chief of Administration will assess, confirm and communicate to the Concessionaire within 30 Days after receiving each quarterly report whether the Concessionaire has (1) satisfied the SWaM goals, (2) demonstrated Good Faith Efforts, or (3) failed to satisfy the requirements of clause (1) and (2) of this Section 24.03(b)(iv)(B).

(v) Failure to Demonstrate SWaM Good Faith Efforts Related to Design-Build Work.

(A) If the Chief of Administration notifies the Concessionaire pursuant to Section 24.03(b)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for a quarterly period, the Concessionaire will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals.

(B) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for two consecutive quarters based on the determinations by the Chief of
Administration pursuant to Section 24.03(b)(iv), the Concessionaire will prepare and submit, at the Concessionaire’s sole cost and expense, a SWaM Performance Improvement Plan for the Department’s review and approval. The SWaM Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of clause (1) and (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work. The Concessionaire will submit the SWaM Performance Improvement Plan within 15 Days after receiving notice from the Chief of Administration pursuant to Section 24.03(b)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B). The Concessionaire will pay the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire’s compliance with the SWaM Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work.

(C) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(b)(iv), the Department may debar or disqualify the Key Members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.03(b)(v).

(D) If the Chief of Administration determines that the Concessionaire has satisfied the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work performed to date, then any prior determinations by the Chief of Administration of the Concessionaire’s failure to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and the Concessionaire’s failure to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals will be disregarded, the Concessionaire will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and a failure to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals will trigger the provisions set forth in Section 24.03(b)(v)(A).

(E) Any decision or action taken by the Chief of Administration or the Department pursuant to Section 24.03(b) is subject to the dispute resolution procedures set forth in Article 21.
Section 24.04 Public Safety and Welfare

The parties recognize and agree that protection of the health, safety and welfare of the public and all persons engaged in connection with the performance of the Concessionaire’s obligations pursuant to this Agreement is a priority. Accordingly, the Concessionaire will comply with the following provisions, along with all other Laws and the Technical Requirements:

(a) the Concessionaire will comply, and will require all Contractors to comply, with all construction safety and health standards established by Law, including the State and Federal Occupational Health and Safety Acts. Neither the Concessionaire nor any Contractor will require any worker to work in surroundings or under working conditions that are unsanitary, hazardous or dangerous to their health or safety, as determined under construction safety and health standards promulgated by the U.S. Secretary of Labor in accordance with Section 107 of the Contract Work Hours and Safety Standards Act; and

(b) the Department will be entitled to require the Concessionaire to suspend any Work or other activities related to the Project, which, in the sole discretion of the Department, presents a risk to the public health, safety or welfare, and to take such other actions as the Department may require to prevent such risk; provided, that if it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then the suspension order and other actions will be treated as a Department Change pursuant to Section 14.02.

Section 24.05 Labor, Employment and DBE/SWaM Related Matters

The Concessionaire will comply, and will cause its Contractors to comply, with the provisions set forth in the Labor, Employment and DBE/SWaM Related Matters attached as Exhibit AA.

Section 24.06 Federal Immigration Reform and Control Act

In accordance with Section 2.2-4311.1 of the Code of Virginia, the Concessionaire certifies that it does not and agrees that it will not, during the Term, knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986. The Concessionaire further agrees that it will require all of its Contractors to certify that they do not and will not knowingly employ an unauthorized alien as defined by such Act.
ARTICLE 25.

MISCELLANEOUS

Section 25.01 Transfers by the Concessionaire

(a) Lock-Up Period. During the Lock-up Period, the Concessionaire will not, without the Department’s approval, Transfer, or otherwise permit the Transfer of, any or all of the Concessionaire’s Interest to or in favor of any Person (a “Transferee”) or permit any Person to:

(i) Transfer, or otherwise dispose of 50% or more of any direct or indirect ownership interest in the Concessionaire;

(ii) grant any security interest, Lien or other encumbrance over its direct or indirect ownership interest in the Concessionaire;

(iii) enter into any agreement in respect of any direct or indirect ownership interest in the Concessionaire or in respect of any votes attached to any such shares held by such Person in the Concessionaire, in each case (A) other than customary shareholder, partnership or organizational agreements among the Equity Members as of the Agreement Date solely with respect to the governance and management of the Concessionaire or (B) other than agreements for Transfers of less than 50% of any direct or indirect ownership interest in the Concessionaire; or

(iv) agree, whether or not subject to any condition precedent or subsequent, to do any of the foregoing.

Notwithstanding the foregoing, this Section 25.01 will not prohibit or restrict the following:

(A) a Transfer to the Collateral Agent or trustee or such Person’s nominee or transferee, as permitted in connection with the exercise of rights and remedies under the Project Financing Agreements, or a Transferee permitted or approved under the Direct Agreement;

(B) any other Transfer identified in clauses 1 through 8 of the definition of Change in Control; or

(C) any agreement to make any of the Transfers described in the preceding clauses (A) and (B) of this Section 25.01(a).

(b) Post Lock-Up Period. Following the Lock-up Period, the Concessionaire will not Transfer, any or all of the Concessionaire’s Interest to or in favor of a Transferee, unless:

(i) the Department has approved such proposed Transferee based upon a determination in accordance with Section 25.01(c) (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement); and
(ii) the proposed Transferee (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement) enters into an agreement with the Department in form and substance reasonably satisfactory to the Department wherein the Transferee acquires the rights and assumes the obligations of the Concessionaire and agrees to perform and observe all of the obligations and covenants of the Concessionaire pursuant to this Agreement.

(c) The Department’s approval of a proposed Transferee may be withheld only if the Department determines that the proposed Transfer is prohibited by Law or such proposed Transferee is not capable of performing the obligations and covenants of the Concessionaire pursuant to this Agreement, which determination may be based upon, or take into account, one or more of the following factors:

(i) the financial strength and integrity of the proposed Transferee, and its direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;

(ii) the capitalization of the proposed Transferee;

(iii) the experience of the proposed Transferee and each of its direct Contractors in operating toll roads or highways and performing other projects; and

(iv) the background of the proposed Transferee, each of its direct Contractors, and their direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person’s past or present performance on other projects).

If the Department is not satisfied that these conditions are met, it may condition its consent on provision of reasonable additional security or other reasonable arrangements.

(d) Except for a Transfer of all the Concessionaire’s Interest to the Collateral Agent upon its exercise of remedies under the Financing Assignments or to a Transferee that is permitted or has been approved under the Direct Agreement, no Transfer of all or any of the Concessionaire’s Interest will be made or have any force or effect if at the time of such Transfer there has occurred a Concessionaire Default that has not been remedied or an event that with the lapse of time, the giving of notice or otherwise would constitute a Concessionaire Default, unless the Transferee is prepared to cure such Concessionaire Default in accordance with the Direct Agreement.

(e) A Change in Control of the Concessionaire will be deemed to be a Transfer of the Concessionaire’s Interest for purposes of this Section 25.01.

(f) Any Transfer or other sale, transfer, disposition or other transaction made in violation of this Section 25.01 will be null and void ab initio and of no force and effect.
Section 25.02 Ethical Standards

(a) The Concessionaire has adopted and provided copies to the Department of its written policies establishing ethical standards of conduct for all its directors, officers and supervisory or management personnel in dealing with the Department and employment relations. Such policies including any amendments or modifications will include standards of ethical conduct concerning the following:

(i) restrictions on gifts and contributions to, and lobbying of, any State Party and any of their respective commissioners, directors, officers and employees;

(ii) protection of employees from unethical practices in the selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

(iii) protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false Claim), unethical or unsafe actions or failures to act by the Concessionaire or its personnel or any Contractors;

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

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

(vi) adherence to the Department’s organizational conflict of interest rules and policies pertaining to the hiring of any consultant which has assisted the Department in connection with the negotiation of this Agreement or the conduct of Oversight Services for the Project.

(b) The Concessionaire will cause its directors, members, officers and supervisory and management personnel, and require those of its Contractors, to adhere to and enforce the adopted policy on ethical standards of conduct. The Concessionaire will establish reasonable systems and procedures to promote and monitor compliance with the policy.
(c) Without limiting the foregoing provisions of this Section 25.02, the Concessionaire further agrees: (i) no gifts, gratuities, or favors of any nature whatsoever will be given or offered by any Concessionaire Party to personnel of the Department; and (ii) no Concessionaire Party will employ any personnel of the Department for any services during the Term, without the prior written consent of the Department. If the Department determines, after investigation, that a Concessionaire Party or any of its employees, representatives, or agents of any person acting in its behalf have violated this provision, the Concessionaire Party may, at the discretion of the Department, be disqualified from bidding on future contracts with the Department for a period of six months from the date of the Department’s determination of such a violation. Any implicated employees, agents, or representatives of the Contractor may be prohibited from working on any contract awarded by the Department for the period of disqualification.

Section 25.03 Assignment by the Department

The Department may, subject to giving the Concessionaire not less than 90 Days prior written notice or as required by Law, transfer and assign its interests, in whole or in part, in the Project, this Agreement and any other Project Agreements to any other public agency or public entity of the State as permitted by Law; provided, that the assignee (a) has assumed all of the Department’s obligations, duties and liabilities pursuant to this Agreement and the Project Agreements then in effect and has provided the Concessionaire with reasonable assurance of its legal authority and sufficient financial resources to honor and perform same and (b) will not be required to have financial resources in excess of those then available to the Department.

Section 25.04 Authorized Representatives

(a) Each of the Concessionaire and the Department hereby designates the following individuals as its initial Concessionaire Representative(s) and Department Representative(s), respectively, to administer this Agreement on its respective behalf:

(i) For the Concessionaire:

President
95 Express Lanes LLC
6440 General Green Way
Alexandria, Virginia 22312

(ii) For the Department:

Chief Engineer
Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA  23219

(b) The Concessionaire Representatives and the Department Representatives will be reasonably available to each other during the Term and will have the authority to issue
instructions and other communications on behalf of the Concessionaire and Department, respectively, and will be the recipient of notices and other written communications from the other party pursuant to this Agreement (except any notice initiating or relating to the dispute resolution procedures of Article 21 will be given in accordance with Section 25.05). However, such Representatives will not have the authority to make decisions or give instructions binding upon the Concessionaire or the Department, except to the extent expressly authorized by the Concessionaire or the Department, as the case may be, in writing. In the event the Concessionaire or the Department designates different Representatives, it will give the other party written notice of the identity of and contact information for the new Concessionaire Representative(s) or Department Representative(s), as the case may be.

Section 25.05 Notices

(a) Whenever under the provisions of this Agreement it will be necessary or desirable for one party to serve any notice, request, demand, report or other communication on another party, the same will be in writing and will not be effective for any purpose unless and until actually received by the addressee or unless served (i) personally, (ii) by independent, reputable, overnight commercial courier, (iii) by facsimile transmission, where the transmitting party includes a cover sheet identifying the name, location and identity of the transmitting party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein or (iv) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

If to the Department:

Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219
Attention: Commissioner of Highways
Facsimile: (804) 786-2940

With copies to:

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

If to the Concessionaire:

95 Express Lanes LLC
Section 25.06 Binding Effect

Subject to the limitations of Section 25.01 and Section 25.03, this Agreement will be binding upon and will inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the parties hereto, such reference also will be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such party, as if in every case so expressed.

Section 25.07 Relationship of Parties

(a) The relationship of the Concessionaire to the Department will be one of an independent contractor, not an agent, partner, lessee, joint or co-venturer or employee, and neither the Department nor the Concessionaire will have any rights to direct or control the activities of the other or their respective Affiliates, contractors or consultants, except as otherwise expressly provided in this Agreement.

(b) Officials, employees and agents of the Concessionaire or the Department will in no event be considered employees, agents, partners or representatives of the other.
Section 25.08 No Third-Party Beneficiaries

Nothing contained in this Agreement is intended or will be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement, except rights expressly contained herein for the benefit of the Lenders, the Collateral Agent and/or State Indemnitees.

Section 25.09 Limitation on Consequential Damages

Except as expressly provided in this Agreement to the contrary, neither party will be liable to the other for punitive damages or special, indirect, incidental or consequential damages of any nature, whether arising in contract, tort (including negligence) or other legal theory. The foregoing limitation will not, however, in any manner:

(a) prejudice the Department’s right to recover liquidated damages from the Concessionaire as provided in this Agreement;

(b) limit the Concessionaire’s liability for any type of damage arising out of the Concessionaire’s obligation to indemnify, protect, defend and hold each State Indemnitee harmless from Third Party Claims under Article 15 and Section 16.03 of this Agreement;

(c) limit the Concessionaire’s liability for any type of damage to the extent covered by the proceeds of insurance required hereunder; or

(d) limit the amounts expressly provided to be payable by the Department or the Concessionaire pursuant to this Agreement.

Section 25.10 Waiver

(a) No waiver by any party of any right or remedy pursuant to this Agreement or the other Project Agreements will be deemed to be a waiver of any other or subsequent right or remedy pursuant to this Agreement or the other Project Agreements. The consent by one party to any act by the other party requiring such consent will not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

(b) No act, delay or omission done, suffered or permitted by one party or its agents will be deemed to waive, exhaust or impair any right, remedy or power of such party pursuant to this Agreement or any other Project Agreement, or to relieve the other party from the full performance of its obligations pursuant to this Agreement and the other Project Agreements.

(c) No waiver of any term, covenant or condition of this Agreement will be valid unless in writing and executed by the obligee party.

(d) The acceptance of any payment or payment by a party will not (i) waive any preceding or then-existing breach or default by the other party of any term, covenant or condition of this Agreement, other than the other party’s prior failure to pay the particular amount or part
thereof so accepted, regardless of the paid party’s knowledge of such preceding or then-existing breach or default at the time of acceptance of such payment or payment or (ii) continue, extend or affect (A) the service of any notice, any suit, arbitration or other legal proceeding or final judgment, (B) any time within which the other party is required to perform any obligation or (C) any other notice or demand.

(e) No custom or practice between the parties in the administration of the terms of this Agreement will be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of this Agreement.

Section 25.11 No Brokers

Except for any financial adviser or investment banker whose fee will be paid by the party retaining such adviser or banker (or in the case of a Concessionaire Financial Party, by such party or the Concessionaire), each party represents and warrants that it has not dealt with any real estate or business opportunity broker or agent or any finder in connection with this Agreement. Each party agrees, to the extent permitted by Law, to indemnify, protect, defend with counsel acceptable to the other party and hold harmless the other party against any Claim for commission, finder’s fee or like compensation asserted by any real estate or business opportunity broker, agent, finder or other Person claiming to have dealt with the indemnifying party in connection with this Agreement.

Section 25.12 Governing Law; Compliance with Law and Federal Requirements

(a) This Agreement will be governed by and construed in accordance with the Laws of the State applicable to contracts executed and to be performed within the State.

(b) The Concessionaire will keep fully informed of and comply and require its Contractors to comply with Law. The Concessionaire will execute and file the documents, statements, and affidavits required under any Law required by or affecting this Agreement or the execution of the Work. The Concessionaire will permit examination of any records made subject to such examination by such Law.

(c) The Concessionaire will comply and require its Contractors to comply with all Laws applicable to the Project as a result of the costs of the Project being financed in part with State funds, federal-aid funds and State bond proceeds, including the applicable Federal Requirements attached as Exhibit U.

(d) The Concessionaire acknowledges and agrees that the USDOT will have certain approval rights with respect to the Project, including the right to provide certain oversight and technical services with respect to the Work. The Concessionaire will cooperate with USDOT and provide such access to the Project and information as USDOT may request in the exercise of USDOT’s duties, rights and responsibilities in connection with the Project.
Section 25.13 Use of Police Power

Nothing in this Agreement limits the authority of the Department to exercise its regulatory and police powers granted by Law.

Section 25.14 Survival

The dispute resolution procedures, the indemnifications, limitations, releases, obligations to pay termination compensation and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the Work will survive the expiration or earlier termination of this Agreement and/or the completion of the Work.

Section 25.15 Subpoena

Except as provided for in Section 33.1-4 of the Code of Virginia, the Concessionaire may subpoena any Department personnel; provided, that the Concessionaire will pay for such personnel’s time at its fully burdened rate (including overhead and fringe benefits), together with all out-of-pocket expenses incurred, no later than 30 Days after the Concessionaire’s receipt of an invoice reasonably documenting the amount of such time provided.

Section 25.16 Construction and Interpretation of Agreement

(a) The language in all parts of this Agreement will in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any party. The parties hereto acknowledge and agree that this Agreement has been prepared jointly by the parties and has been the subject of arm’s length and careful negotiation over a considerable period of time, that each party has been given the opportunity to independently review this Agreement with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of this Agreement, this Agreement will not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction will be utilized.

(b) If any court of competent jurisdiction issues a final, non-appealable judicial order finding that a term or provision of this Agreement is invalid or unenforceable, the remainder of this Agreement will not be affected thereby and each other term and provision of this Agreement will be valid and enforceable to the fullest extent permitted by Law. It is the intention of the parties to this Agreement, and the parties hereto agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the parties in good faith will supply as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

(c) The captions of the articles and sections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.
(d) References in this instrument to this “Agreement” mean, refer to and include this instrument as well as any riders, exhibits, addenda and attachments hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking “herein,” “hereunder” or “pursuant hereto” (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument will be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. All references to a subsection or clause “above” or “below” refer to the denoted subsection or clause within the section in which the reference appears. Unless expressly provided otherwise, all references to Articles and Sections refer to the Articles and Sections set forth in this Agreement. Unless otherwise stated in this Agreement or the Project Agreements, words which have well-known technical or construction industry meanings are used in this Agreement or the Project Agreements in accordance with such recognized meaning. Wherever the word “including,” “includes” or “include” is used in this Agreement or the Project Agreements, except where immediately preceded by the word “not”, it will be deemed to be followed by the words “without limitation”. Wherever reference is made in the Project Agreements to a particular Governmental Authority, it includes any public agency succeeding to the powers and authority of such Governmental Authority.

(e) As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

(f) The Project Agreements are intended to be complementary and consistent and to be read together as a complete agreement. In the event of any conflict or inconsistency between the Articles of this Agreement and the exhibits to this Agreement, the conflict or inconsistency will be resolved by applying the following order of document precedence, from highest to lowest:

(i) Change Orders and amendments to the articles of this Agreement and Definitions;

(ii) the Articles of this Agreement and Definitions;

(iii) Project Description and Scope Documentation;

(iv) the Technical Requirements, as amended; and

(v) the other exhibits to this Agreement, as amended.

(g) A Project Agreement to which the Department is not a party will have no effect upon the terms and conditions of this Agreement or the construction or interpretation thereof.
(h) Any standard or specification with which the Concessionaire is required to comply by a provision of this Agreement during the Construction Period, shall be the specific edition or version identified in the Technical Requirements, and the Concessionaire shall not be required during the Construction Period to comply with any newer, updated or revised edition or version unless the parties so agree or the Concessionaire is so directed by the Department as a Department Change.

Section 25.17 Counterparts

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

Section 25.18 Entire Agreement; Amendment

(a) THIS AGREEMENT AND THE PROJECT AGREEMENTS TO WHICH THE DEPARTMENT AND THE CONCESSIONAIRE ARE BOTH PARTIES CONSTITUTE THE ENTIRE AND EXCLUSIVE AGREEMENT BETWEEN THE PARTIES RELATING TO THE SPECIFIC MATTERS COVERED HEREIN AND THEREIN. ALL PRIOR WRITTEN AND PRIOR OR CONTEMPORANEOUS VERBAL AGREEMENTS, UNDERSTANDINGS, REPRESENTATIONS AND/OR PRACTICES RELATIVE TO THE FOREGOING, INCLUDING THE INTERIM AGREEMENT, ARE HEREBY SUPERSEDED, REVOKED AND RENDERED INEFFECTIVE FOR ANY PURPOSE. THIS AGREEMENT MAY BE ALTERED, AMENDED OR REVOKED ONLY BY AN INSTRUMENT IN WRITING SIGNED BY EACH PARTY HERETO, OR ITS PERMITTED SUCCESSOR OR ASSIGNEE, EXCEPT TO THE EXTENT THE DEPARTMENT HAS THE RIGHT TO AMEND BY DEPARTMENT CHANGE OR DIRECTIVE LETTER PURSUANT TO ARTICLE 14. NO VERBAL AGREEMENT OR IMPLIED COVENANT WILL BE HELD TO VARY THE TERMS HEREOF, ANY STATUTE, LAW OR CUSTOM TO THE CONTRARY NOTWITHSTANDING.

(b) This Agreement and the other Project Agreements attempt to set forth in full all requirements applicable under the Act as to the development, operation, maintenance, repair, management and financing of the Project and attempt to define in full the rights and responsibilities of each party in connection therewith. To the extent requirements and rights and responsibilities have not been addressed in this Agreement and the other Project Agreements, the parties agree to carry out their respective responsibilities in the spirit of cooperation contemplated by the Act, recognizing that they may not have defined in a sufficient detail or anticipated fully all activities necessary for the full implementation of the Project.

Section 25.19 Payment of Concessionaire Damages and Other Amounts by the Department

(a) THE DEPARTMENT’S PAYMENT OF ANY CONCESSIONAIRE DAMAGES, LOSSES OR ANY OTHER AMOUNTS DUE AND OWING BY THE DEPARTMENT PURSUANT TO THIS AGREEMENT WILL BE SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY AND ALLOCATION BY THE CTB.
Upon determination of Concessionaire Damages or such other amounts due and owing by the Department, the Department will with all practical dispatch consistent in all respects with Law and its obligations pursuant to this Agreement:

(i) deliver to the Governor and the Director of the Department of Planning and Budget of the State, before December 1 with respect to any such payment requested to be appropriated by the next regular session of the General Assembly, a statement of the amount of any such payment due or expected to be due and a request that the Governor include in his budget to be delivered to the next session of the General Assembly a provision that there be appropriated such amounts for such purpose to the extent required, from any legally available funds;

(ii) use its diligent efforts to have (A) the Governor include, in each biennial or any supplemental budget the Governor presents to the General Assembly, the amounts set forth in any statement delivered pursuant to (i) above, (B) the General Assembly appropriate and reappropriate, as applicable, such amounts to or on behalf of the Department for the purpose of paying any Concessionaire Damages or other amounts due and owing by the Department to the Concessionaire pursuant to this Agreement, and (C) the CTB allocates such appropriated amounts as applicable for payment to the Concessionaire; and

(iii) notify the Concessionaire promptly upon becoming aware of any failure by (A) the Governor to include such amounts in his budget delivered to the next session of the General Assembly, (B) the General Assembly to appropriate such amounts during such next session of the General Assembly or (C) the CTB to so allocate such amounts for payment to the Concessionaire.

(b) The parties hereto agree and acknowledge that, subject to appropriation, such obligation of the Department to pay the Concessionaire Damages and other amounts was and is a material inducement and consideration for the execution and delivery of this Agreement by the Concessionaire.

(c) The Department will pay any sum due pursuant to Section 20.03, Section 20.05, Section 20.06 or Section 20.07 within 60 Days after the date of determination of the applicable termination compensation amount; provided, in each case, that the Department may defer payment of such sum for an additional 270 Days if it reasonably determines that such additional period is necessary in order to obtain funds to pay such sum; provided further, that any payment of such sum will be made together with interest thereon (A) at the average earnings rate on the State’s Transportation Trust Fund or any successor thereto during the period that runs from the date such sum would have otherwise become due to the date that is 60 Days thereafter and (B) after such period, at the Bank Rate until the date of payment thereof; except that to the extent such payment is based on the Concessionaire Debt or the amounts required for the Concessionaire to achieve the Base Case Equity IRR, such amounts will be re-calculated as of the date of payment.
(d) The Department will proceed to make payment to the Concessionaire of the undisputed amount of any sum due pursuant to Section 20.03, Section 20.05, Section 20.06 or Section 20.07 without regard to the dispute resolution procedures.

Section 25.20 Taxes

The Concessionaire is solely responsible for the payment of Taxes accrued or arising out of the performance of its obligations pursuant to this Agreement.

Section 25.21 Payments to Department or Concessionaire

(a) Except as otherwise expressly provided herein or in any Project Agreement, payments due to the Department or the Concessionaire hereunder, as applicable, will be due and payable within 30 Days of receipt by the Concessionaire or the Department, as applicable, of an invoice therefor, together with any supporting documentation.

(b) Each party will be entitled to deduct, offset or withhold from any amounts due from one party to the other party any amounts then due and owing from such other party.

(c) Except as otherwise provided, neither party is required to pay amounts due that are being contested in accordance with the dispute resolution procedures described in Article 21.

Section 25.22 Interest on Overdue Amounts

Any amount not paid when due pursuant to this Agreement will bear interest from the date such payment is due until payment is made (after as well as before judgment) at a variable rate per annum at all times equal to the Bank Rate (except as provided otherwise in Section 25.19(c)), which interest will be payable on demand. Interest will be compounded annually and payable on the date on which the related overdue amount is paid.

[SIGNATURE PAGE(S) TO FOLLOW]
IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Comprehensive Agreement Relating to the I-95 HOV/HOT Lanes Project as of the date first written above.

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

By:______________________________
Gregory A. Whirley, Sr.
Commissioner of Highways

95 EXPRESS LANES LLC,
a Delaware limited liability company

By:______________________________
Name:______________________________
Title:______________________________
Exhibit O

List of Initial Project Financing Agreements and Financing Assignments

1. Indenture of Trust, dated as of July 1, 2012, between Virginia Small Business Financing Authority (the “Issuer”) and U.S. Bank National Association (the “Trustee”).

2. Loan Agreement, dated as of July 1, 2012, between Virginia Small Business Financing Authority (the “Issuer”) and 95 Express LLC (the “Borrower”).

3. Collateral Agency and Account Agreement dated as of July 1, 2012, by and among 95 Express LLC (the “Borrower”), U.S. Bank National Association (the “Trustee”) and U.S. Bank National Association (the “Collateral Agent” and the “Securities Intermediary”).

4. Subordination and Intercreditor Agreement, dated as of July 1, 2012, by and among the United States Department of Transportation acting by and through the Federal Highway Administrator (the “TIFIA Lender”), U.S. Bank National Association (the “Trustee”) and U.S. Bank National Association (the “Collateral Agent”).

5. Security Agreement, dated as of July 1, 2012, between 95 Express LLC (the “Grantor”) and U.S. Bank National Association (the “Collateral Agent”).

6. Transurban Membership Interest Pledge Agreement, dated as of July 1, 2012 between Transurban DRIVe USA LLC (the “Pledgor”) and U.S. Bank National Association (the “Collateral Agent”).

7. Fluor Membership Interest Pledge Agreement, dated as of July 1, 2012, between Fluor Enterprises, Inc. (the “Pledgor”) and U.S. Bank National Association (the “Collateral Agent”).

8. Transurban Equity Funding Agreement, dated as of July 1, 2012, by and among Transurban DRIVe USA LLC (the “DRIVe Member”), 95 Express LLC (the “Borrower”) and U.S. Bank National Association (the “Collateral Agent”).

9. Fluor Equity Funding Agreement, dated as of July 1, 2012, by and among between Fluor Enterprises, Inc. (the “Fluor Member”), 95 Express LLC (the “Borrower”) and U.S. Bank National Association (the “Collateral Agent”).

10. Transurban Equity Funding Guaranty, dated as of July 1, 2012, by and among Transurban Holdings Limited (“Holdings”), Transurban International Limited (“International”), and Transurban Infrastructure Management Limited in its capacity as responsible entity of the Transurban Holding Trust (“Trust”, and together with Holdings and International, the “Transurban Guarantor”), 95 Express LLC (the “Borrower”), U.S. Bank National Association (the “Trustee”), and the Virginia Department of Transportation (the “Department”).

11. Fluor Equity Funding Guaranty, dated as of July 1, 2012, by and among Fluor Corporation (the “Fluor Guarantor”), 95 Express LLC (the “Borrower”), U.S. Bank National Association (the “Trustee”), and the Virginia Department of Transportation (the “Department”).
COMPREHENSIVE AGREEMENT

RELATING TO THE I-95 HOV/HOT LANES PROJECT

DATED AS OF JULY 31, 2012

BY AND BETWEEN

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

AND

95 EXPRESS LANES LLC,
a Delaware limited liability company

**THE VIRGINIA DEPARTMENT OF TRANSPORTATION RESERVES THE RIGHT TO MODIFY ANY OF THE TERMS PRESENTED IN THIS DRAFT COMPREHENSIVE AGREEMENT**
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This COMPREHENSIVE AGREEMENT RELATING TO THE I-95 HOV/HOT LANES PROJECT (this “Agreement”) is made and entered into as of July 31, 2012 by and between the VIRGINIA DEPARTMENT OF TRANSPORTATION (the “Department”), an agency of the Commonwealth of Virginia (the “State”), the address of which Department is 1401 East Broad Street, Richmond, Virginia 23219; and 95 EXPRESS LANES LLC, a Delaware limited liability company (the “Concessionaire”), the address of which is 6440 General Green Way, Alexandria, Virginia 22312.

ARTICLE 1.

RECITALS

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

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

WHEREAS, pursuant to the Act, on September 24, 2003, Clark/Shirley submitted an unsolicited conceptual proposal to the Department for the Proposed Project. In accordance with the Department’s Act guidelines then in effect, the Department posted and published notice of the conceptual proposal and solicited competing proposals. On March 17, 2004, Fluor (as defined herein) submitted a conceptual proposal to the Department for the development, design, financing, construction, operation and maintenance of the HOT Lanes on I-95.

WHEREAS, both competing proposals were referred to an initial review committee (the “Initial Review Committee”) for preliminary review.

WHEREAS, following a determination by the Initial Review Committee that the conceptual proposals offered by both proposers merited further review, the Commonwealth Transportation Board on January 20, 2005 adopted a resolution approving both such conceptual proposals for further evaluation. The Deputy Secretary of Transportation invited both proposers to submit detailed proposals for consideration by the Public-Private Transportation Advisory Panel (the “Advisory Panel”) in accordance with the Department’s Act guidelines.

WHEREAS, on June 3, 2005, Clark/Shirley and Fluor and Transurban (as defined herein), which was identified as a subcontractor in Fluor’s conceptual proposal, submitted detailed proposals to the Advisory Panel for consideration.

WHEREAS, the Advisory Panel evaluated the detailed proposals, and on November 1, 2005, recommended to the Acting Commissioner that the detailed proposal submitted by Fluor and Transurban be further developed pursuant to the Act.
WHEREAS, on October 24, 2006, the Department, Fluor Virginia, Inc. and Transurban (USA) Development Inc. entered into an Interim Agreement, which was amended as of May 6, 2008, and further amended by an Amendment No. 2 dated as of March 23, 2012, each by and among the Department, Fluor Enterprises, Inc. (the successor-in-interest to Fluor Virginia, Inc.) (“Fluor”) and Transurban (USA), Inc. (“Transurban”) (as so amended, the “Interim Agreement”).

WHEREAS, on January 7, 2009, the FHWA issued a Categorical Exclusion for the Proposed Project. The FHWA approved the Department’s Special Experimental Project 14 work plan on June 27, 2006.

WHEREAS, on February 2, 2011, the Department (i) reduced the scope of the Proposed Project by eliminating the originally planned construction of six miles of HOV/HOT lanes on I-395 and planned upgrades to specific interchanges and (ii) changed the name of the Proposed Project to the I-95 HOV/HOT Lanes Project.

WHEREAS, on November 7, 2011, the Department submitted to FHWA the Environmental Assessment, and requested that FHWA issue a FONSI for the Project.

WHEREAS, FHWA reviewed the Environmental Assessment and other information and issued the FONSI on December 5, 2011.

WHEREAS, the Department, the Concessionaire, Fluor and Transurban entered into an agreement dated as of the date hereof terminating the Interim Agreement.

WHEREAS, the Department and the Concessionaire desire to herein set forth the terms to develop and operate the Project pursuant to a long-term concession arrangement granted to the Concessionaire by the Department by this Agreement.

AGREEMENT

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

ARTICLE 2.

DEFINITIONS

All capitalized terms used in this Agreement, but not expressly defined in this Agreement, have the respective meanings set forth in Exhibit A attached to this Agreement.
ARTICLE 3.

BASIC ROLES AND RESPONSIBILITIES

Section 3.01 Basic Agreement

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

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

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

(d) The Concessionaire may retain Contractors to perform certain of its responsibilities pursuant to this Agreement, subject to the terms and conditions of this Agreement. Performance of any of the Work by a Contractor will satisfy the obligation of the Concessionaire to perform such Work; provided that any such Work performed will be binding on the Concessionaire and the foregoing shall not relieve the obligation of the Concessionaire to manage such Contractor. Except with regard to Limited Notices to Proceed, notices relating to Substantial Completion pursuant to Section 8.08(e), notices relating to Final Acceptance pursuant to Section 8.09(b), and notices relating to Service Commencement pursuant to Section 9.02(a), the making of any submittals or the giving of any notices to the Department by the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work) will satisfy the obligation of the Concessionaire to make such submittal or give such notice; provided that any such submittal made or notice given by the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work) will be binding on the Concessionaire and the foregoing shall not relieve the obligation of the Concessionaire to manage the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work). In any such event, the Concessionaire will remain fully and primarily responsible for the performance of the Work, the making of submittals or the giving of any notices by any Contractors.

(e) The Department will be entitled to exercise such oversight of the activities of the Concessionaire and its Contractors in accordance with this Agreement, but will also be entitled to rely upon the Concessionaire to directly manage, oversee and resolve disputes involving its Contractors, without the involvement of the Department (except as otherwise provided in this Agreement).
(f) The Department will use reasonable efforts in performing its rights and duties under this Agreement to minimize any disruption to or impairment of the performance of the Concessionaire’s rights and obligations under this Agreement; provided, that nothing in this Section 3.01(f) will limit the Department’s rights and obligations under this Agreement.

Section 3.02 Project Agreements

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

(a) Escrow Agreement attached as Exhibit D;
(b) Design-Build Contract attached as Exhibit E;
(c) Design-Build Work Guarantee attached as Exhibit F;
(d) Operations and Maintenance Agreement attached as Exhibit I; and
(e) Shared Facilities Agreement attached as Exhibit X.

Section 3.03 Nature of Parties’ Interests Pursuant to This Agreement

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

(b) The Department and the Concessionaire acknowledge their mutual intent that, despite the Department’s retention of fee title to (or other good and valid real property interest in) the Project Assets and the Project Right of Way, as a result of the Concessionaire’s rights and interests therein pursuant to the Permit granted to the Concessionaire under this Agreement, to the maximum extent permitted by Law, for federal income tax purposes the Concessionaire will be treated as having acquired (i) an ownership interest in those Project Assets that have an expected economic useful life equal to or less than the Term, (ii) an interest in the Project Right of Way and those Project Assets that have an expected economic useful life greater than the Term (with the amount allocable under this clause (ii) treated for purposes of section 467 as giving rise to rent that is allocated ratably to each year during the Term) and (iii) a franchise and license, permit, or other right within the meaning of section 197(d)(1)(F) and 197(d)(1)(D) of the Internal Revenue Code of 1986, as amended, and in that regard an amount equal to the Concessionaire’s cost of development, design, construction and start-up of the Project represents acquisition cost of such assets (the “Cost”), and no payment by the Department to the Concessionaire pursuant to Section 7.02 will be treated as part of the Cost. The Cost will be allocated for all income tax purposes in the manner determined by the Concessionaire, which allocation will be consistent with Section 1060 of the Internal Revenue Code of 1986, as amended and the Concessionaire will execute and file all income tax returns with the Internal
Revenue Service in a manner consistent with such allocation, including Form 8594. The Department and the Concessionaire do not contemplate that the Department will be required to file any return with the Internal Revenue Service with respect to such allocation, but that if required to do so the Department will file such return in a manner consistent with such allocation.

Section 3.04 Quiet Possession and Enjoyment

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

ARTICLE 4.

GRANT OF PERMIT; TERM

Section 4.01 Grant of Permit

(a) Pursuant to the Act and subject to the terms and conditions of this Agreement, the Department grants to the Concessionaire the exclusive right, and the Concessionaire accepts (i) the obligation to develop, design, finance, construct, operate and maintain the Project and (ii) the right to establish, impose, charge, collect, use and enforce payment of tolls and related charges (the “Permit”).

(b) The Department’s grant of the Permit pursuant to Section 4.01(a), and the Concessionaire’s obligations with respect thereto pursuant to Section 4.01(a), are conditional upon Financial Close having occurred in accordance with Section 7.03; provided however that portions of the Work may be performed by the Concessionaire prior to Financial Close pursuant to Section 8.02 and Section 8.04.

(c) In consideration of the Permit granted to the Concessionaire by the Department pursuant to this Section 4.01, the Concessionaire will perform the Work at its own expense except as otherwise provided herein and pay (to the extent required) to the Department the Permit Fee in accordance with the Permit Fee calculation attached as Exhibit J.
Section 4.02 Term

This Agreement will take effect on the Agreement Date and will remain in effect, until the first to occur of (i) the 73rd anniversary of the Service Commencement Date or (ii) the effective date of the termination of this Agreement pursuant to Article 20 (the “Term”).

ARTICLE 5.

TOLLING

Section 5.01 Tolling of the Project

(a) Toll Revenues.

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

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

(b) Users of the HOT Lanes.

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

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

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

(iv) Permitted Vehicles (other than vehicles referred to in clauses (ii) and (iii) above) equipped with a transponder (in the absence of other available technologies as provided in Section 5.01(e)) will be entitled to use the HOT Lanes at a 100% discount from otherwise applicable tolls.
provided in Section 5.01(e)) will be entitled to use the HOT Lanes subject to payment of the applicable tolls.

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

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

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

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

(i) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable administrative fees for account maintenance, account statements and customer service;

(ii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable amounts for the purchase or rental of transponders or other electronic tolling devices;

(iii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable, refundable security deposits for the distribution of transponders or other electronic toll devices;

(iv) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable video surcharges or other reasonable fees for permitted travel on the Project Assets by vehicles that are not equipped with a transponder or other available equipment allowing the processing of the applicable tolls through E-ZPass (or any successor to E-ZPass utilized on State Highways at that time); and

(v) reasonable fees, penalties and interest for toll violations, including costs of collection in accordance with Law; and
(vi) other incidental fees and charges reasonable and customary in connection with the services being provided at that time by the Concessionaire; provided, that the amount of any such other incidental fees and charges will not exceed the amount reasonably necessary for the Concessionaire to recover its Allocable Costs, directly incurred with respect to the items, services and work for which they are levied.

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

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

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

(g) Transaction Costs.

(i) Without limiting the immediately succeeding sentence, the Department or its agents will use commercially reasonable efforts to work with the Concessionaire to limit transaction costs charged to the Project by the Department, including charges for toll transaction account management services. The Department will not charge the Concessionaire or the Project any fees or other transaction amounts for toll transaction account management services, other than as set forth in the Electronic Toll Collection Agreement.
(ii) If the Department, or its successors or assigns, ceases to provide all or a material part of the ETC Services and as a result the Concessionaire incurs costs related to self-performing, or engaging a Contractor to perform, the ETC Services no longer provided by the Department, or its successors or assigns, then the Department agrees to pay the Concessionaire the amount of such reasonable costs. If the Concessionaire self-performs or contracts with a Contractor to provide ETC Services, the Department, or its successors or assigns, will provide the same access to customer accounts as if the Department continued to provide the ETC Services, if such access is permitted by Law and if the Concessionaire pays to the Department, or its successors or assigns, the reasonable costs of providing such access.

(h) Violations Processing Services.

(i) The Department has implemented and maintains a processing system for the enforcement of penalties for toll violations in Virginia for electronic toll collection systems on State Highways. The Concessionaire may, but is not obligated to, enter into an agreement with the Department to obtain the benefits of such enforcement system, in accordance with the Violation Processing Services Agreement in the form attached as Exhibit L. In consideration of such services, the Concessionaire will pay the Department its customary charges for such services in effect from time to time. For purposes of identifying and apprehending toll violators of the Project, provided it is authorized under Law, and any applicable agreements or arrangements, the Department will make available to the Concessionaire the benefits of any agreements or arrangements which the Department has in place with other state authorities or agencies that provide access to records in their possession relating to vehicle and vehicle owner data, and will coordinate with the Virginia State Police in accordance with Section 9.06(a) with respect to the provision of policing services, emergency services, traffic patrol and traffic law enforcement services on the Project.

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

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

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

**Section 5.02 Toll Rates**

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

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

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

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

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

(i) type, weight and occupancy of the vehicle;

(ii) number of axles;

(iii) time of day and/or week;

(iv) time and location of entry or exit to or from the HOT Lanes;

(v) traffic volume, vehicle speed, vehicle type; and

(vi) similar variables or combinations of such variables.

Notwithstanding the foregoing, (A) the Concessionaire may adopt and implement discount programs for different classes or groups of persons using the HOT Lanes under like conditions, subject to the provisions of Section 24.01 and (B) it is understood that dynamic tolling may result in vehicles that enter the HOT Lanes at different times being subject to different toll rates as well as in vehicles travelling on the same section of the HOT Lanes being subject to different toll rates.
Section 5.03 Reserved

Section 5.04 User Confidentiality

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

Section 5.05 Suspension of Tolls

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

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

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

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

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

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

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

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

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

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

Section 5.06 Disposition of Gross Revenues

(a) Gross Revenues will be used first to pay all due and payable Operating Costs, specifically including all amounts due to the Department pursuant to this Agreement (which amounts will be paid on a pari passu basis with all other operations and maintenance costs), before they may be used and applied for any other purpose.

(b) The Concessionaire will not use Gross Revenues to make any Distributions (or to pay any amount payable pursuant to an Affiliate Contract subject to approval but not approved by the Department pursuant to Section 24.02(l)), unless and until the Concessionaire first pays the following:

(i) any undisputed amounts due to the Department pursuant to the terms of this Agreement;
(ii) current and delinquent operating and maintenance costs (including any payments to Affiliates made solely in accordance with the applicable Affiliate Contracts entered into in accordance with Section 24.02(l));

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

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

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

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

In the event there are any disputed amounts due to the Department pursuant to the terms of this Agreement, the Concessionaire will maintain a cash reserve for such disputed amounts in accordance with GAAP or any other generally accepted accounting principles which are acceptable to the Department as a condition precedent to making any Distribution or payment to an Affiliate. If the Concessionaire makes any Distribution or payment to an Affiliate in violation of this Section 5.06(b), the same will be deemed to be held in trust by such Person for the benefit of the Department and the Collateral Agent, and will be payable to the Department or the Collateral Agent on demand. If the Department collects any such amounts held in trust, it will make them available for any of the purposes set forth above and, at the request of the Collateral Agent, deliver them to the Collateral Agent.

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

Section 5.07 Revenue Risk Related to Traffic Volume

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

(b) (i) From the period beginning on the second anniversary of the Service Commencement Date to December 31, 2030 (the “First Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of 35% of the total flow of all Permitted Vehicles in two consecutive Toll Sections that are then using such Toll Sections going in the same direction
for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “First Threshold HOV Percentage and Rate”) of 1,450 vehicles per hour per traffic lane; provided, however, that the Department will not be required to make any payment, in question pursuant to this Section 5.07(b)(i) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeds the First Threshold HOV Percentage and Rate.

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

(iii) From January 1, 2041 to the 40th anniversary of the Financial Close Date (the “Third Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of 38% of the total flow of all Permitted Vehicles in two consecutive Toll Sections that are then using such Toll Sections going in the same direction for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “Third Threshold HOV Percentage and Rate”) of 1,550 vehicles per hour per traffic lane; provided, however, that the Department will not be required to make any payments pursuant to this Section 5.07(b)(iii) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeded the Third Threshold HOV Percentage and Rate.

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

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

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

(vii) Notwithstanding the foregoing, this Section 5.07(b) will cease to apply on the first to occur of: (A) the date on which the Highest Revenue Share IRR has been reached and (B) the 40th anniversary of the Financial Close Date.

Section 5.08 Failure to Meet OSPS

(a) At any time after the second full month following the Service Commencement Date, the Concessionaire will notify the Department if the Concessionaire’s scheduled monthly report identifies an instance of the Project’s failure to meet the OSPS (as provided in the Technical Requirements). The notice will describe such failure in reasonable detail. The Department will notify the Concessionaire within 30 Days of its receipt of the Concessionaire’s report whether or not it requires an OSPS Improvement Plan (the “OSPS Improvement Plan”).
(b) Upon a notification from the Department pursuant to Section 5.08(a) that the Project requires an OSPS Improvement Plan, the Concessionaire (at its sole cost and expense) will prepare and submit the OSPS Improvement Plan to the Department for its approval. The OSPS Improvement Plan will not be required to propose a general strategy to improve overall OSPS compliance, but will be required to propose a strategy to address the specific reasons which the Concessionaire reasonably believes caused such failure as described in the Concessionaire’s report. The OSPS Improvement Plan will be delivered to the Department within 30 Days of the Department’s notice (or longer if mutually agreed to by the parties) and will cover the matters set forth in Section 5.08(a). The Department will review the OSPS Improvement Plan in accordance with the provisions of Section 10.05. The Concessionaire will diligently implement the elements of the approved OSPS Improvement Plan that are within the control of the Concessionaire promptly following the Department’s approval thereof and within the schedule set forth in such OSPS Improvement Plan.

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

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

(i) will not be higher than 55 mph;

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

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

Section 5.09 SAFETEA-LU Compliance

(a) The Department agrees to provide to FHWA the certifications required of a State agency under 23 U.S.C. §166 and acknowledges that it has entered into the Toll Agreement attached as Exhibit M. The delivery of a certification by the Department that the HOT Lanes do not comply with the applicable requirements of 23 U.S.C. §166, or such other federal, rule or regulation will not constitute a default by the Department under this Agreement.
(b) The Concessionaire agrees to maintain and operate the HOT Lanes, at all times, in compliance with the provisions of 23 U.S.C. §166 and 23 U.S.C. §129, successor provisions, all regulations promulgated thereunder, and the Toll Agreement. Accordingly, the Concessionaire will be responsible for the satisfaction of the requirements of 23 U.S.C. §166(b)(4), in accordance with the terms of this Agreement, and will otherwise coordinate its compliance efforts with the Department so as to enable the Department to provide the certifications required by Section 5.09(a).

Section 5.10 USDOT Reporting Requirements

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

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

(c) If the Concessionaire enters into one or more agreements with the USDOT in connection with the TIFIA Credit Assistance, TIGER Credit Assistance or other financing program, the Concessionaire agrees to provide the Department with executed versions of such agreements together with any agreements or instruments evidencing or securing the Concessionaire’s obligations thereunder, including any collateral pledge agreements. In Exhibit G, the Department is providing the Concessionaire with a listing of the reports, notices and other filings, copies of which are to be provided to the Department concurrently with the Concessionaire’s delivery (or receipt) thereof. The Concessionaire agrees to provide the Department with copies of such reports, notices and other filings made under such agreements as are requested by the Department pursuant to the preceding sentence; provided however, that the Concessionaire, in its reasonable discretion, may determine not to provide the Department with reports, notices and filings that it believes are not germane to the Project and the Department. The Concessionaire will provide within ten days after its receipt of a request by the Department, its rationale for not providing a report, notice or other filing requested by the Department pursuant to this Section 5.10(c).

(d) If the Concessionaire enters into a Project Financing Agreement with the Collateral Agent that provides for the collection and distribution of Gross Revenues, the Concessionaire agrees to provide to the Department, as soon as reasonably practicable after the Concessionaire’s actual receipt of the same, a copy of: any written notice of resignation or removal of the Collateral Agent; any written notice of the appointment of a successor Collateral Agent; any written notice of any merger of the Collateral Agent; any written notice of any transfer by the Collateral Agent of its rights under the Project Financing Agreements to an affiliate; and any written notice of any change in any Deposit Account Bank.
ARTICLE 6.

BASE CASE FINANCIAL MODEL

Section 6.01 Initial Base Case Financial Model and Base Case Financial Model

(a) The Concessionaire and the Department agree to the composition of the Initial Base Case Financial Model as of the Agreement Date, which is included in the Escrow Documents and which will be deposited with the Escrow Agent as described in Section 18.05.

(b) The Initial Base Case Financial Model will be updated upon Financial Close in accordance with Section 7.03(b)(i) through (vi) and will become the Adjusted Financial Model.

(c) The Adjusted Financial Model will be updated upon Financial Close in accordance with Section 7.03(b)(vii) and this Agreement and such update will become the Base Case Financial Model.

(d) The Concessionaire will not cause (or permit any other Person to cause) the Initial Base Case Financial Model, the Adjusted Financial Model or the Base Case Financial Model to contain any hidden data. The Concessionaire will furnish to the Department any password or other access rights for each of the Initial Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model.

Section 6.02 Base Case Financial Model Updates

(a) Other than in accordance with the terms of this Agreement, in no event will the Base Case Financial Model, the Adjusted Financial Model, the Adjusted Financial Model Update or any Base Case Financial Model Update be changed except with the prior written approval of both the Department and the Concessionaire. The Concessionaire will furnish to the Department any password or other access rights for the Base Case Financial Model Update or Adjusted Financial Model Update.

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

(i) upon submission of a notice of a Refinancing under Section 7.05;

(ii) within 60 Days after the delivery of a Delay Event Notice that extends the Guaranteed Substantial Completion Date;

(iii) within 60 Days after the delivery of a Compensation Event Notice;

(iv) within 60 Days after the delivery of a notice of a Net Cost Savings or positive Net Revenue Impact under Section 14.04:
(v) within 60 Days after the Concessionaire notifies the Department that it proposes to undertake a Concessionaire Project Enhancement; and

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

(c) Any proposed Base Case Financial Model Update shall become the Base Case Financial Model Update following its approval by the Department in accordance with Section 6.03.

(d) Within 150 Days following the end of each fiscal year, the most recent undisputed Base Case Financial Model Update (or, if there has been no undisputed Base Case Financial Model Update, the Base Case Financial Model) will be updated to reflect audited historical cash flows for the most recently audited fiscal year; provided, however, such Base Case Financial Model Update will not: (i) include changes in Financial Model Formulas, (ii) include changes in forecast cash flows or (iii) allow such historical information to flow through the Financial Model Formulas.

Section 6.03 Certain Adjustments

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

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

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

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

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

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

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

**Section 6.04  Financial Model Disputes**

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

(b) In the event of a Dispute, the Initial Base Case Financial Model, the immediately preceding Adjusted Financial Model or the immediately preceding Base Case Financial Model Update (as applicable) that is not being disputed (or, if there has been no undisputed Base Case Financial Model Update and no disputed Adjusted Financial Model, the Base Case Financial Model) will remain in effect until such Dispute is resolved or a new Adjusted Financial Model or a new Base Case Financial Model Update is issued and not disputed. If a proposed Base Case Financial Model, Adjusted Financial Model or Base Case Financial Model Update (as applicable) has not been disputed, or if any such Dispute has been so resolved, the proposed Base Case Financial Model, Adjusted Financial Model or Base Case Financial Model Update (as applicable) will serve as the Base Case Financial Model, new Adjusted Financial Model Update or the current Base Case Financial Model Update (as applicable) and will be submitted to the Escrow Agent in accordance with Section 18.05(d).

**Section 6.05  Audit of Financial Model**

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

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

ARTICLE 7.

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

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

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

(b) Each bond or promissory note evidencing Concessionaire Debt must include a conspicuous recital on its face to the effect that payment of the principal thereof and interest thereon does not constitute a claim against the Department’s fee simple title to or other good and valid real property interest in the Project Assets, the Project Right of Way, the Department’s interest hereunder or its interest and estate in and to the Project Assets or any part thereof, is not an obligation of any State Party, moral or otherwise, and neither the full faith and credit nor the taxing power of any State Party is pledged to the payment of the principal thereof and interest thereon.

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

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

   (ii) a representation, warranty or other assurance as to (A) the ability of the Concessionaire to perform its obligations with respect to the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project or (B) the adequacy of the Gross Revenues to provide for payment of the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project.
(d) The Concessionaire will make or cause to be made Equity Contributions (the "Equity Contribution Amount") equal to: (i) an amount equal to the Base Capital Contributions set forth in Section 2.2 of each Equity Funding Agreement (the "Base Equity Contributions"), as adjusted pursuant to this Agreement (the "Initial Equity Commitment Amount"); provided, however, that after the Agreement Date, the Concessionaire will not adjust the Initial Equity Commitment Amount without the approval of the Department in its sole discretion, (ii) an amount equal to the Contingent Capital Contributions set forth in Section 2.3 of each Equity Funding Agreement, as required pursuant to such Equity Funding Agreement (the "Contingent Capital Contribution Amount"); and (iii) $108,419,977 (the "Concessionaire TIFIA Protection Amount"), which is subject to adjustment or cancellation pursuant to Section 7.07.

Section 7.02 Public Funds

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

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

Section 7.03 Financial Close

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

(i) the Concessionaire has provided the Department: (A) a list of and proposed initial drafts of the Initial Project Financing Agreements and Financing Assignments set forth in Exhibit O and (B) a proposed initial draft of the Base Case Financial Model reflecting any changes in financing from the Initial Base Case Financial Model, contemporaneously with the distribution of such drafts to the Lenders and other parties to Financial Close for the Department’s review and comment, and has included the Department on all subsequent distributions of such drafts to the Lenders and other parties to Financial Close up and until the Concessionaire has furnished the proposed final drafts pursuant to Section 7.03(a)(ii);

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Design-Build Letter of Credit;

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

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

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

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

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

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

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

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

(L) the Equity Funding Agreements; and

(M) the Equity Funding Guaranties.

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

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

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

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

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

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

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

(iv) **PABs Interest Rate Protection.**

(A) (1) The Department will bear the risk and have the benefit of the first 25bps of change in PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate and (2) the Department and the Concessionaire will equally share the risk and the benefit in any change between 25bps and 100bps in the PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate to the actual PABs Interest Rate applicable to the PABs issued as of the Financial Close Date, and (3) the Concessionaire will bear the risk and have the benefit of any change in excess of 100 bps in PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate.
(B) If the PABs Interest Rate as of the Financial Close Date has changed from the Benchmark PABs Interest Rate, the Initial Base Case Financial Model will be updated in accordance with the Financial Close Adjustment Protocol set forth in Exhibit BB to reflect the PABs Interest Rate and to reflect the risk and benefit allocated to the Department (ignoring for this calculation any change in the Benchmark PABs Interest Rate the risk and benefit of which has been allocated to the Concessionaire) and used to adjust the Initial Public Funds Amount in accordance with the Financial Close Adjustment Protocol such that the Equity IRR is equal to the Initial Equity IRR.

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

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

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

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

(d) **Payments at Financial Close.**

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

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

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

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

Section 7.04 Project Financing Agreements; Department’s Rights and Protections

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

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

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

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

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

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

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

(vii) each Financing Assignment will require that if the Concessionaire is in default under the Concessionaire Debt secured by the Financing Assignment or under the Financing Assignment and the Lender or Collateral Agent gives notice of such default to the Concessionaire, then the Collateral Agent will also give concurrent notice of such default to the Department. Each Financing Assignment also will require that the Collateral Agent deliver to the Department, concurrently with delivery to the Concessionaire or any other Person, every notice of election to sell, notice of sale or other notice required by Law or by the Financing Assignment in connection with the exercise of remedies under the Financing Assignment;
(viii) no Financing Assignment will grant to a Lender any right to apply funds deposited with the Depositary in accordance with Section 17.07, except for the express purposes for which the reserve or deposit is established;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 7.05 Refinancing Requirements

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

(b) Project Financing Agreements Related to Refinancings.

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

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

(c) Department’s Right to Approve Refinancing. Any Refinancing of Concessionaire Debt will be subject to the Department’s prior approval, which approval will not be unreasonably withheld or delayed; provided, that no such approval will be required if the Concessionaire first demonstrates to the Department that:

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

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

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

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

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

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

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

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

(d) Payment of Department Expenses.

(i) In connection with any Refinancing, the Concessionaire will pay the Department for the Department’s Allocable Costs incurred related to the Refinancing at the time of the closing of the Refinancing. The Department will provide the Concessionaire with an estimate of its expected costs related to such Refinancing; if there is a change in circumstances relating to the Refinancing following the submission of the Department’s initial estimate that is expected to result in higher expenses, then the Department will provide a revised estimate. For any Refinancings that do not close, the Department will be paid for its documented expenses for such Refinancings from and at the time of (or, at the Concessionaire’s option, at any time prior to) any subsequent successful Refinancings, and will be entitled to payment of interest on such expenses based on the Bank Rate calculated from the date on which such expenses were due and payable according to the first invoice issued by the Department for such expenses until paid by the Concessionaire.

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

(e) Other Requirements.

(i) Every Refinancing will be subject to the provisions of Section 7.01 and Section 7.03 and the other provisions of this Agreement pertaining to Concessionaire Debt and Financing Assignments.

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

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

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

Section 7.06 Collateral Agent’s Rights

The Collateral Agent’s rights are set forth in the Direct Agreement.

Section 7.07 TIFIA Credit Assistance Protection

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

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

(ii) If the Concessionaire fails to execute and deliver, prior to March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)) (A) any TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) or (B) any TIFIA Loan Documentation containing terms consistent with the terms described in Exhibit H, but containing other terms and conditions that are inconsistent with the terms and conditions contained in the TIFIA loan agreements and intercreditor agreements for Relevant Precedent, which inconsistent terms and conditions are reasonably expected to have a material adverse effect on the Concessionaire’s financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile, and the Department has not agreed to perform or cause to be performed such term or condition or otherwise resolve such inconsistent terms or conditions to the mutual satisfaction of the Concessionaire and the Department, each acting reasonably, then in each case, the Department TIFIA Protection Amount will be decreased by an amount equal to $30,000,000 and the Concessionaire TIFIA Protection Amount will be increased by $30,000,000. For the avoidance of doubt, the Concessionaire may choose to execute and deliver the TIFIA Loan Documentation described in clause (B), in which case no adjustment to the Department TIFIA Protection Amount or the Concessionaire TIFIA Protection Amount will be made. The failure of the Concessionaire to enter into the TIFIA Loan Documentation pursuant to this Section 7.07(a)(ii) will not be a Concessionaire Default and the Department will have no right to terminate this Agreement or exercise any other rights or remedies that may be available to the Department hereunder as a result thereof (other than as specifically provided in this Section 7.07(a)(ii)).

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

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

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

(b) Funding Adjustments at TIFIA Closing Date. If the Concessionaire enters into the TIFIA Loan Documentation on or before March 31, 2013, the Adjusted Financial Model will be updated to calculate a further change, positive or negative, in the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount using the following protocol (ignoring for these calculations any adjustments to the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount pursuant to Section 7.07(a)):

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

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

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

(B) the revenue sharing / prepayment clauses; or

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

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

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

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

(d) TIFIA Protection Amount Funding.

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

(ii) If the Department TIFIA Protection Amount is a negative amount (the “Department Credit Amount”) as a result of the adjustments pursuant to this Section 7.07, the Department will not be required to make the Department TIFIA Protection Amount, the Public Funds Amount will be decreased by an amount equal to the Department Credit Amount, and the parties will provide written notice to the GARVEE Trustee or the Trustee, as relevant, to transfer an amount equal to the Department Credit Amount to or to the order of the Department within 10 days after the later of (A) the giving of such notice to the GARVEE Trustee or the Trustee, as relevant, or (B) the Second Funding Closing Date. If the Concessionaire TIFIA Protection Amount is a negative amount as a result of the adjustments pursuant to this Section 7.07, the Concessionaire TIFIA Protection Amount will be zero, the Equity Contribution Amount payable by the Equity Sponsors under the Equity Funding Agreements will be automatically reduced by such amount effective as of the Second Funding Closing Date, and the parties will provide prompt written notice to the Trustee of such reduction.

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

ARTICLE 8.

DESIGN AND CONSTRUCTION OF THE PROJECT

Section 8.01 General Obligations of the Concessionaire

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

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

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

(i) physical conditions of an unusual nature that differ materially from those ordinarily encountered in the area;

(ii) changes in surface topography;

(iii) variations in subsurface moisture content;

(iv) Utility facilities;

(v) Hazardous Substances, including contaminated groundwater;

(vi) any archeological, paleontological or cultural resources; and

(vii) any species listed as threatened or endangered under Federal or State endangered species Law;
provided, that the foregoing will not limit the Concessionaire’s rights with respect to Compensation Events and Delay Events.

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

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

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

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

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

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

Section 8.02  Limited Notices to Proceed to Perform Certain Work

(a) The Concessionaire may request that the Department issue one or more Limited Notices to Proceed (“LNTP”) authorizing the Concessionaire to commence certain portions of the Work as set forth in this Section 8.02. Prior to issuance of a LNTP, the parties will agree upon the conditions to the issuance of such LNTP, as well as the scope, schedule and payment terms (if applicable) for such portion of the Work.
(b) The Concessionaire will deliver notice to the Department upon the satisfaction of the agreed conditions to the issuance of any LNTP and request that the Department issue such LNTP for the applicable portion of the Work. The Department will endeavor to respond to such request, within 21 Days following receipt of such request by the Department, by delivery to the Concessionaire of the applicable LNTP or notice of the conditions that the Department believes, in its reasonable discretion, to have not been satisfied. The Concessionaire will have a reasonable opportunity to address those deficiencies and re-submit a notice to the Department or, if the Concessionaire does not agree with the Department’s assessment, to refer the matter to the dispute resolution procedures pursuant to Article 21. If the Concessionaire has not received a response within such 21-Day period, such failure by the Department to respond will be deemed approval, but will not be deemed a waiver of the Department’s other rights or the Concessionaire’s other obligations, including compliance with Good Industry Practice, the Technical Requirements, Governmental Approvals and Law.

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

Section 8.03 Conditions Precedent for Notices to Proceed

(a) Notice to Proceed with Design Work. Except with respect to Early Work approved and undertaken pursuant to Section 8.02(c) and except as may be authorized in a LNTP, the Concessionaire will not commence any design Work unless and until the following conditions have been satisfied (or the Department has advised that it will waive such conditions) and the Department has delivered notice to that effect to the Concessionaire (such notice being referred to as the “Design Work Notice to Proceed”):

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

(ii) the Department has approved the following Project Development Plans: (A) Concessionaire Management Plan; (B) Document Management Plan; (C) Quality Management System Plan; (D) Design Quality Management Plan; (E) Public Information and Communications Plan; and (F) DBE/SWaM Plan;

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

(iv) the Concessionaire certifies to the Department that all representations and warranties of the Concessionaire set forth in Section 23.02 remain true in all material respects;
(v) the Concessionaire certifies to the Department that all insurance policies required under Section 17.01(a) specified in the Design Work Notice to Proceed for the Work, except with respect to the builder’s risk insurance, have been obtained and will be in full force and effect, and in the case of Project-specific policies, the Concessionaire has delivered to the Department duplicate originals or copies thereof certified by the Concessionaire’s insurance broker to be true and correct copies of the originals; and

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

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

(b) Notice to Proceed for Construction. In addition to the conditions set forth in Section 8.03(a), the Concessionaire will not commence construction of the Project Assets unless and until the following conditions have been satisfied (or the Department, in its discretion, waives such conditions) and the Department has delivered notice to that effect to the Concessionaire (such notice being referred to as the “Construction Notice to Proceed”):

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

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

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

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

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

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

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

Section 8.04 Design Work

(a) Except as provided in Section 8.02(c) with respect to the Early Work, the Concessionaire will submit to the Department accurate and complete copies of all Design Documentation and Construction Documentation relating to the Work, which is required to be submitted, within three Days after such documentation is delivered to the Concessionaire by the Design-Build Contractor under the Design-Build Contract. Each submittal will comply with the applicable requirements of the Technical Requirements. The Department’s review of any submittal shall comply with the submittal and review procedures set forth in Section 10.05.

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

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

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

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

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

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

(h) The design and construction of the Project Assets will accommodate certain improvements, projects and plans, all as set forth in the Technical Requirements.
Section 8.05 Acquisition of Project Right of Way; Utility Relocations; Railroad Easements

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

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

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

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

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

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

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

(b) Condemnation. The Concessionaire will use its best efforts (as such term is defined for this purpose in the Technical Requirements) (i) to acquire the Project Right of Way and any other real property or real property rights outside the Project Right of Way necessary for the construction and operation of the Project that are set forth in the ROW Acquisition and Relocation Plan by making 

bona fide efforts to purchase the Project Right of Way or such other real property or real property rights from the owners of such real property or real property rights for amounts not to exceed just compensation therefore and (ii) to settle claims with landowners amicably, each in accordance with Law. If, despite the Concessionaire’s best efforts, it is unable to reach a settlement with landowners within 30 Days, the Department will handle any necessary condemnation proceedings in accordance with the provisions of the Technical Requirements. Prior to the Department filing a condemnation proceeding, the Concessionaire will prepare all necessary paperwork and supporting documentation required for the proceeding and it will deliver that documentation to the Department. The Department then will file the condemnation proceeding(s) and handle such proceeding(s) in accordance with the Technical Requirements.

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

(d) ROW Costs.

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

(ii) If the aggregate ROW Costs exceed $275,000, the Concessionaire will pay the first $150,000 of such excess. If the aggregate ROW Costs exceed $425,000, the Department will pay any such excess. If the aggregate ROW Costs are less than $275,000, the Concessionaire will deposit an amount equal to the difference between such amount and the aggregate ROW Costs into the Project Enhancement Account.

(e) Utility Relocations.

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

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

(f) Acquisition of Railroad Easements. The Department will obtain, at the Department’s sole cost and expense, any easements and other property rights necessary for the Work located on property owned by Norfolk Southern Corporation, and facilitate the negotiation of a construction agreement between the Concessionaire and Norfolk Southern Corporation (the “Railroad Easement”). Notwithstanding the foregoing, (i) the Concessionaire will pay the Department for Allocable Costs incurred by the Department in the Department’s efforts to obtain the Railroad Easement, to the extent such Allocable Costs are incurred by the Department as a result of any Concessionaire Party’s misconduct, negligence or other culpable act, error or omission and (ii) the Concessionaire will pay the costs of any Work performed on the Railroad Easement and reimburse Norfolk Southern Corporation any of its costs in connection therewith, all as provided in the Technical Requirements.

Section 8.06 Governmental Approvals

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

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

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

(d) The Concessionaire will at all times and at its sole cost and expense comply with the NEPA Documents, including, without limitation, compliance necessitated by a change in the base design of the Project. If supplements to the NEPA Documents or additional NEPA Documents are needed following the Agreement Date, the Department will prepare the necessary documentation using data and other information provided by the Concessionaire, and the Concessionaire will pay the Department for its Allocable Costs incurred in the preparation of such documentation; provided, that the Department will pay for supplements to the existing
Section 8.07 Construction Work and Project Schedule

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

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

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

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

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

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

Section 8.08 Substantial Completion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 8.09 Final Acceptance

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

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

(i) Substantial Completion has occurred;

(ii) other than the Permitted Encumbrances (not including clause (c) of the definition thereof), the Project is free and clear of all Liens, claims, security interests or encumbrances arising out of or in connection with the performance of the Work during the Construction Period;
(iii) all Punch List items have been completed and delivered to the reasonable satisfaction of the Department;

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

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

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

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

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

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

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

Section 8.10 Liquidated Damages for Delayed Completion

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

(b) **Liquidated Damages Related to Final Acceptance.** If the Concessionaire does not achieve Final Acceptance by the Final Acceptance Deadline, the Department will be entitled to assess $5,000 as liquidated damages for each Day that Final Acceptance of the Project remains to be achieved following the expiration of the Final Acceptance Deadline, and the Concessionaire will cause any related liquidated damages payable by the Design-Build Contractor under the Design-Build Contract.

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

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

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

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

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

(v) notwithstanding the above, liquidated damages are not intended to excuse Concessionaire or any of its Contractors from liability for any other breach of its obligations under the Project Agreements, or limit the Department’s recourse to other remedies hereunder such as termination pursuant to Article 19 and Article 20; *provided*, that no Concessionaire Default will occur solely as a result of a delay in achieving Substantial Completion by the Guaranteed Substantial Completion Date, except as set forth in Section 19.01(e).
(d) Payment of Liquidated Damages. The Concessionaire will pay all undisputed liquidated damages under this Section 8.10 monthly in arrears not later than 30 Days after the end of each calendar month, and in accordance with the requirements set forth in Section 5.06(b).

Section 8.11 Warranties; Defective Design and Construction

(a) Warranties.

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

(ii) The warranties in Section 8.11(a) are exclusive and are in lieu of all other warranties by contract. No implied or statutory warranties will apply. Subject to Section 8.11(a)(iii) below and to such limitations on coverage including aggregate caps specified in the Design-Build Contract, the foregoing warranties for Work relating to the Project Assets will be effective for a period of, with respect to the Design-Build Work, 60 months beginning on the date on which substantial completion of the Design-Build Work is achieved as such date is defined in the Design-Build Contract (the “Warranty Period”). Such warranties will survive termination of this Agreement for Work that was in place prior to termination.

(iii) With respect to the warranty furnished by the Design-Build Contractor pursuant to Section 8.11(a)(i) and if and to the extent the Concessionaire obtains general or limited warranties from any Contractor in favor of the Concessionaire with respect to design, materials, workmanship, construction, equipment, tools, supplies, software or services, the Concessionaire will cause such warranties to be expressly extended to the Department; provided, that the foregoing requirement will not apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products (including software products), equipment or supplies where the warranty cannot be extended to the Department using commercially reasonable efforts. The Department will only have the right to exercise remedies under any such warranty so long as the Concessionaire or a Lender is not pursuing remedies thereunder. To the extent that any Contractor warranty would be voided by reason of the Concessionaire’s negligence or failure to properly incorporate material or equipment into the Work, the Concessionaire will be responsible for correcting such defect.

(iv) Contractor warranties are in addition to all rights and remedies available pursuant to this Agreement or Law or in equity, including Claims against the Performance Security, and will not limit the Concessionaire’s liability or responsibility imposed by this Agreement or Law or in equity with respect to the Work, including liability for Non-Conforming Work, design defects, patent and latent construction defects, strict liability, breach, negligence, willful misconduct or fraud.
(b) Non-Conforming Work. In the event of the occurrence of a Defect in the design or construction Work, including in any materials and equipment furnished as part of the construction, and including any Non-Conforming Work, the Department will be entitled, in addition to any other remedies:

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

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

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

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

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

Section 8.12 Transportation Management Plan.

(a) The Department will develop, fund and implement a transportation management plan for the Project (“Transportation Management Plan” or “TMP”), which will be undertaken in coordination with the Concessionaire’s Maintenance of Traffic Plan and Sequence of Construction Plan. The Department will provide the Concessionaire with a reasonable opportunity to comment on the TMP. The TMP will set forth the program for traffic management and related activities to ensure safety and mobility for the travelling public throughout the I-95 Corridor for the duration of the Construction Period. The Concessionaire’s Maintenance of Traffic Plan (as described further in the Technical Requirements) will be consistent with, and included as part of, the TMP for the Construction Period.

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

Section 8.13 Substantial Completion of Segments of the Project. In the Department’s sole discretion, it may issue a Substantial Completion Certificate and an authorization to commence Service Commencement with respect to certain Segments of the Project to be identified by the Concessionaire and approved by the Department, prior to issuing a Substantial Completion Certificate and authorization to commence Service Commencement for the balance of the Project. In such case, solely for the purpose of processing such early acceptance, the Department and the Concessionaire will develop a set of requirements that must be satisfied and other conforming changes to this Agreement, so that such Segments of the Project may be accepted early by the Department, in its sole discretion, pursuant to this Section 8.13.

Section 8.14 Lane Closure Damages. In its performance of the Work during the Construction Period, the Concessionaire may temporarily close existing lanes on the Project Right of Way only in accordance with the Technical Requirements. Any such closure that exceeds the time period permitted therefor in the Technical Requirements is a “Non-Permitted Closure”. If a Non-Permitted Closure occurs, the Department will notify the Concessionaire thereof and of the associated Lane Closure Damages, in writing, within 48 hours. The Concessionaire will pay to the Department the liquidated damages set forth below (the “Lane Closure Damages”) at the time and in the manner set forth in the Technical Requirements. The Lane Closure Damages for any Non-Permitted Closure will not exceed $200,000 per incident.

<table>
<thead>
<tr>
<th>Elapsed Time (min)</th>
<th>I-95, I-395, I-495 and all ramps</th>
<th>Major Arterials</th>
<th>All other roads</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-5, or any portion thereof</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
</tr>
<tr>
<td>Every additional minute or portion thereof after the initial five minutes stated above.</td>
<td>$1,000 plus $2,500 per each additional minute</td>
<td>$1,000 plus $1,500 per each additional minute</td>
<td>$500 plus $500 per each additional minute</td>
</tr>
</tbody>
</table>

Section 8.15 Failure to Achieve Substantial Completion by Long Stop Date; Substantial Completion Recovery Plan

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

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

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

(a) The Parties acknowledge that the contract price for the Design-Build Work in the Design-Build Contract includes certain agreed quantities set forth in the Technical Requirements (the “Baseline Quantities”) and associated unit prices and markups for concrete sign foundations, electric service panel feeds, and undercut excavation (the “Allowance Items”) as set forth in the Technical Requirements. If the actual quantities of the Allowance Items in the Design-Build Work exceed the Baseline Quantities, the Design-Build Contractor will be entitled to payment by the Concessionaire of an amount equal to the agreed unit price and markup multiplied by the actual quantities which exceed the Baseline Quantities; provided however, that such payment by the Concessionaire to the Design-Build Contractor will not exceed $15,000,000. The Department will pay the Concessionaire for any such amount that the Concessionaire pays to the Design-Build Contractor; provided however, that the maximum such amount payable by the Department to the Concessionaire pursuant to this Section 8.16(a) will not exceed $15,000,000.

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

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

(d) The Department will pay for the acquisition of stream and wetland credits in accordance with the Technical Requirements. The Concessionaire will perform stream restoration construction activities in accordance with the Technical Requirements.
ARTICLE 9.

PROJECT MANAGEMENT; OPERATIONS AND MAINTENANCE

Section 9.01  Transition of Operations and Maintenance to Concessionaire

(a) Care, Custody and Control.

(i) Except as otherwise specifically provided for in a LNTP, after the Financial Close Date and prior to the Substantial Completion Date, the Concessionaire will (A) have care, custody and control of the Design Build Right of Way for the Project Assets and (B) be responsible for the security and protection of active construction areas on the Project Assets and the Project Right of Way and (1) all materials, equipment, supplies and any other property of any Concessionaire Party and (2) all materials, equipment, supplies and any other property of the Department being held in a secure location at or on the Project Assets or otherwise being used or procured in connection with the Work, whether or not on the Project Right of Way. Notwithstanding the foregoing, during the Construction Period, the Department will (x) except as otherwise provided herein, operate and maintain the existing HOV Lanes and access ramps at its own cost and expense to the extent they are not actively under construction as provided in Section 9.07 (the “HOV Assets”); (y) have care, custody and control of the HOV Assets; and (z) be responsible for the security and protection of the HOV Assets and all materials, equipment, supplies and any other property of the Department at or on the HOV Assets, in all cases except as otherwise provided in Section 9.02.

(ii) Through the coordination process described in Section 8.07, the Concessionaire and the Department will determine from time to time which portions of the existing HOV Lanes will be open for traffic or under construction.

(iii) On and after the Substantial Completion Date to the end of the Term, the Concessionaire will have care, custody and control of the Project Assets (other than the Department Shared Assets).

(b) Turnover Process. The Concessionaire will implement and comply with the Turnover Plan to ensure the timely and orderly transition of operations and maintenance of the Project from the Department to the Concessionaire. The parties will cooperate and coordinate with each other with respect to activities undertaken pursuant to the Turnover Plan attached as Exhibit V.

Section 9.02  Conditions Precedent to Service Commencement of the Project

(a) The Concessionaire will not initiate Service Commencement until the following conditions have been satisfied (or the Department, in its sole discretion, waives any such condition) and the Department has delivered notice to that effect to the Concessionaire (the “Service Commencement Notice to Proceed”):

(i) the Department has issued the Substantial Completion Certificate, or it has been determined pursuant to the dispute resolution procedures set forth herein that the Department should have issued such certificate;

(ii) the Department has approved the Operations and Maintenance Plan, the updated Performance Requirements Baseline Tables, all other Project Documentation and all other Project Development Plans required by the Technical Requirements to be submitted on or before the Service Commencement Date;

(iii) the Concessionaire has received and delivered to the Department copies of all Governmental Approvals necessary to operate the Project and has satisfied all conditions and requirements thereof which must be satisfied before the Project can be lawfully opened for regular public use, all such Governmental Approvals remain in full force and effect, and there exists no un cured material violation of the terms and conditions of any such Governmental Approval;

(iv) all insurance policies required under Section 17.01 for the Operating Period have been obtained and will be in full force and effect, and the Concessionaire has delivered to the Department duplicate originals or copies thereof (or endorsements reasonably acceptable to the Department extending coverage to the Project), certified by the Concessionaire’s insurance broker to be true and correct copies of the originals;

(v) there exists no Concessionaire Default for which the Concessionaire has received notice from the Department, except as to any Concessionaire Default that has been cured or for which Service Commencement will effect its cure, and there exists no event or condition that, with notice or lapse of time, would constitute a Concessionaire Default;

(vi) all Operations and Maintenance Agreements and agreements relating to toll collection and violation enforcement on the HOT Lanes are in full force and effect;

(vii) the Concessionaire has implemented the Maintenance Management System in accordance with the Technical Requirements;

(viii) to the extent not previously completed pursuant to Section 8.08, the Concessionaire has completed the toll commissioning process described in the Technical Requirements, and the ETTM System is completed, has passed all demonstration and performance testing in accordance with the Construction Documentation and the Technical Requirements, including demonstration of interoperability with E-ZPass or any successor to E-ZPass then utilized on State Highways, and is ready for normal operation unless previously completed pursuant to Section 8.08;

(ix) the Concessionaire has deposited the Source Code Documentation with the Escrow Agent in accordance with Section 18.06;

(x) all Project Agreements are in full force and effect;
(xi) the Concessionaire has paid or caused to be paid to the Department all amounts due and payable from the Concessionaire to the Department, including, but not limited to, Lane Closure Damages, in connection with this Agreement, including any applicable interest thereon (except such amounts subject to dispute in accordance with the dispute resolution procedures);

(xii) the Concessionaire has provided to the Department the training required to have been provided prior to Service Commencement by the Technical Requirements;

(xiii) the Concessionaire has submitted to the Department an Annual Budget for the remainder of the Agreement Year in which the Substantial Completion Date occurs (or, if the remainder of such year is shorter than 90 Days, an Annual Budget that conforms with the requirements specified in Section 9.08, for the remainder of such Agreement Year and for the following Agreement Year); and

(xiv) the Concessionaire has certified to the Department in writing that the conditions set forth in this subsection (a) have been satisfied as of the date of such certification.

(b) The parties will comply with the submittal and review procedures set forth in Section 10.05 in the Department’s determination of whether the Concessionaire has satisfied the conditions precedent for achieving Service Commencement.

(c) The Department’s issuance (or deemed issuance) of the Service Commencement Notice to Proceed will not constitute a waiver by the Department of any then-existing breach of this Agreement by the Concessionaire.

Section 9.03  Concessionaire Obligation to Manage and Operate

(a) At all times following the Service Commencement Date, the Concessionaire, at its sole cost and expense (except as otherwise provided herein), will cause the Project to be managed, maintained and operated in accordance with Law, all Governmental Approvals, the terms, conditions and standards set forth in this Agreement, including the requirements set forth in the Technical Requirements, and in accordance with Good Industry Practice. Without limiting the foregoing, the Concessionaire agrees to be responsible for the following, at its sole cost and expense at all times following the Service Commencement Date for the Project:

(i) the management and control of traffic on the Project Assets, including, but not limited to, incident response services and temporary partial or full closures of the Project Assets, subject to the Department’s rights to assume control as expressly provided in this Agreement;

(ii) the maintenance and repair of the Project Assets and all systems and components thereof, including the ETTM System, which the Concessionaire may upgrade, modify, change and replace, as applicable, in accordance with this Agreement and the requirements set forth in the Technical Requirements;
(iii) the operation of the Project Assets and the ETTM System, and otherwise carrying out the collection and enforcement of tolls and other incidental charges in accordance with Article 5 respecting the Project Assets;

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

(v) traffic management, and maintenance and repair responsibilities under Section 9.04(a) in accordance with the Technical Requirements; and

(vi) except as otherwise specifically provided herein (including the right of the Concessionaire to close all or a portion of the HOT Lanes in accordance with the provisions hereof), at all times during the Term, causing the Project Assets to be continuously open and operational for use by all members of the public travelling in Permitted Vehicles 24 hours a day, 365 Days a year.

(b) Snow and Ice Removal.

(i) Prior to the Service Commencement Date, the Department will, at its own cost, remove snow and ice from the HOV Lanes that are open to traffic.

(ii) Subject to Section 9.03(b)(iv), the Department will provide snow and ice removal services on the HOT Lanes at a comparable level of service to that it provides on the GP Lanes. The Concessionaire will provide access to the HOT Lanes to the Department or its contractors to provide snow and ice removal services. If the Concessionaire does not provide access to the HOT Lanes to the Department or its contractors, then the Department will not be required to provide snow and ice removal services on the applicable HOT Lanes during the pendency of such denial of access.

(iii) Other than as provided in Section 9.03(b)(iv), the Department will have no liability to the Concessionaire arising out of its snow and ice removal services. If the Department’s contractors for snow and ice removal damage the Project Assets, the Department will provide to the Concessionaire any amounts that the Department has received in respect of such damage from such contractor or its insurer. Subject to Section 9.03(b)(i) and Section 9.03(b)(ii), the Department will have full discretion to establish priorities for its contractors regarding timing and location of services, materials and equipment, without liability to the Concessionaire, other than as provided in clause (iv) below.

(iv) The Concessionaire may notify the Department if the Department fails at any time to provide snow and ice removal to the HOT Lanes at a level of service comparable to that it provides on the GP Lanes. Such notice will be given verbally, to be immediately followed up in writing, to the Department’s District Administrator and Assistant District Administrator for Maintenance or its designee (i.e. Duty Officer) for the Northern Virginia District and the Fredericksburg District for the applicable section of the HOT Lanes. If the Department fails to respond affirmatively within two hours of
the written notice from the Concessionaire or if the Department does not begin snow and ice removal services within four hours of such written notice, except if the Concessionaire does not provide access to the HOT Lanes to the Department, then the Concessionaire may arrange for other contractors to provide such service and the Department will pay the Concessionaire for such contractors’ reasonable documented cost of snow and ice removal services; provided that such contractors will not in any way hinder the removal of snow and ice from the GP Lanes.

(v) The Concessionaire may arrange for a contractor to provide snow and ice removal services to the HOT Lanes, at the Concessionaire’s sole cost and expense, even if the Department is providing such services at a level of service comparable to that it provides on the GP Lanes, with prior written notice to the Department; provided that any such contractor will not in any way hinder the removal of snow and ice from the GP Lanes. Such notice will be given verbally, to be immediately followed up in writing, to the Department’s District Administrator and Assistant District Administrator for Maintenance or its designee (i.e. Duty Officer) for the Northern Virginia District and the Fredericksburg District for the applicable section of the HOT Lanes.

(c) **Drainage.** The Concessionaire will be responsible, at its own cost and expense, for the maintenance, repair and replacement of the existing drainage system located within and outside of the Project Right of Way in accordance with the Technical Requirements, except to the extent such responsibility is allocated to the Department in accordance with the Technical Requirements.

**Section 9.04 Procedures Relating to Maintenance Work**

(a) **General.** The Concessionaire will perform all maintenance obligations with respect to the Project in accordance with this Agreement and the Technical Requirements.

(b) **Life Cycle Maintenance Plan.** No later than 90 Days before the beginning of each calendar year after the Service Commencement Date, the Concessionaire will prepare and deliver to the Department a full five-year period maintenance plan on a rolling basis that describes life cycle asset maintenance for the Project (each, a “Life Cycle Maintenance Plan”) in accordance with the Technical Requirements. The Life Cycle Maintenance Plan will include a description of all Major Maintenance to be undertaken during such five-year period, by component, item or discrete project (each, a “Task”), the estimated costs and timing relating to each Task, the underlying assumptions used to develop such plan, including assumptions arising from the re-evaluations of the physical condition of the Assets conducted pursuant to Section 9.04(d); and such other information as may be reasonably requested by the Department.

(c) **Review and Approval of Life Cycle Maintenance Plan.**

(i) The Department will review and approve the Life Cycle Maintenance Plan and components thereof, including, but not limited to, the proposed scope of work, timing and estimated costs for the Major Maintenance. The Department will deliver its comments, approval or disapproval to the Concessionaire within 45 Days after the
Concessionaire has delivered each proposed Life Cycle Maintenance Plan to the Department in accordance with Section 9.04(b).

(ii) The Concessionaire will reasonably consider any changes or additions proposed by the Department to the proposed Life Cycle Maintenance Plan and will modify the Life Cycle Maintenance Plan to reflect those changes and additions which are consistent with the standards and requirements of this Agreement.

(iii) In the event of any Dispute relating to a Life Cycle Maintenance Plan, the Department and the Concessionaire will endeavor in good faith to resolve any such Dispute within 60 Days after it is provided to the Department. Any Disputes raised by the Department with respect to the Life Cycle Maintenance Plan must be based on whether it and the underlying assumptions are reasonable, realistic and consistent with Good Industry Practice, the Technical Requirements and Law. If no agreement is reached within such 60-Day period as to any such matter, either party may submit the Dispute to the dispute resolution procedures set forth in Article 21. Until resolution of any Dispute relating to a Life Cycle Maintenance Plan, the treatment of the disputed Tasks in the most recently-approved Life Cycle Maintenance Plan will remain in effect and govern the requirements relating to such Tasks. If there is no approved Life Cycle Maintenance Plan then in effect, the Concessionaire will proceed as directed by the Department until resolution of such Dispute.

(d) Inspection and Implementation.

(i) After the Service Commencement Date, the Concessionaire will conduct inspections of the physical condition of the Project Assets pursuant to the Technical Requirements. Every five years after the Service Commencement Date, the Concessionaire will conduct an assessment of the physical condition of the Project Assets pursuant to the Technical Requirements, and will prepare a comparative analysis of such conditions to the conditions as previously reported (or, with respect to any Project Enhancements, their condition upon completion thereof), such analysis to take into account any changes in Federal Requirements and changes to safety standards. The condition of each Asset will be assessed using the Department’s Maintenance Rating Program in accordance with the Technical Requirements. If any Asset is determined by the Concessionaire or the Department to fall below the applicable level or rating specified in the Technical Requirements for such Asset, the Concessionaire will, within 90 Days of such assessment, develop and submit to the Department a plan to restore such Asset to a condition that will enable the Asset to meet all applicable Performance Requirements, and such plan will also include a budget, timeline and identification of the funding sources (if known at the time) that will be utilized to restore such Asset.

(ii) The Department will be responsible at its sole cost and expense for inspection of bridges and structures on the Project Right of Way in accordance with the Technical Requirements. The Concessionaire will cooperate with the Department in its conduct of inspections and will use reasonable efforts to minimize any disruption to the Department’s conduct of such inspections. The Department and the Concessionaire will
use reasonable efforts to minimize any disruption to or impairment of the Work, the Project and the Department’s inspection activities.

(iii) If the Concessionaire fails to complete any of the Tasks in accordance with this Agreement and the applicable Life Cycle Maintenance Plan, the Department may demand by notice in writing that such Tasks be completed by the Concessionaire. If the Concessionaire has failed to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers such notice, the Department may, at its option, but is not obligated to, either (A) carry out such Task or correct such defective work using Department personnel, materials and equipment or (B) procure the services for such Task or corrective work by one or more contractors. If the Concessionaire fails to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers notice pursuant to this Section 9.04(d)(iii) and the Department elects to pursue its rights pursuant to Section 9.04(d)(iii)(A) or (B), then the Concessionaire will pay the Department’s Allocable Costs it incurs to complete such Task or corrective work, and its third-party costs to procure such contract(s).

(iv) Notwithstanding anything to the contrary in Section 9.04(d)(iii), the Concessionaire may, by written notice delivered to the Department within 30 Days of receipt of the Department’s notice of demand described in Section 9.04(d)(iii), object to any such demand by the Department on the basis that the Concessionaire has completed the Task(s) specified in the Department’s demand in accordance with this Agreement and the applicable Life Cycle Maintenance Plan or that such Task(s) are not then required in accordance with this Agreement or the applicable Life Cycle Maintenance Plan, which notice will give details of the grounds for such objection. Upon the giving of any such notice, the parties will endeavor to reach agreement as to any matters referred to in the notice. If no agreement is reached as to any such matter within 30 Days after the giving of such notice, either party may refer the Dispute to the dispute resolution procedures set forth in Article 21. Notwithstanding the foregoing, the Concessionaire will perform the Task as directed by the Department and the Department will be entitled to exercise its remedies for the Concessionaire’s failure to comply with such directive in accordance with this Agreement. If it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then such directive and any additional Work required by the Department will be treated as a Department Change pursuant to Section 14.02.

Section 9.05 Major Maintenance Reserve Fund

The Concessionaire will fund the Major Maintenance Reserve Fund in such amounts and in accordance with the terms as may be required by the Lenders.

Section 9.06 Police and Enforcement Services

(a) The Department will coordinate with the Virginia State Police to provide policing services, and to provide emergency services (fire and rescue), including traffic patrol and traffic law enforcement services, to be provided on the Project at a level of service equivalent to that
provided on comparable State Highways from time to time. All such foregoing services will be provided without any charge to the Concessionaire or the Project. For the avoidance of doubt, such services will not include any enforcement of HOV compliance. In addition, if reasonably requested by the Concessionaire, the Department will assist the Concessionaire in obtaining enhanced levels of police services for the control of traffic for construction or maintenance activities or as otherwise needed (and in each case, at the Concessionaire’s sole cost and expense). Notwithstanding such assistance, the Concessionaire will be solely responsible for obtaining such enhanced services and the Department does not guarantee that such services can be obtained.

(b) The Concessionaire may, at its sole cost and expense, engage the Virginia State Police to provide toll enforcement and HOV enforcement services (including the identification and apprehension of toll violators), and the Department will assist the Concessionaire in obtaining such services if so requested by the Concessionaire. The Concessionaire will not engage or permit the engagement of private security services to provide traffic patrol or traffic law enforcement services on the Project; provided, that the foregoing does not preclude the Concessionaire from engaging private security firms or employing other appropriate security devices, vehicle occupancy detection equipment or other automated technology to protect, collect and enforce the payment of Toll Revenues and to identify toll and/or HOV violators, subject to Law, and to enforce any private rights and civil remedies available to it respecting toll and/or HOV violations.

(c) Notwithstanding the foregoing, the Concessionaire will not permit any private security firm to stop vehicles, apprehend road users, or engage in any other direct enforcement activity on the Project Right of Way.

(d) The Department will not have any responsibility or liability to the Concessionaire resulting from or otherwise relating to the failure of the Virginia State Police or any other public agencies to provide policing services contemplated by this Section 9.06 or any of the acts or omissions of the Virginia State Police or such agencies with respect to such services.

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

Section 9.07 Maintenance by the Department.

(a) Except as otherwise provided herein, the Department will maintain, repair and, subject to and in accordance with the Department’s normal course of operations and activities as in effect from time to time, cause to be open and operational, in a manner consistent with access to State Highways, so as to permit access to the HOT Lanes by Permitted Vehicles, the ramps, bridges and roadways directly connecting to the HOT Lanes over which the Department has sole control. The foregoing does not restrict the Department’s right to operate existing or new facilities, to modify existing facilities, to construct new facilities, including Project Enhancements, and, subject to Section 12.02(d)(i) through (iii), to perform planned and
emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project.

(b) Except as set forth in the Technical Requirements, the Department will maintain and repair the Department Shared Assets, subject to and in accordance with the Technical Requirements and the Department’s normal course of operations and activities as in effect from time to time. Except as set forth in the Technical Requirements, the cost for maintenance and repair of the Department Shared Assets will be paid by the Department.

(c) The Department will be responsible, at its own cost and expense, for the maintenance, repair and replacement of the existing drainage system located within and outside of the Project Right of Way in accordance with the Technical Requirements, except to the extent such responsibility is allocated to the Concessionaire in accordance with the Technical Requirements.

(d) Activities undertaken by the Department pursuant to this Section 9.07 will not constitute a Compensation Event, unless they meet the criteria as provided in this Agreement.

Section 9.08 Annual Budget

(a) For each Agreement Year and partial Agreement Year from and after the Service Commencement Date, the Concessionaire will file with the Department an annual budget for the Project for such full or partial Agreement Year at least 60 Days prior to the start thereof (an “Annual Budget”). Each Annual Budget will be in a form reasonably acceptable to the Department and show in reasonable detail in respect of such full or partial Agreement Year:

(i) projected Gross Revenues;

(ii) projected Operating Costs, including all amounts payable to the Department;

(iii) projected maintenance expenses, including the costs of Major Maintenance activities to be performed pursuant to the Life Cycle Maintenance Plan;

(iv) projected debt service and other amounts payable with respect to Concessionaire Debt, including deposits to reserve funds held for benefit of the Project Lenders;

(v) projected Distributions; and

(vi) for each Agreement Year after the Concessionaire has achieved the Initial IRR to the Agreement Year in which the Concessionaire achieves the Highest Revenue Share IRR, the date on which the Concessionaire expects to achieve the Highest Revenue Share IRR.
The Concessionaire will provide such other information as the Department may reasonably require in connection with its review of the Annual Budget, including: (i) any amendments to operating budgets pursuant to the O&M Agreement; and (ii) any budgets related to the Shared Facilities Agreement.

Section 9.09 Signage.

(a) The Concessionaire will submit a Signage Plan to the Department for its review and approval pursuant to the Technical Requirements. The Concessionaire will limit its signage to the Project Right of Way and any other real property or real property rights as set forth in Section 8.05.

(b) The Concessionaire agrees that it shall, at its sole cost, install, operate and maintain on connecting State Highways such signs solely notifying motorists of the access to the HOT Lanes, the amount of tolls and fines for toll violations, the applicable High Occupancy Requirement, and other relevant information, in accordance with applicable Law and the Technical Requirements.

(c) The Department will remain responsible, at its cost, for general directional signs on State Highways informing the public of the direction and distance to the HOT Lanes and other State Highways. During the Term, the Department will also cooperate with, and use its commercially reasonable efforts to cause other public agencies or entities to cooperate with, the Concessionaire to install, at the Concessionaire’s cost, additional signs along State Highways notifying motorists of the access to the HOT Lanes and any other communications relating to the HOT Lanes as are reasonably requested by the Concessionaire, subject to any obligation to obtain any necessary authorizations of any other Governmental Authority and in accordance with applicable Law. In connection with any such request, the Concessionaire will submit the proposed layout, location, type, size, color and content of all such traffic signs or other signs.

ARTICLE 10.

CONCESSIONAIRE PROJECT AND QUALITY MANAGEMENT; DEPARTMENT OVERSIGHT AND OTHER SERVICES

Section 10.01 Project and Quality Management

The Concessionaire will provide oversight and management of the Project to control the scope, quality, cost, and on-time delivery of the Work. If the Concessionaire is required to rectify any Non-Conforming Work in accordance with Section 8.11(b), the parties will review the Quality Management System Plan to assess and determine whether changes, including increased management and oversight efforts by the Concessionaire, to such plan are necessary to prevent such further Non-Conforming Work.
Section 10.02 Right to Oversee Work

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

(b) The Concessionaire will fully cooperate with the Department to facilitate its conduct of Oversight Services. In the course of performing Oversight Services, the Department will use reasonable efforts to minimize the effect and duration of any disruption to or impairment of the Work or the Project.

Section 10.03 Department Access and Inspection

The Department, the FHWA, and their respective authorized agents will have unrestricted access at all times to enter upon, inspect, sample, measure and physically test any part of the Project Assets or the Project Right of Way, as well as any materials, supplies, machinery and equipment to be incorporated into or used in construction, operation or maintenance of the Project. The Department will also have the right, upon reasonable advance written notice (except as provided in Section 18.07(b)) to the Concessionaire, to inspect financial or other records relating to the Project. Upon the Concessionaire’s request, the Department will provide the Concessionaire with the results of any such test or inspections subject to any protections from disclosure under applicable Law.

Section 10.04 Compensation for Oversight Services

(a) Except as otherwise expressly provided in this Agreement, including, without limitation, Section 10.04(b), Section 10.04(c), Section 10.05(h), Section 11.05(a) and Section 24.03, the Department will not be compensated for its Oversight Services, whether in respect of the design, inspection or permitting for the Project, any Project Enhancement or any Safety Compliance Orders.

(b) Notwithstanding Section 10.04(a), if at any time the Concessionaire has failed to perform any of its construction, operating or maintenance obligations in any material respect then, in addition to other remedies available pursuant to this Agreement and the other Project Agreements, the Department, with written notice to the Concessionaire given concurrently with the increase in the Department’s monitoring or as soon as practicable thereafter, is entitled to adequately and appropriately increase the level of its monitoring of the Project and the Concessionaire’s compliance with its construction, operation and maintenance obligations pursuant to this Agreement, until such time as the Concessionaire has demonstrated to the Department’s reasonable satisfaction that it will perform and is capable of performing its construction, operation and maintenance obligations pursuant to this Agreement. The Concessionaire will compensate the Department for all Allocable Costs incurred by the Department as a result of such increased level of monitoring from and after the date on which
such increased level of monitoring begins, **provided**, that if the increased monitoring is due to a delay in achieving Substantial Completion, Service Commencement or Final Acceptance, the Concessionaire will compensate the Department for such increased monitoring solely by payment of liquidated damages pursuant to Section 8.10. The Concessionaire’s total liability to the Department during the Construction Period in connection with any increased monitoring will not exceed $2,000,000 in the aggregate.

(c) If the Department increases its monitoring or oversight as permitted in this Agreement during the Operating Period, then the Department will give notice of such increased level of monitoring as provided in Section 10.04(b). Within 10 Days following the day on which increased monitoring activities begin, the Department will provide the Concessionaire with a budget for its increased oversight and/or monitoring activities which sets out its total proposed costs in reasonable detail. If there is a change in circumstances in the oversight activities or the events which precipitated them occurs following the submission of the Department’s initial budget, then the Department will provide a revised budget, which budget will detail any increased costs.

(d) The Concessionaire may submit a cure plan describing specific actions the Concessionaire will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject. Notwithstanding Section 10.04(c), if the Department accepts a cure plan, the Department shall not increase its monitoring or other Oversight Services unless the Concessionaire fails to diligently pursue such cure plan.

**Section 10.05 Department Approvals**

(a) This Section 10.05 sets forth procedures governing certain submittals or requests by the Concessionaire (or the Design-Build Contractor or the O&M Contractor) to the Department (including, but not limited to, plans, schedules, designs, Design Documentation and Construction Documentation) which require an approval, review, comment, consent, notification, determination, decision or other response (collectively, a “Response”) from the Department pursuant to this Agreement. All submittals or requests to the Department will be made in the form required by, and otherwise in conformity with, the requirements set forth in the Technical Requirements. Except as otherwise provided in this Agreement, the procedures set forth in this Section 10.05 will apply to any submittal or request by the Concessionaire relating to, or any required approval or disapproval by the Department of, the following: any proposed OSPS Improvement Plan pursuant to Section 5.08(b); the issuance of a Design Work Notice to Proceed pursuant to Section 8.03(a) or a Construction Notice to Proceed pursuant to Section 8.03(b); any submittal of Design Documentation and Construction Documentation relating to the Work pursuant to Section 8.04(a); the approval of the ROW Acquisition and Relocation Plan pursuant to Section 8.05(a); the determination of whether Substantial Completion has been achieved pursuant to Section 8.08(e); the determination of whether Final Acceptance has been achieved pursuant to Section 8.09(c); the determination of whether the conditions precedent for achieving Service Commencement have been achieved pursuant to Section 9.02(b); any Signage Plan pursuant to Section 9.09(a); data, reports and any proposed Remedial Action Plan pursuant to Section 16.01(b); insurance submittals pursuant to Section 17.02(e); and a Disbursement Request pursuant to the Public Funds Amount Payment Terms attached as Exhibit N.
(b) Except as otherwise set forth herein, any submittal, resubmittal or request to the Department will be deemed complete at 5:30 p.m. Eastern time on the seventh Day following its receipt by the Department unless, the Department notifies the Concessionaire in writing prior to 5:30 p.m. Eastern time on such seventh Day that such submittal, resubmittal or request is incomplete according to the standards set forth in the Technical Requirements and sets forth in reasonable detail the incomplete elements of the submittal, resubmittal or request.

(c) In any case in which a submittal or request is or has been deemed to be complete under Section 10.05(b), the Department will review and respond to such submittal or request as promptly as reasonably possible, and no later than 21 Days after the date on which the Concessionaire (or the Design-Build Contractor or the O&M Contractor) has delivered such submittal or request to the Department. The Department will respond within such 21-Day period by (i) approving, certifying or taking other appropriate action with respect to, the submittal or request, as applicable or (ii) disapproving such submittal or request and providing written notice to the Concessionaire specifying in reasonable detail the reasons for which it has disapproved the submittal or request. If the Department objects or disapproves any submittal or request in accordance with clause (ii) of the preceding sentence, the Concessionaire will resubmit the submittal or request as promptly as reasonably possible, and the Department will resume its review and respond to such submittal or request by approving or disapproving the submittal or request (provided that such submittal or request is complete or has been deemed to be complete under Section 10.05(b)) within 10 Days following its receipt of a resubmittal or request. The Department’s review of a resubmittal or request will be limited to the issue, condition or deficiency which gave rise to the Department’s disapproval and will not extend to other aspects for which a notice of disapproval was not previously provided to the Concessionaire unless the issue, condition or deficiency which gave rise to the Department’s disapproval reasonably relates to the Department’s disapproval for which notice was previously provided. The Concessionaire is in no way obligated to incorporate the Department’s comments unless necessary to comply with a specific requirement of this Agreement.

(d) The time periods specified in Section 10.05(c) will be extended for the duration of a Force Majeure Event that prevents the Department or the Concessionaire, as applicable, from performing under this Section 10.05.

(e) Unless otherwise provided in this Agreement, if the Department fails to respond to a complete submittal or request which has been timely submitted or resubmitted, as the case may be within the applicable time periods, as provided in this Section 10.05, the Department will be deemed to have approved, certified or taken other similar action with respect to, such submittal or request; provided that such deemed approval will not be deemed a waiver of the Department’s other rights or the Concessionaire’s other obligations pursuant to this Agreement, including compliance with the Technical Requirements, Governmental Approvals, Good Industry Practice and applicable Law. Notwithstanding the foregoing, the deemed approval provisions of this Section 10.05(e) will not apply to the issuance of a Design Work Notice to Proceed pursuant to Section 8.03(a) or a Construction Notice to Proceed pursuant to Section 8.03(b), the approval of the ROW Acquisition and Relocation Plan pursuant to Section 8.05(a), the determination of whether Substantial Completion has been achieved pursuant to Section 8.07(a) or the delivery of the Final Acceptance Report.
8.08(e); the determination of whether Final Acceptance has been achieved pursuant to Section 8.09(c); the submission of any data, reports and any proposed Remedial Action Plan pursuant to Section 16.01(b); or a Disbursement Request pursuant to the Public Funds Amount Payment Terms attached as Exhibit N.

(f) Unless otherwise agreed by the parties, the Concessionaire is entitled to resolve any disapproval by the Department of a resubmittal in accordance with the dispute resolution procedures set forth in Article 21. If the Department reasonably believes that all or a portion of a resubmittal fails to comply with this Agreement, the Department may, in accordance with this Agreement, direct the Concessionaire to perform the Work in accordance with the Department’s instructions. In such event, the Concessionaire will diligently proceed with the Work in accordance with such directive, and may (i) dispute the Department’s directive in accordance with this Agreement and (ii) if it chooses, proceed with the dispute resolution procedures set forth in Article 21. If it is finally determined in accordance with such dispute resolution procedures that the Concessionaire’s submittal or resubmittal complied with this Agreement, the Work required under the Department’s directive will be treated as a Department Change.

(g) In all cases where Responses are required to be provided hereunder, such Responses will not be withheld or delayed unreasonably and such determinations will be made reasonably except in cases where a different standard is specified. In cases where sole discretion is specified with respect to a Response by the Department, the Response will not be subject to the dispute resolution procedures set forth in Article 21. Any failure of the Department to respond to a matter which is determined in the Department’s sole discretion (by way of example, Deviations pursuant to Section 14.03) within 21 Days after delivery of the Concessionaire’s request to the Department will be deemed disapproval by the Department. The Department will provide within ten days after a request by the Concessionaire its rationale, in reasonable detail, for any disapproval or deemed disapproval of any matter where the Department has sole discretion to approve or disapprove.

(h) Subject to Section 10.04, if the Concessionaire must submit a submittal or request to the Department for review and Response more than twice due to the Concessionaire’s failure to comply with the requirements of this Agreement, the Concessionaire will pay the Department for the Department’s Allocable Costs incurred thereafter in reviewing any portions of such submittal or request. If the Concessionaire must submit a submittal or request more than twice due to the Department’s failure to comply with the requirements of this Agreement, the Department will pay the Concessionaire for the Concessionaire’s Allocable Costs incurred thereafter in preparing or submitting any portions of such submittal or request.

Section 10.06 Limitations on the Concessionaire’s Right to Rely

(a) The Concessionaire expressly acknowledges and agrees that the Department’s rights, if any, under the Project Agreements:

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

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

(iii) to perform Oversight Services,

exist solely for the benefit and protection of the Department, do not create or impose upon the Department any standard or duty of care toward any Concessionaire Party, all of which are hereby disclaimed, may not be relied upon, nor may the Department’s exercise or failure to exercise any such rights be relied upon, by the Concessionaire in determining whether the Concessionaire has satisfied the standards and requirements set forth in this Agreement and may not be asserted, nor may the Department’s exercise or failure to exercise any such rights be asserted, against the Department by the Concessionaire as a defense, legal or equitable, to the Concessionaire’s obligation to fulfill such standards and requirements; provided, that the foregoing will not limit the Department’s liabilities or obligations pursuant to this Agreement.

(b) To the maximum extent permitted by Law, and subject to the provisions of this Agreement, the Concessionaire hereby releases and discharges the Department from any and all duty and obligation to cause permitting, Project Right of Way acquisition, Utility Relocation, construction, equipping, operations, maintenance, policing, renewal, replacement, traffic management or other management of or for the Project or the Project Right of Way, by the Department, to satisfy the standards and requirements set forth in the Project Agreements; provided, that the foregoing will not limit the Department’s liability or obligations under this Agreement. The Department will be entitled to remedies for Non-Conforming Work pursuant to Section 8.11(b).

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

(i) relieve the Concessionaire from performance of the Work or of its responsibility for the selection and the competent performance of its Contractors;

(ii) relieve the Concessionaire of any of its obligations or liabilities under the Project Agreements;

(iii) be deemed or construed to waive any of the Department’s rights and remedies under the Project Agreements; or

(iv) be deemed or construed as any kind of representation or warranty, express or implied, by the Department.
(d) Notwithstanding Section 10.06(a), (b) and (c) above: (i) any Notices to Proceed and certificates or notices of Substantial Completion, Service Commencement and Final Acceptance will be binding on the Department and the Concessionaire will be entitled to rely thereon; provided however, that the delivery of such notices and certificates will not constitute a waiver by the Department of any breach of this Agreement by the Concessionaire or relieve the Concessionaire of any of its obligations hereunder; (ii) the Concessionaire will be entitled to rely on specific approved written Deviations and interpretative engineering decisions the Department gives pursuant to this Agreement in accordance with the Technical Requirements, the Design-Build Contract or any Development Contract, and any Law; (iii) the Department is not relieved from any liability arising out of a knowing, intentional material misrepresentation under any written statement the Department delivers; and (iv) the Department is not relieved from its obligations under this Agreement or any Development Contract.

Section 10.07 Suspension of the Work

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

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

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

(iii) failure to provide proof of required insurance coverage or to provide or maintain the required Performance Security;

(iv) failure to carry out and comply with Directive Letters; and

(v) failure to satisfy any conditions to commencing performance of the applicable portion of the Work set forth in Article 8 or Section 9.01.

(b) The Department will lift the suspension order promptly after it is permitted by the terms of the court order or judgment, after the dangerous or unsafe condition is rectified, or after the Concessionaire fully cures and corrects the applicable breach or failure to perform.

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

(d) The issuance of a suspension order will not affect the Concessionaire’s rights to cure or correct any such incidents giving rise to the issuance of the suspension order in accordance with this Agreement.

ARTICLE 11.

NON-COMPLIANCE POINTS SYSTEM

Section 11.01 Non-Compliance Points System

(a) Exhibit W to this Agreement sets forth a table for the identification of certain Concessionaire breaches or failures to perform its obligations under this Agreement that may result in the assessment by the Department of Non-Compliance Points. The Non-Compliance Points system is used by the Department to measure the Concessionaire’s performance levels and the accumulation of Non-Compliance Points by the Concessionaire may trigger the remedies set forth or referenced in this Article 11. This Article 11 shall apply only during the Operating Period. The inclusion in Exhibit W of a breach or failure to perform shall not determine whether such breach or failure is material.

(b) The Department may exercise any of its remedies under this Article 11 without prejudice to any other rights or remedies it has under this Agreement.

(c) If the Department determines any breach or failure described in Exhibit W has occurred, the Department shall within five Days of its determination deliver to the Concessionaire written notice thereof describing the breach or failure in reasonable detail. Within five Days of receipt of the Department’s notice, the Concessionaire shall investigate the Department’s claim and provide a written report as to whether the breach or failure in performance has in fact occurred and describing any mitigating factors. Within 10 Days after receiving the Concessionaire’s report, the Department shall deliver to the Concessionaire a written determination setting forth the number of Non-Compliance Points, if any, the Department, in its sole discretion, has assessed to the Concessionaire.

Section 11.02 Assessment of Non-Compliance Points and Cure Periods

The Department may assess Non-Compliance Points as described in Section 11.03 and Section 11.04 subject to the following terms and conditions.

(a) The Non-Compliance Points system will apply commencing on the later of (i) the Service Commencement Date and (ii) the fifth anniversary of the “Service Commencement Date” as such term is defined in the Capital Beltway Comprehensive Agreement. In addition, there will be a phased introduction of the Non-Compliance Points system, and for the initial year that the Non-Compliance Points system is applicable, the thresholds for “Total Cumulative
Number of Uncured Points” specified on page 1 of Exhibit W will be increased by 50% for the first year, and over the period of the next five years such threshold will be reduced 10% per year such that the thresholds in Exhibit W apply.

(b) The Department will not assess points for the first instance of each breach or failure provided that the breach or failure is cured within the cure period stated in Exhibit W. However, the Department will provide notice to the Concessionaire that a breach or failure has occurred. Any subsequent instances of each breach or failure may be subject to the assessment of Non-Compliance Points.

(c) Exhibit W sets forth the maximum number of Non-Compliance Points the Department may assess for each breach or failure. The Department may, in its sole discretion, assess fewer Non-Compliance Points for a particular breach or failure based on the merits of the individual breach or failure.

(d) Where a single act or omission gives rise to more than one breach or failure as described in Exhibit W, the Department may assess Non-Compliance Points for only one breach or failure. In such circumstances, the Department may, in its sole discretion, assess Non-Compliance Points for the breach or failure with the highest maximum number of Non-Compliance Points shall apply.

(e) For breaches or failures classified as category A in Exhibit W, Non-Compliance Points shall be assessed only at the end of the applicable cure period if the Concessionaire has failed to cure within that time. Additional Non-Compliance Points may be assessed again at the end of each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Non-Compliance Points equals or exceeds the level described in Section 11.05(c).

(f) For breaches or failures classified as category B in Exhibit W, the Non-Compliance Points shall be assessed on the date of the written determination from the Department to the Concessionaire. Provided that the breach or failure is not then cured within the applicable cure period, Non-Compliance Points shall be assessed again at the end of the first and each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Non-Compliance Points equals or exceeds the level described in Section 11.05(c).

(g) For breaches or failures identified as category C in Exhibit W (no applicable cure period), the Non-Compliance Points shall be assessed on the date of the written determination from the Department to the Concessionaire.

(h) Any cure period specified in Exhibit W shall be extended day-for-day for any Delay Event that prevents performance of Work to cure a breach or failure.

(i) At every 10 year anniversary of the Agreement Date, or upon significant revision of the Technical Requirements, either party, by written notice to the other party at least 90 Days prior to such anniversary reserves the right to request a review of the Non-Compliance Points.
system. Upon receiving the notice, both parties must review the existing Non-Compliance Point system in place and agree in writing to any revisions required to the system.

Section 11.03 Notification of Cure

When the Concessionaire determines it has cured any breach or failure for which the Department has assessed Non-Compliance Points, the Concessionaire shall deliver written notice to the Department. The Concessionaire’s written notice shall identify the breach or failure at issue and describe what steps were undertaken to cure it. The Department or its designee shall then promptly verify the cure through inspection or other means and provide to the Department a written certification of cure. The Department retains the right to verify independently that the breach or failure in performance has in fact been cured.

Section 11.04 Accumulation of Non-Compliance Points

(a) The total of uncured Non-Compliance Points assessed by the Department shall be monitored by the Department or its designee on an ongoing basis for the duration of the Operating Period.

(b) The cumulative total of cured and uncured Non-Compliance Points assessed by the Department shall be monitored in rolling 365 Day cycles from the time the breach has been cured for those breaches classified in categories A and B, and from the time the breach has occurred for those breaches classified in category C. At the end of each 365 Day cycle, the Non-Compliance Points assessed for that specific breach will be subtracted for the cumulative total number of Non-Compliance Points the Concessionaire has been assessed.

Section 11.05 Impact of Non-Compliance Points

(a) Increased Monitoring. If the Concessionaire is assessed 135 or more Non-Compliance Points during any 365 Day cycle or maintains 30 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.05, the Department may increase the level of monitoring of the Project in accordance with Section 10.04. The Concessionaire shall compensate the Department for its Allocable Costs incurred as a result of such increased level of monitoring. The Concessionaire may submit a cure plan describing specific actions the Concessionaire will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject.

(b) The Remedial Plan.

(i) If the Concessionaire is assessed 200 or more Non-Compliance Points during any 365 Day cycle or maintains 45 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.04, the Department may require the Concessionaire to prepare and submit a remedial plan for the Department’s approval. The remedial plan shall be delivered to the Department within 45 Days of its request. The remedial plan shall set forth a schedule
and describe specific actions the Concessionaire will undertake to improve its performance as demonstrated by its incurring no additional Non-Compliance Points and by reducing the total number of uncured Non-Compliance Points it has accumulated to date. Such actions may include but are not limited to improvements to Concessionaire’s quality management practices, plans and procedures; changes in its organizational and management structures; increased monitoring and inspections; changes in key personnel; and the replacement of subcontractors.

(ii) If, after 180 Days following the implementation of the remedial plan, the Concessionaire can demonstrate that: (1) the remedial plan has reduced the number and frequency of Non-Compliance Points assessed as compared to the period prior to the implementation of the remedial plan; (2) the Concessionaire is complying in all material respects with the course of action described in the remedial plan; and (3) the Concessionaire has no uncured Non-Compliance Points, then the total number of Non-Compliance Points assessed over the course of the 180 Day period shall be reduced by 50%. If the rolling 365 Day cycle described in Section 11.04(b) ends at any time during the 180 Day period described herein, the total number of Non-Compliance Points the Concessionaire has cured during that 365 Day cycle shall carry over to the next 365 Day cycle. However, if the total number of Non-Compliance Points assessed over the course of the 180 Day period is reduced by 50% as described above, the total number of previously cured Non-Compliance Points that were carried over also shall be subtracted from the Concessionaire’s cumulative total number of assessed Non-Compliance Points.

(c) Default. If the Concessionaire: (1) fails to deliver to the Department the remedial plan within 45 Days of the Department’s request; or (2) fails to comply with the course of action set forth in the remedial plan and incurs a total of 245 Non-Compliance Points during any 365 Day cycle or maintains 68 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.04(a), the Department may notify the Concessionaire in writing that such failure is a breach of a material obligation hereunder, in which event such failure shall become a Concessionaire Default under Section 19.01(b) unless cured following such notice within the time period specified in Section 19.01(b).

Section 11.06 Disputes Regarding the Assessment of Non-Compliance Points

(a) The Concessionaire may object to the assessment of Non-Compliance Points or the amount of Non-Compliance Points assessed by delivering to the Department written notice of its objection within 10 Days of receipt of the Department’s written determination assessing the Non-Compliance Points at issue. Such notice shall set forth with specificity the grounds for the Concessionaire’s objection.

(b) The Department will reasonably consider the Concessionaire’s objections and Representatives of the Department and the Concessionaire will meet to discuss the matter within 30 Days after the Concessionaire has provided its written objection. If, at the conclusion of this 30 Day period, the Concessionaire still objects to the Department’s decision, it may pursue dispute resolution under Article 21.
(c) If for any reason the Concessionaire fails to deliver its written notice of objection within the time period specified in Section 11.06(a), the Concessionaire shall have waived its right to challenge the Department’s assessment of Non-Compliance Points.

ARTICLE 12.

PROJECT ENHANCEMENTS AND SAFETY COMPLIANCE ORDERS

Section 12.01 Project Enhancements by the Concessionaire

The Concessionaire will have the right, at its sole cost and expense, at any time after the Service Commencement Date, to design, develop, construct, operate and maintain Concessionaire Project Enhancements within the Project Right of Way, including any fundamental change in the dimensions, character, quality, location or position of all or any part of the Project; provided, that the Concessionaire will not undertake any such Project Enhancements unless all aspects thereof are approved in writing by the Department in its sole discretion, and the Concessionaire has entered into a Development Contract with the Department with respect to such Concessionaire Project Enhancement.

Section 12.02 Project Enhancements by the Department

(a) The Department will have the right from time to time after the Service Commencement Date, at its sole cost and expense, to design, develop, construct, operate and maintain Department Project Enhancements. The Department will have the right to design, develop, construct, operate and maintain Department Project Enhancements through one or more of the following mechanisms, as the Department selects from time to time in its sole discretion:

(i) use by the Department of its own personnel, materials and equipment;

(ii) contracting with third parties through requests for proposals, competitive bids, negotiations or any other lawful procurement process; and

(iii) authorizing and directing the Concessionaire, at the Department’s sole cost and expense, to undertake the Department Project Enhancements, through contracting for necessary traffic and revenue studies and all necessary planning, design, engineering, permitting, financial, right-of-way acquisition services, Utility Relocation, construction, installation, project management, operation, maintenance, repair and other work and services;

provided, that the Department will give the Concessionaire at least 60 Days’ written notice prior to initiating any procurement process referred to in clause (ii) above, during which time the Concessionaire will have the right, but not the obligation, to agree in writing to undertake the Department Project Enhancement on such terms and conditions as the Department and the Concessionaire will mutually agree upon; provided further, that if the Department and the Concessionaire fail to agree upon such terms and conditions within such 60 Day period, the Department will be entitled to proceed with any of the mechanisms set forth in clauses (i), (ii)
and (iii) of this Section 12.02(a) and will have no further liability or obligation to the Concessionaire except as otherwise expressly provided in this Agreement.

(b) If the Department authorizes and directs the Concessionaire to undertake a Department Project Enhancement pursuant to Section 12.02(a)(iii), then, in cooperation with the Department, as applicable, and subject to (i) the review and written approval by the Department in its sole discretion and (ii) without limiting the Concessionaire’s right to claim additional Concessionaire Damages, the Department making available to the Concessionaire sufficient funds, through monthly progress payments for work performed and costs incurred (plus an amount not to exceed 10% of such costs to pay the Concessionaire for reasonable and documented costs actually incurred to administer the work), including without limitation the costs of obtaining any Governmental Approvals necessitated by such Department Project Enhancement, in order to perform the work required to design, construct, operate and maintain such Department Project Enhancement, the Concessionaire will implement such Project Enhancement in accordance with the terms and provisions of this Agreement, and the Project Enhancement will be deemed a part of the Project and will become subject to all the terms and provisions of this Agreement as of the date the Concessionaire is required to assume such responsibility pursuant to this Section 12.02(b).

(c) The Department will have the right to enter upon the Project and the relevant rights of way for any purpose relating to Department Project Enhancements under this Section 12.02 to the extent reasonably necessary.

(d) The Department will have the right at any time (and without liability to the Concessionaire for any damages it may suffer, except as otherwise expressly provided in this Agreement) to perform planned and emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project; provided that

(i) the Department shall use reasonable commercial efforts to keep the Concessionaire informed of planned maintenance, renewal and replacement and repair activities which can reasonably be foreseen to impact activities on the Project;

(ii) the Department shall provide to the Concessionaire copies of and other information concerning the Department’s then current maintenance, renewal and replacement and repair program, upon the Concessionaire’s reasonable request; and

(iii) to the extent it relates to Department Project Enhancements, the provisions of Section 12.02 shall govern the Department’s liability to the Concessionaire therefor.

Section 12.03 Safety Compliance Orders

(a) The Department may, but is not obligated to, issue Safety Compliance Orders to the Concessionaire at any time after the Substantial Completion Date; provided, that no Safety Compliance Order may in any event order or direct the Concessionaire to do any act in violation of any Law. Compliance with a Safety Compliance Order by the Concessionaire will not be
deemed a default by the Concessionaire under the provisions of this Agreement or any other VDOT Project Agreement.

(b) The Department will use good faith efforts to inform the Concessionaire at the earliest practicable time of any circumstance or information relating to the Project which in the Department’s reasonable judgment is likely to result in a Safety Compliance Order. Except in the case of an Emergency, the Department will consult with the Concessionaire, prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts and the availability of Concessionaire resources to fund the Safety Compliance Work. The Department may, in its discretion, monitor and inspect the Project Assets at any time and from time to time for the purposes of determining whether any circumstances exist that warrant issuance of a Safety Compliance Order and giving the Department and the Concessionaire reports and recommendations related to such matters.

(c) If the Department issues a Safety Compliance Order, the Concessionaire will proceed, at its sole cost and expense, with the necessary environmental, design and construction Work to carry out the Safety Compliance Order as follows:

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

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

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

Section 12.04 Development of Other Facilities

(a) Except for the right of the Concessionaire to receive compensation set forth in Section 12.02, Section 12.04(d) (with respect to disruptions to the construction of the Project) Section 12.05 and Section 12.06(e) (with respect to disruptions to the construction of the Project), the State Parties will have the unlimited right, each in its sole discretion, at any time and without liability, to finance, develop, approve, construct, expand, improve, modify, upgrade, add capacity to, reconstruct, rehabilitate, restore, renew and replace any existing and new transportation or other facilities other than the Project (including, without limitation, free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, HOT/HOV lanes,
light rail, heavy rail, high-speed rail, freight rail and bus lanes) and exercise all of its authority to advise and recommend on transportation planning, development and funding, and to otherwise improve the GP Lanes and other roadways and structures within or adjacent to the I-95 Corridor (collectively, the “Department Projects”) outside the HOT Lanes, and whether nearby or otherwise located as to affect the Project, its operation and maintenance (including the costs and expenses thereof), its vehicular traffic and/or its revenues, provided, that:

(i) the Department will use diligent efforts to keep the Concessionaire informed of planned maintenance, renewal and replacement and repair activities of the Department Projects, which can reasonably be foreseen to impact the Work or traffic on the HOT Lanes; and

(ii) the Department will provide to the Concessionaire copies of and other information concerning the Department’s then current maintenance, renewal and replacement and repair program of the Department Projects, upon the Concessionaire’s reasonable request.

(b) The Department Projects include those facilities (i) owned or operated by the State Parties, including those owned or operated by a private entity pursuant to a contract with a State Party; (ii) owned or operated by a joint powers authority or similar entity to which a State Party is a member; (iii) owned or operated by any other Governmental Authority pursuant to a contract with a State Party, including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities and (iv) owned or operated by any other Governmental Authority (including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities) with respect to which a State Party has contributed funds, in-kind contributions or other financial or administrative support. The foregoing rights include the ability to institute, increase or decrease tolls or other fees and charges on such facilities or modify, change or institute new or different operation and maintenance procedures.

(c) The State Parties will have the right, without liability, to make discretionary and non-discretionary distributions of Federal and other funds for any transportation projects, programs and planning, and to exercise all of its authority to advise and recommend on transportation planning, development and funding on any project of its choosing.

(d) In no event will the taking of any action described in this Section 12.04 by a State Party (i) constitute a default by the Department pursuant to this Agreement or (ii) entitle the Concessionaire to Concessionaire Damages or other relief, except to the extent provided in (A) Section 12.02 with respect to any such existing and new transportation or other facilities that constitute Department Project Enhancements and (B) Section 12.05 with respect to Alternative Facilities; provided however, that if the construction activities associated with a Department Project directly cause a material disruption to the construction of the Project, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement; provided further however, that the Concessionaire will not be entitled to Concessionaire Damages or other relief if such material disruption is caused by a Concessionaire Party.
Section 12.05 Alternative Facilities.

(a) Additional Lanes.

(i) If the Department determines that Additional Lanes are in the State’s best interests, the Department will consult with the Concessionaire as to an appropriate strategy to implement such Additional Lanes. Prior to undertaking construction of Additional Lanes, the Department will give the Concessionaire the first right to submit a proposal to construct such Additional Lanes as new HOT Lanes and HOV Lanes at the Concessionaire’s sole cost as a Concessionaire Project Enhancement, so long as the Concessionaire demonstrates that (A) it has or can obtain sufficient funding (whether debt, equity, other sources of funds or combination thereof) for such Concessionaire Project Enhancement, and (B) it has or can obtain (with appropriate assistance from the Department) all required Governmental Approvals for such Concessionaire Project Enhancement.

(ii) The Concessionaire’s proposal to construct Additional Lanes as new HOT Lanes pursuant to a Concessionaire Project Enhancement will contain the information specified by the Department in writing and delivered to the Concessionaire. The Concessionaire’s failure to submit such a proposal within 120 Days of its receipt of the Department’s specifications as to the contents of the Concessionaire’s proposal will constitute a waiver of the Concessionaire’s right to submit a proposal pursuant to this Section 12.05. If a valid proposal is submitted by the Concessionaire, the Department will evaluate the Concessionaire’s proposal in accordance with the Department’s specifications within 90 Days of its submission. If the Concessionaire determines not to pursue the construction of such Additional Lanes as a Concessionaire Project Enhancement or the Department does not approve such Concessionaire Project Enhancement after review in accordance with the Department’s specifications, the Department may add Additional Lanes as a Department Project; and except as provided in clause (iv), such Additional Lanes will constitute a Compensation Event.

(iii) The Department will coordinate the activities described in Section 12.05(a) with the Concessionaire so as to minimize to the extent reasonably feasible the disruption to the Concessionaire’s construction, operation and maintenance of the Project and the generation of Toll Revenues.

(iv) Without limiting the applicability of clause (ii) above, the construction of Additional Lanes by or on behalf of the Department will not constitute a Compensation Event if the Highest Revenue Share IRR has been reached as of the date on which Commencement of Use of the Additional Lanes begins.

(b) Route One Improvements. The Route One Improvements will be treated as a Compensation Event unless the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Route One Improvements.
(c) **Occoquan Bridge Improvements.** The Occoquan Bridge Improvements will be treated as a Compensation Event unless the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Occoquan Bridge Improvements.

(d) **Southern HOT Lanes.** The Southern HOT Lanes will be treated as a Compensation Event unless (i) the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Southern HOT Lanes or (ii) the Concessionaire develops and constructs the Southern HOT Lanes as a Concessionaire Project Enhancement.

(e) **Procedures.**

(i) This Section 12.05(e) sets forth the Concessionaire’s sole and exclusive rights and remedies with respect to Alternative Facilities, and supersedes any provisions of this Agreement to the contrary; provided however, that if the construction activities associated with an Alternative Facility directly cause a material disruption to the construction of the Project Assets, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement. Such rights and remedies are subject to Section 12.05(e)(iii).

(ii) The Concessionaire Damages owing from the Department to the Concessionaire on account of an Alternative Facility will be equal to the Concessionaire Damages, if any, attributable to the Alternative Facility, but only to the extent that any such amount of any such reduction has not been previously recognized under Section 14.04. The foregoing Concessionaire Damages will be determined in the same manner, and subject to the same conditions and limitations, as for a Compensation Event under Section 14.01.

(iii) The Concessionaire acknowledges that each of CTB and the Department has a paramount public interest and duty to develop and operate whatever Department Projects it deems to be in the best interests of the State, and that the compensation to which the Concessionaire is entitled on account of Alternative Facilities is a fair and equitable remedy. Accordingly, the Concessionaire will not have, and irrevocably waives and relinquishes, any and all rights to institute, seek or obtain any injunctive relief or pursue any action, order or decree to restrain, preclude, prohibit or interfere with CTB’s or the Department’s rights to plan, finance, develop, operate, maintain, toll or not toll, repair, improve, modify, upgrade, reconstruct, rehabilitate, restore, renew or replace Alternative Facilities; provided, that the foregoing will not preclude the Concessionaire from enforcing its right to submit proposals for Additional Lanes and the Northern HOT Lanes pursuant to Section 12.05(a) and Section 12.06(a), respectively, its rights to compensation under this Section 12.05, or claiming any relief in respect of Compensation Events or Delay Events, if appropriate. The filing of any such action by the Concessionaire seeking to restrain, preclude, prohibit or interfere with CTB’s or the Department’s rights will automatically entitle CTB or the Department, as applicable, to recover all costs and expenses, including attorneys fees, of defending such action and any appeals.
Section 12.06 Northern HOT Lanes

(a) Concessionaire Project Enhancement - Concessionaire's Sole Cost.

(i) If the Department determines to develop the Northern HOT Lanes or if the Concessionaire proposes to develop, construct, operate and maintain Northern HOT Lanes, the Department and the Concessionaire will consult as to an appropriate strategy to implement the Northern HOT Lanes. The Concessionaire will have the first right to submit a proposal to the Department to develop, construct, operate and maintain the Northern HOT Lanes at the Concessionaire’s sole cost as a Concessionaire Project Enhancement, so long as the Concessionaire demonstrates that (i) it has or can obtain sufficient funding (whether debt, equity, or combination thereof) for the development, construction, operation and maintenance of the Northern HOT Lanes, (ii) it has or can obtain (with appropriate assistance from the Department) all required Governmental Approvals for the development, construction, operation and maintenance of the Northern HOT Lanes and (iii) neither the Department nor any other agency of instrumentality of the State will be required to make a contribution of public funds or provide any other sort of financial support or credit in connection with the development, construction, operation and maintenance of the Northern HOT Lanes, other than customary approvals and non-financial support from an issuer of bonds that will be used to finance the Northern HOT Lanes.

(ii) The Concessionaire’s proposal to develop, construct, operate and maintain the Northern HOT Lanes as a Concessionaire Project Enhancement will contain the information specified by the Department in writing and delivered to the Concessionaire. The Concessionaire’s failure to submit such a proposal within 120 Days of its receipt of the Department’s specifications of the contents of the Concessionaire’s proposal will constitute a waiver of the Concessionaire’s first right to submit a proposal pursuant to this Section 12.06. If the Concessionaire submits a valid proposal, the Department will evaluate the Concessionaire’s proposal in accordance with the Department’s specifications within 90 Days of its submission.

(b) Concessionaire Project Enhancement - Department Contribution. If the Concessionaire or the Department determine that the Department (or any other agency or instrumentality of the State) would be required to make a contribution of public funds or provide any other sort of financial support or credit in connection with the development and construction of the Northern HOT Lanes, the Concessionaire shall have the first right to submit a proposal to operate and maintain the Northern HOT Lanes as a Concessionaire Project Enhancement. In such event, the Concessionaire and the Department shall cooperate in the solicitation of proposals to develop and construct the Northern HOT Lanes through competitive processes in accordance with Law. The acceptance of any proposal to develop, construct, operate and maintain the Northern HOT Lanes shall be at the Department’s sole discretion.

(c) Department Project. If the Concessionaire determines not to pursue the development, construction, operation and maintenance of the Northern HOT Lanes as a Concessionaire Project Enhancement or the Department does not approve such Concessionaire
Project Enhancement after review in accordance with the Department’s specifications, the Department may develop, construct, operate and maintain the Northern HOT Lanes as a Department Project.

(d) The development, construction, operation and maintenance of the Northern HOT Lanes will not be a Delay Event or a Compensation Event, and the Concessionaire acknowledges and agrees that the Department may, in its sole discretion, develop additional general purpose lanes or HOV lanes in the area between the intersection of Eads Street and Interstate 395 and the current northern terminus of the I-95 Corridor, which is approximately one mile north of Route 648 (Edsall Road); provided however, that if the construction activities associated with the Northern HOT Lanes directly cause a material disruption to the construction of the Project, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement; provided further however, that the Concessionaire will not be entitled to Concessionaire Damages or other relief if such material disruption is caused by a Concessionaire Party.

ARTICLE 13.

DELAY EVENTS

Section 13.01 Delay Event Notice and Determination

(a) If the Concessionaire is affected by a Delay Event, it will give written notice to the Department within 30 Days following the date on which the Concessionaire first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Delay Event, (provided, that in the case of the same Delay Event being a continuing cause of delay, only one notice will be necessary) (a “Delay Event Notice”). Such Delay Event Notice will include (i) a detailed description of the Delay Event, (ii) details of the circumstances from which the Delay Event arises and (iii) an estimate of the duration of the delay in the performance of obligations pursuant to this Agreement attributable to such Delay Event and information in support thereof, if known at that time. The Concessionaire will also provide such further information relating to the Delay Event as the Department may reasonably require. The Concessionaire will bear the burden of proving the occurrence of a Delay Event and the resulting impacts.

(b) If for any reason the Concessionaire fails to deliver a Delay Event Notice within such 30-Day period, the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or right to time extensions or any other relief with respect to such Delay Event pursuant to this Agreement or any Project Agreement.

(c) Upon the occurrence of a Delay Event, the Concessionaire will promptly undertake efforts to mitigate the effects of such Delay Event, including all steps that would generally be taken in accordance with Good Industry Practice. The Concessionaire will promptly deliver to the Department an explanation of the measures being undertaken to mitigate the delay and other consequences of the Delay Event. The Concessionaire will notify the
Department within 30 Days following the date on which it first became aware (or should have become aware, using all reasonable due diligence) that such a Delay Event has ceased.

(d) Notwithstanding the occurrence of a Delay Event, the Concessionaire will continue its performance and observance pursuant to this Agreement of all of its obligations and covenants to be performed to the extent that it is reasonably able to do so and will use its reasonable efforts to minimize the effect and duration of the Delay Event. Without limiting the foregoing, the occurrence of a Delay Event will not excuse the Concessionaire from timely payment of monetary obligations pursuant to this Agreement, from compliance with Law, or from compliance with the Technical Requirements, except temporary inability to comply with the Technical Requirements as a direct result of the Delay Event.

(e) Subject to the Concessionaire giving the notice required in Section 13.01(a), a Delay Event will excuse the Concessionaire from whatever performance is prevented or delayed by the Delay Event referred to in such notice to the extent set forth in Section 13.02 and Section 13.03.

Section 13.02 Delay Events During the Construction Period

A Delay Event occurring during the Construction Period will excuse the Concessionaire from performance of its obligations to perform the Work pursuant to this Agreement but only to the extent that such obligations are directly affected by such Delay Event. In addition, during the Construction Period, extensions of milestones and/or activities identified on the Baseline Schedule for Delay Events affecting the Work will be made based on Time Impact Analysis, using the then current Baseline Schedule and taking into account impacts of the Delay Events on Critical Path items, in accordance with the Technical Requirements, and will extend the Guaranteed Substantial Completion Date, the Final Acceptance Deadline and the Long Stop Date. For avoidance of doubt, the Long Stop Date may be extended in accordance with this Agreement by reason of a Delay Event that occurs during the period after the Guaranteed Substantial Completion Date. If the Department and the Concessionaire cannot agree upon the extension, then either party will be entitled to refer the matter to the dispute resolution procedures in Article 21.

Section 13.03 Delay Events After Service Commencement

A Delay Event occurring after Service Commencement will only excuse the Concessionaire from performance of its obligations to perform O&M Work pursuant to this Agreement directly affected by such Delay Event.
ARTICLE 14.

COMPENSATION EVENTS; DEPARTMENT CHANGES; DEVIATIONS; NET COST SAVINGS

Section 14.01 Compensation Events

(a) Compensation Event Notice.

(i) If the Concessionaire is affected by a Compensation Event, it will give written notice to the Department within 30 Days following the date on which the Concessionaire first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Compensation Event (a "Compensation Event Notice"); provided, that, in the case of a Department Project Enhancement, a Compensation Event Notice must be given within 30 days following the Commencement of Use of such Department Project Enhancement. The Compensation Event Notice will set forth (A) the Compensation Event and its date of occurrence in reasonable detail, (B) the amount claimed as Concessionaire Damages and (C) details of the calculation thereof including a written analysis and calculation of the estimated Net Cost Impact, if any, and estimated Net Revenue Impact, if known at that time; provided that, if the amount of Concessionaire Damages and details of the calculation thereof are not available within the 30-Day notice period required herein, the Concessionaire may submit an estimate of the amount, or if known, the actual amount claimed as Concessionaire Damages and details of the calculation thereof no later than 60 Days from submission of the Compensation Event Notice; provided however, the Concessionaire may update the amount of claimed Concessionaire Damages and details thereof every 30 Days.

(ii) If, for any reason, the Concessionaire fails to deliver such written Compensation Event Notice within the foregoing time period, the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or right to Concessionaire Damages or other adverse effects on Gross Revenues or on costs, expenses and liabilities attributable to such Compensation Event.

(iii) After the Concessionaire submits a Compensation Event Notice, the Department may, but is not required to, obtain, at its sole cost, (A) a comprehensive report as to the Concessionaire’s estimate of the Net Cost Impact attributable to the Compensation Event and (B) from a traffic and revenue consultant a traffic and revenue study, prepared in accordance with Good Industry Practice, analyzing and calculating the estimated Net Revenue Impact attributable to the Compensation Event. Within 90 Days after receiving a Compensation Event Notice and the supporting documentation required by Section 14.01(a)(i), the Department will provide to the Concessionaire a copy of such reports as it has elected to obtain. If the Department disagrees with the entitlement to or amount of Concessionaire Damages claimed by the Concessionaire, the Concessionaire and Department will commence good faith negotiations to resolve the Dispute within 120 Days after the delivery of the Compensation Event Notice. If the Dispute cannot be
resolved within such 120 Days, either party may submit the Dispute for resolution pursuant to Article 21.

(b) Concessionaire Damages Determination.

(i) Concessionaire Damages with respect to any Compensation Event will be calculated based on the sum of (A) any adverse Net Cost Impact and (B) any adverse Net Revenue Impact for each year that there is an impact attributable to such Compensation Event; provided, that, subject to Section 14.01(c), any Net Cost Savings and positive Net Revenue Impact attributable to such Compensation Event will be used to decrease the amount of Concessionaire Damages. The calculation of Concessionaire Damages will be based on the difference in the projected cost and revenue related to the Project immediately prior to the occurrence of the Compensation Event and the projected cost and revenue related to the Project after taking into account the impact of the Compensation Event.

(ii) Following the calculations pursuant to Section 14.01(b)(i), the Concessionaire will incorporate such calculations into the proposed Base Case Financial Model Update and will provide such proposed Base Case Financial Model Update to the Department pursuant to Article 6.

(iii) The Concessionaire Damages will be net of all applicable insurance proceeds payable to the Concessionaire or its Contractors associated with the Compensation Event (or that would have been payable to the Concessionaire or its Contractors but for the failure by the Concessionaire or its Contractors to comply with the insurance requirements set forth in Section 14.01(b)(v) and Article 17), except as any payment of such insurance proceeds is affected by the bankruptcy or insolvency of the provider of such insurance, and will include all costs of asserting a Claim for such insurance proceeds and any increased insurance premium resulting from any such Claim; provided, that any increased insurance premium resulting from such Claim is certified in writing by the insurance provider of the Concessionaire or its Contractor, as applicable, prior to payment by the Department.

(iv) The Concessionaire will conduct all discussions and negotiations with the Department to determine any Concessionaire Damages and will share with the Department all data, documents and information pertaining thereto, on an Open Book Basis. As part of such negotiations, the parties will continue to refine and exchange, on an Open Book Basis, plans, drawings, configurations and other information related to the Compensation Event, traffic and revenue data, information, analyses and studies and financial modeling and quantifications of projected Net Cost Impacts, Net Revenue Impacts or Net Cost Savings, if any.

(v) The Concessionaire will take all steps reasonably necessary to mitigate the amount of the Concessionaire Damages attributable to, and other consequences of, any Compensation Event, including all steps that would generally be taken in accordance
with Good Industry Practice, including filing a timely claim for insurance and pursuing such claims.

(vi) If the Concessionaire and the Department are unable to agree upon the amount of the Concessionaire Damages within 120 Days after the delivery of the Compensation Event Notice, then either party, by written notice to the other party, may terminate the negotiations and request the Dispute be resolved in accordance with Article 21; provided, that the Department will proceed to make payment to the Concessionaire of the undisputed portion of the Concessionaire Damages in accordance with Section 14.01(b) without regard to the dispute resolution procedures.

(vii) The Concessionaire will not be entitled to Concessionaire Damages which are de minimis.

(c) Compensation Event Payment. Following a determination of the Concessionaire Damages pursuant to Section 14.01(b), the Department will compensate the Concessionaire for such Concessionaire Damages in such manner as agreed upon by the parties in writing or as may be determined through the dispute resolution procedures set forth in Article 21; provided, that:

(i) in the case of any lump sum payment of the Concessionaire Damages or any other payment schedule that differs from the projected timing of the Concessionaire Damages, the net present value of the Concessionaire Damages will be determined using the then appropriate risk adjusted discount rate(s), as agreed between the Department and the Concessionaire;

(ii) in the case of any payment method chosen other than an up-front lump sum payment or a payment that is based on the projected timing and amounts of the Concessionaire Damages, the payment method will yield an amount that will be equal to the present value of a lump sum payment, using appropriate risk adjusted discount rate(s) as agreed by the parties;

(iii) the amount and timing of payment of Concessionaire Damages related to a Compensation Event will take into account the ability of the Concessionaire, first, to obtain funding in relation to such Concessionaire Damages in accordance with Section 14.01(d) and, second, to have funds available in such time and in such amounts as are required to make current payments to third parties in respect of any portion of Net Cost Impact related to such Compensation Event; and

(iv) any Net Cost Savings or positive Net Revenue Impact attributable to such Compensation Event not included in the determination of Concessionaire Damages under the provisions of this Section 14.01 will be included in the Permit Fee calculated pursuant to the Permit Fee calculation, as agreed between the Department and the Concessionaire.

(d) Concessionaire Funding of Concessionaire Damages. If requested by the Department, the Concessionaire will use commercially reasonable efforts to obtain funding for a portion or the full amount of Concessionaire Damages; provided, however, that the
Concessionaire will not be obligated to obtain such funding if the Concessionaire, in its reasonable discretion, determines that obtaining such funding will diminish the Project Value, or to the extent such funding, combined with any payments from the Department, will not make funds available in such time and in such amounts as are required to make current payments to third parties as they are due or will become due in respect of any portion of Net Cost Impact included as part of such Concessionaire Damages. If the Concessionaire is able to obtain funding for all or part of the Concessionaire Damages, the Concessionaire will submit a funding proposal for the Department’s review and approval. Such funding proposal will identify the terms and conditions required to secure funding for such Concessionaire Damages, including any proposed payments by the Department. The Department will reject or accept the funding proposal within 30 Days of receipt of the funding proposal. If the funding proposal is accepted by the Department, the Department will issue a Change Order to implement the funding proposal and, to the extent such funding proposal secures financing for less than 100% of the Concessionaire Damages, the Change Order will provide funding for the remainder thereof on terms and conditions mutually agreed by the parties.

(e) **Sole Remedy and Release of Claims.**

(i) Without limiting the Concessionaire’s rights with respect to non-monetary relief for Delay Events, the Concessionaire Damages as determined according to this Section 14.01 will represent the sole right to compensation and damages for the adverse effects of a Compensation Event.

(ii) As a condition precedent to the Department’s obligation to compensate any portion of the Concessionaire Damages, following a determination of the Concessionaire Damages, the Concessionaire will execute a full, unconditional, irrevocable release, in form reasonably acceptable to the Department, of any Claims, Losses or other rights to compensation or other monetary relief associated with such Compensation Event, except for (A) the Claim and right to the subject Concessionaire Damages, (B) the Concessionaire’s right to non-monetary relief for a Delay Event and (C) the right to terminate this Agreement in accordance with Article 20 and to receive any applicable termination compensation.

(f) **Additional Provisions for Certain Compensation Events.**

(i) For the Compensation Event described in clause (k) of the definition thereof, the Concessionaire will be entitled to recover the Net Cost Impact for such Compensation Event; provided, however, that:

(A) in no event will the Concessionaire be entitled to submit a Claim if the Net Cost Impact of such Compensation Event does not equal or exceed $10 million per occurrence (“Claim Threshold”);

(B) if such Compensation Event meets the Claim Threshold, the Department will be solely responsible for the Net Cost Impact in excess of $10 million for such Compensation Event; provided, however, that the Concessionaire will be solely
responsible for the Net Cost Impact up to $10 million per occurrence for the first two Compensation Events that meet the Claim Threshold; and

(C) the Department will be responsible for the Net Cost Impact for such Compensation Events after the first two such Compensation Events occur that meet the Claim Threshold.

For the avoidance of doubt, the Concessionaire will be solely responsible for such Compensation Events with a Net Cost Impact under $10 million per occurrence.

(ii) For the Compensation Event described in clause (i) of the definition thereof, the Concessionaire will be entitled to recover the Net Cost Impact for such Compensation Event, provided, however, that:

(A) the Concessionaire will be solely responsible for the Net Cost Impact up to $5 million in the aggregate for such Compensation Event;

(B) the Department will be solely responsible for the Net Cost Impact in excess of $5 million but less than or equal to $10 million for such Compensation Event; and

(C) the parties will share evenly the Net Cost Impact in excess of $10 million for such Compensation Event.

The provisions of this Section 14.01(f)(ii) apply to each event and not in the aggregate.

Section 14.02 Department Changes

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

(i) is not in compliance with Law;

(ii) would contravene an existing Governmental Approval and such contravention cannot be corrected by the issuance of a further or revised Governmental Approval;

(iii) would cause an insured risk to become uninsurable; or

(iv) would give rise to a material and adverse health or safety issue.
(b) **Request for Change Proposal.**

(i) If the Department desires to initiate a Department Change, then the Department will issue a Request for Change Proposal. The Request for Change Proposal will set forth the nature, extent and details of the proposed Department Change.

(ii) Within 21 Days following Concessionaire’s receipt of the Request for Change Proposal, the Concessionaire will provide the Department with a preliminary written response, and within a reasonable time thereafter (not to exceed 30 Days or such other timeframe agreed upon between the Concessionaire and the Department), with a definitive written response (a “Change Proposal”), as to whether, in the Concessionaire’s opinion, the Department Change constitutes a Compensation Event, and if so, (A) a detailed assessment of the Net Revenue Impacts and Net Cost Impacts, to the extent known at that time, (B) the effect of the proposed Department Change on the Concessionaire’s performance of its obligations pursuant to this Agreement, to the extent known at the time, (C) the proposed Base Case Financial Model Update and (D) a TIA if applicable.

(iii) Within 30 Days following the delivery of the Change Proposal, the Concessionaire and the Department will exercise good faith efforts to negotiate a mutually acceptable Change Order.

(iv) The Department will pay the Concessionaire’s Allocable Costs for preparing a Change Proposal and conducting preliminary work to respond to a Request for Change Proposal at the Department’s request. Upon payment of such Allocable Costs, the Department will own all Work Product included in the Change Proposal.

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

(i) a Change Order setting forth, among other things, the adjusted scope of the Work and adjustments to the Baseline Schedule and the Technical Requirements, if applicable, will have been mutually agreed upon between the Department and the Concessionaire and issued by the Department;

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

(iii) all necessary Governmental Approvals to commence the Work required to implement the Department Change have been obtained.
(d) Disputed Work.

(i) If the Department and the Concessionaire agree that the Work in question constitutes a Department Change and are unable to reach an agreement on a Change Order, the Department may deliver to the Concessionaire a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question, notwithstanding such disagreement. Such Directive Letter will include any changes to the Technical Requirements, if applicable, necessary to proceed with the Work covered by the Directive Letter.

(ii) If the parties disagree whether the Work in question constitutes a Department Change, the Department will have the right to issue a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question, and the Concessionaire will proceed with such work. Such Directive Letter will include any changes to the Technical Requirements necessary to proceed with the Work covered by the Directive Letter.

(iii) Upon receipt of a Directive Letter under (i) or (ii) above, the Concessionaire will implement and perform the Work in question as directed by the Department and the Department will make payments to the Concessionaire for such Work performed pursuant to Section 14.02(e).

(iv) To the extent there are any Disputes related to any Directive Letter issued under Section 14.02(d), such Disputes will be subject to the dispute resolution procedures set forth in Article 21.

(e) Payments for Directive Letter Work. If the Department issues a Directive Letter to the Concessionaire pursuant to Section 14.02(d), the Department will make payments to the Concessionaire on a monthly basis for the Work in question for the reasonable Allocable Costs of the Work in question, subject to subsequent adjustment through the dispute resolution procedures set forth in Article 21.

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

Section 14.03 Concessionaire Requests for Deviations

(a) The Concessionaire may request the Department to approve, in the Department’s sole discretion, Deviations by submitting to the Department a written change request in a form approved by the Department. At a minimum, the following information will be submitted with each such change request:

(i) a statement that the request is submitted pursuant to this Section 14.03(a);
(ii) a statement concerning the basis for the request, benefits to the Department or the Project and an itemization of the contract items and requirements affected by the request;

(iii) a detailed estimate of the time and/or cost savings and impacts on Gross Revenues;

(iv) proposed specifications and recommendations as to the manner in which the requested changes are to be accomplished; and

(v) the time by which the request must be approved so as to obtain the maximum cost-effectiveness.

(b) The Department may consider and approve or disapprove, in its sole discretion, any such request, and the Concessionaire will bear the burden of persuading the Department that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice and achieves the Department’s applicable safety standards and criteria. No Deviation will exist or be effective unless and until approval thereof is expressly provided in writing by the Department. Approval of a submission containing a Deviation will not constitute approval of the Deviation unless and until the Department expressly and specifically approves the Deviation in writing pursuant to the terms of this Section 14.03(b). The Department’s decision will not be subject to the dispute resolution procedures of Article 21. If not previously communicated, the Department will provide within 10 Days after a request by the Concessionaire its rationale, in reasonable detail, for any disapproval of a Deviation proposed by the Concessionaire.

(c) Unless otherwise agreed, the Concessionaire will be solely responsible for payment of any increased costs, for any losses of Gross Revenues, for all Allocable Costs and for any schedule delays or other impacts resulting from the implementation of a Deviation requested by the Concessionaire that has been approved by the Department.

Section 14.04 Net Cost Savings or Positive Net Revenue Impact

(a) Whenever it believes a Net Cost Saving or positive Net Revenue Impact exists or will arise from a Compensation Event, a Deviation, or a Department waiver of Non-Conforming Work, the Department at its election may, and the Concessionaire will, deliver to the other party written notice thereof. The notice will set forth (i) the Compensation Event and its date of occurrence in reasonable detail, the proposed or approved Deviation, or the Non-Conforming Work, as the case may be, (ii) a preliminary estimate, if then known, of the amount of the Net Cost Saving or positive Net Revenue Impact and (iii) a brief, preliminary written analysis and calculation thereof. Such notice will be brought within 30 Days after a claim for Concessionaire Damages or, if no claim is brought by the Concessionaire for Concessionaire Damages, within 30 Days after the occurrence of the Compensation Event or, in the case of a Project Enhancement, within 30 Days after the Commencement of Use of the Project Enhancement.
(b) If the Concessionaire gives such a notice to the Department, the parties will follow the terms and procedures set forth in Section 14.01 as if they applied to the determination of the Net Cost Saving or positive Net Revenue Impact.

(c) Following a determination of the Net Cost Saving or positive Net Revenue Impact by mutual agreement or the dispute resolution procedures set forth in Article 21, the Department will decide on the percentage share of each that it desires as compensation, in any event not to exceed 50% of the applicable Net Cost Savings and/or positive Net Revenue Impact. The Concessionaire will compensate the Department in an amount equal to the selected percentage in the manner provided for in Section 14.01(c); provided that when Concessionaire Damages and Net Cost Saving or positive Net Revenue Impact are payable in the same time period, such amounts shall be netted to the extent possible. The parties will select one or any combination of the following methods of compensation:

(i) through monthly payments of the selected percentage of the Net Cost Saving or positive Net Revenue Impact in accordance with a written payment schedule determined by mutual agreement or through the dispute resolution procedures set forth in Article 21;

(ii) by a lump sum payment of the selected percentage, payable as determined by mutual agreement or through the dispute resolution procedures set forth in Article 21; or

(iii) in such other manner as agreed upon by the parties in writing.

ARTICLE 15.

INDEMNIFICATION

Section 15.01 Indemnities of the Concessionaire

In addition to the Concessionaire’s indemnity obligations as set forth elsewhere in this Agreement, the Concessionaire will indemnify, defend, and hold harmless a State Indemnitee from and against any Losses actually suffered or incurred by such State Indemnitee (except to the extent such Losses are solely caused by the misconduct, negligence or other culpable act, error or omission of a State Indemnitee), due to Third-Party Claims that are based upon:

(a) any actual or alleged failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement or a Project Agreement or, any actual or alleged breach by the Concessionaire of its representations or warranties set forth herein or therein;

(b) any actual or alleged misconduct, negligence or other culpable act, error or omission of a Concessionaire Party in connection with the Project;
(c) any actual or alleged patent or copyright infringement or other actual or alleged improper appropriation or use by a Concessionaire Party of trade secrets, patents, proprietary information, know-how, trade marked or service marked materials, equipment, devices or processes, copyright rights or inventions in connection with the Project;

(d) any actual or alleged inverse condemnation, trespass, nuisance or similar taking of or harm to real property committed or caused by a Concessionaire Party in connection with the Project arising from any actual or alleged (i) failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement; (ii) breach by Concessionaire of its representations or warranties set forth in this Agreement or (iii) misconduct, negligence or other culpable act, error or omission of a Concessionaire Party; provided, however, that the Concessionaire will not be required to indemnify, defend or hold harmless a State Indemnitee from and against any Losses actually suffered or incurred by such State Indemnitee due to Third-Party Claims that are based upon any actual inverse condemnation arising from the establishment of the Project Right of Way as identified in the NEPA Documents and any other real property or real property rights outside the Project Right of Way acquired pursuant to Section 8.05(b);

(e) any actual or alleged violation of any Federal or state securities or similar law by any Concessionaire Party, or the Concessionaire’s failure to comply with any requirement necessary to preserve the tax exempt status of interest paid on the PABs;

(f) any actual or alleged Tax attributable to any Transfer of the Concessionaire’s Interest or any part thereof; or

(g) any actual or alleged claim for brokerage commissions, fees or other compensation by any Person who acted on behalf of the Concessionaire, its Affiliates or their respective Representatives in connection with this Agreement or a Project Agreement, any Transfer of the Concessionaire’s Interest or any part thereof.

Section 15.02 Defense and Indemnification Procedures

(a) In the event that any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against the Department, it will as promptly as practicable notify the Concessionaire in writing of such Claim, and such notice will include a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim; provided, that any failure to give such prompt notice will not constitute a waiver of any rights of the Department, except to the extent that the rights of the Concessionaire are actually and materially prejudiced thereby. If any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against a State Indemnitee other than the Department, a failure by such State Indemnitee to give the Concessionaire prompt notice in writing of such Claim together with a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim, will constitute a waiver of any rights of such State Indemnitee to indemnification to the extent, and only to the extent, that the rights of the Concessionaire are actually and materially prejudiced thereby.
(b) The Concessionaire will be entitled and obligated to appoint counsel of its choice at the expense of the Concessionaire to represent a State Indemnitee in any action for which indemnification is sought (in which case the Concessionaire will not thereafter be responsible for the fees and expenses of any separate counsel retained by that State Indemnitee except as set forth below); provided, that such counsel will be satisfactory to such State Indemnitee. Notwithstanding the Concessionaire’s appointment of counsel to represent a State Indemnitee in any action, such State Indemnitee will have the right to employ separate counsel, and the Concessionaire will bear the reasonable fees, costs and expenses of such separate counsel, if:

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

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

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

(iv) the Concessionaire authorizes the State Indemnitee to employ separate counsel at the Concessionaire’s expense.

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

ARTICLE 16.

HAZARDOUS SUBSTANCES

Section 16.01 General Obligations

(a) The Concessionaire will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and/or disposal of any Hazardous Substances the presence of which constitutes a Hazardous Environmental Condition that are discovered on, in or under the Project Right of Way on which the Work is performed, after the earlier to occur of (i) the issuance of an LNTP (but limited to the portion of the Project Right of Way on which the LNTP Work is performed pursuant to such LNTP), (ii) issuance of a Construction Notice to Proceed, or (iii) the Service Commencement of the Project in accordance with this Agreement.
(b) After the earlier to occur of (i) the issuance of an LNTP (but limited to the portion of the Project Right of Way on which the LNTP Work is performed pursuant to such LNTP), (ii) the issuance of the Construction Notice to Proceed, or (iii) the Service Commencement of the Project, if the Concessionaire encounters any Hazardous Environmental Condition that must be managed, treated, handled, stored, monitored, removed, transported or disposed of (collectively, “Remedial Actions”), then the Concessionaire will promptly notify the Department. In the case of Hazardous Environmental Conditions that are attributable to Known Pre-Existing Hazardous Substances, the Concessionaire will thereafter proceed with such Remedial Actions in accordance with the Concessionaire’s Environmental Management Plan. In the case of all other Hazardous Environmental Conditions and to the extent not covered by the Environmental Management Plan, the Concessionaire will develop a Remedial Action Plan setting out the scope of the Remedial Actions that the Concessionaire proposes to take in relation to the relevant Hazardous Environmental Condition, such actions to include, but not be limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Substances and submitting copies of such data and reports to the Department for its review and approval, (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Substances (iii) preparing and obtaining Governmental Approvals for remedial action plans, including Department approval, (iv) carrying out the Remedial Action Plan, including, as necessary, disposal of the Hazardous Substances and (v) timely informing the Department of all such actions.

(c) Before any Remedial Actions are taken that would inhibit the Department’s ability to ascertain the nature and extent of the Hazardous Environmental Condition, the Concessionaire will afford the Department the opportunity to inspect areas and locations that require Remedial Actions; provided, that in the case of a sudden release of any Hazardous Substances, the Concessionaire may take all reasonable actions necessary to stabilize and contain the release without prior notice or inspection, but will promptly notify the Department of the sudden release and its location.

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

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

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

Section 16.02 Pre-Existing Hazardous Substances

(a) The Department will pay, to the extent permitted by Law, the Concessionaire for the Concessionaire’s Allocable Costs for Remedial Actions with respect to any Unknown Pre-Existing Hazardous Substances and Third-Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition. To the extent the Concessionaire recovers costs from any available reimbursement program or third parties with respect to Unknown Pre-Existing Hazardous Substances or Third-Party Hazardous Substances, the Concessionaire will pay such costs to the Department, less the Allocable Costs incurred by the Concessionaire in seeking recovery in accordance with Section 16.01(e). The Concessionaire will furnish to the Department documentation supporting the amount recovered from any reimbursement program or third parties and the Allocable Costs incurred by the Concessionaire in pursuing such recovery.

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

(c) At all times during the Term, the Concessionaire will provide cost estimates with respect to such Remedial Actions which may be paid by the Department, for the Department’s review and approval prior to proceeding with any such Remedial Actions, provided, that in the case of a sudden release of any Hazardous Substances, the Concessionaire may take all reasonable actions necessary to stabilize and contain the release without prior submission of such cost estimates. If the Department has not responded to a request for such approval pursuant to this Section 16.02(c) within 21 Days after the Department’s acknowledgement of receipt (or in the case of an emergency a reasonably appropriate shorter period), the request will be deemed to be approved, except to the extent matters deviate from applicable Technical Requirements, or Law.

Section 16.03 Concessionaire Indemnifications Regarding Hazardous Substances

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

(i) Hazardous Substances introduced to or brought onto the Project Right of Way by a Concessionaire Party;

(ii) failure of any Concessionaire Party to comply with any requirement of this Agreement or any other Project Agreement relating to Hazardous Substances (including any failure to perform any Remedial Action required in accordance with Section 16.01) or to otherwise comply with applicable Environmental Laws and Governmental Approvals; or

(iii) the exacerbation, release, spreading, migration, or toxicity of Hazardous Substances due to the negligence, recklessness, or willful misconduct of a Concessionaire Party.

(b) The Concessionaire will defend such Third-Party Claims in accordance with Section 15.02.

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

Section 16.04 Generator Status

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

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

ARTICLE 17.

INSURANCE; PERFORMANCE SECURITY

Section 17.01 Insurance Coverage Required

(a) Required Insurance for the Construction Period. The Concessionaire will provide and maintain at its own expense, or cause the Design-Build Contractor to provide and maintain,
for the Construction Period the insurance coverages specified in Part 1 of the Insurance Requirements attached as Exhibit Y.

(b) Required Insurance for Operating Period. The Concessionaire will provide and maintain at its own expense, or cause the O&M Contractor to provide and maintain, for the Operating Period and for any time period following the Term’s expiration if the Concessionaire is required to return and perform any additional work, the insurance coverages specified in Part 2 of the Insurance Requirements and the Technical Requirements.

(c) Railroad Protective Liability Insurance. The Concessionaire will provide and maintain at its own expense, or cause to be provided and maintained, during the Term, railroad protective liability insurance as specified in the Insurance Requirements and the Technical Requirements or as may be required by any railroad in connection with Work across, under or adjacent to the railroad’s tracks or railroad right-of-way.

Section 17.02 General Requirements Applicable to Insurance

The insurances which the Concessionaire is required to maintain or cause to be maintained under Section 17.01:

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

(b) except for professional liability insurance, worker’s compensation insurance and employer’s liability insurance, the Department will be named as an additional insured on a primary, non-contributory basis;

(c) will not limit the Concessionaire’s liabilities and obligations pursuant to this Agreement, including the Concessionaire’s indemnification obligations;

(d) will be maintained with insurers that at the time coverage commences are authorized to do business in the State and have a current policyholder’s management and financial size category rating of not less than “A-: VIII” according to A.M. Best’s Financial Strength Rating and Financial Size Category, except as otherwise approved by the Department;

(e) will be on terms specified herein or otherwise approved by the Department (such approval not to be unreasonably withheld);

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

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

(h) other than for workers compensation insurance, employer’s liability insurance,
automobile liability insurance, property and business interruption insurance, professional liability
insurance and contractor pollution liability insurance, will be effected on a severability of interest
basis for the purposes of which the insurer accepts the term “insured” as applying to each of the
persons comprising the insured as if a separate policy of insurance had been issued to each of
them (subject always to the overall policy limit not being increased as a result);

(i) other than for professional liability insurance, worker’s compensation insurance,
employer’s liability insurance and property and business interruption insurance, will include
cross-liability clauses allowing one insured to bring a claim against another insured party;

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

(k) other than for workers compensation insurance, employer’s liability insurance,
automobile liability insurance, property and business interruption insurance, will contain a provision under which the insurer agrees that the failure of one insured
to observe and fulfill the terms of the policy will not prejudice the coverage of the other insureds;

(l) other than for workers compensation insurance, employer’s liability insurance,
commercial general liability insurance, excess liability insurance, contractor pollution liability
insurance and automobile liability insurance, have each policy endorsed to contain a standard
mortgagee clause to the effect that the Department and the other insureds will not be prejudiced
by an unintended and/or inadvertent error, omission or misdescription of the risk interest in
property insured under the policies, incorrect declaration of values, failure to advise insurers of
any change of risk interest or property insured or failure to comply with a statutory requirement;

(m) will not include defense costs within the limits of coverage or permit erosion of
coverage limits by defense costs, except that defense costs may be included within the limits of
coverage of professional and contractor pollution liability policies; and

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

Section 17.03 Proof of Coverage

The Concessionaire will deliver to the Department true and correct copies of policies,
material forms, endorsements and premium indications of each insurance policy certified by the
Concessionaire’s insurance broker (or as appropriate the Design-Build Contractor’s, the Lead
Engineering Contractor’s or the O&M Contractor’s broker) to be true and correct copies of such
policies, forms, endorsements and premium indications, as a condition to receiving the
applicable notices to proceed set forth in this Agreement, and annually thereafter no later than
ten Days prior to policy renewal or replacement. The Concessionaire will also deliver to the Department duplicate originals or copies of each Project-specific insurance policy and endorsements for the Project coverage of each other insurance policy certified by the Concessionaire’s insurance broker (or as appropriate the Design-Build Contractor’s, the Lead Engineering Contractor’s or the O&M Contractor’s broker) to be true and correct copies of the originals no later than 60 Days after receiving the applicable notices to proceed set forth in this Agreement and annually thereafter no later than 60 Days after policy renewal or replacement, and also whenever reasonably requested by the Department.

Section 17.04 Adjustments in Coverage Amounts

(a) All insurance coverage limits stipulated in Section 17.01(b), as well as deductibles and self-insured retentions, will be reviewed every three years and adjusted as appropriate, in line with such amounts that would be insured by a prudent business similar to, and undertaking similar activities to, the Concessionaire; provided, that no such review or adjustments will be required with respect to insurance coverage required for the Design-Build Work.

(b) In determining increases in limits and adjustments to deductibles or self-insured retentions, the parties will take into account (A) Claims and Loss experience for the Project, provided, that premium increases due to adverse Claims experience will not be a basis for justifying increased deductibles or self-insured retentions; (B) the condition of the Project, (C) the safety compliance and performance record for the Project; (D) then-prevailing Good Industry Practice for insuring comparable transportation projects; and (E) the provisions regarding unavailability of increased coverage set forth in Section 17.05.

(c) In connection with such review, the Concessionaire will deliver to the Department evidence that such insurance is in effect, together with the Concessionaire’s certification that such insurance is in line with amounts that would be insured by such a prudent business.

(d) Any Dispute regarding increases in limits or adjustments to deductibles or self-insured retentions will be resolved according to the dispute resolution procedures under Article 21.

Section 17.05 Unavailability of Insurance

(a) If any insurance required to be maintained pursuant to this Article 17 (including the limits, deductibles or any other terms under policies for such insurance) ceases to be available on a commercially reasonable basis, the Concessionaire will provide written notice to the Department accompanied by a letter from the Concessionaire’s insurance advisor stating that such insurance is unavailable anywhere in the global market on a commercially reasonable basis. Such notice will be given not later than 30 Days prior to the scheduled date for renewal of any such policy. Except to the extent attributable to the Concessionaire, or any Concessionaire Party upon receipt of such notice by the Department, the Concessionaire and the Department will immediately enter into good faith negotiations regarding the matters set forth in Section 17.05(c) and (d) below.
(b) The Concessionaire will not be excused from satisfying the insurance requirements of this Article 17 merely because premiums for such insurance are higher than anticipated. To establish that the required coverages (or required terms of such coverages, including insurance policy limits) are not available on commercially reasonable terms, the Concessionaire will bear the burden of proving either that (i) the same is not available at all in the global insurance and reinsurance markets or (ii) the premiums for the same have so materially increased over those previously paid for the same coverage that a reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are not justified by the risk protection afforded. For the purpose of clause (ii), the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry.

(c) In the event that the Concessionaire and the Department cannot reach a resolution acceptable to both parties within ten Days, the Concessionaire and the Department will make arrangements for the formation of an insurance panel consisting of the Concessionaire’s insurance advisor (or broker), the Department or its insurance advisor (or broker) and an independent insurance expert from a nationally recognized insurance brokerage firm, chosen by the Concessionaire and reasonably acceptable to the Department. Such independent expert will conduct a separate review of the relevant insurance requirements of this Article 17 and the Technical Requirements and the market for such insurance at the time, giving due consideration to the representations of both insurance advisors, and upon conclusion of such review will issue a written report stating whether such insurance is available or unavailable on a commercially reasonable basis.

(d) If the insurance expert concludes that such insurance is not available on a commercially reasonable basis, the insurance expert will provide a written recommendation (which will include the amount and type of insurance which is available upon a commercially reasonable basis) not less than 15 Days before the date for renewal of such insurance. The Concessionaire will, prior to the expiration of the insurance then in effect, obtain the insurance required by this Article 17 as adjusted in accordance with such recommendation.

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

Section 17.06 Failure to Obtain Insurance Coverage

(a) If in any instance the Concessionaire has not performed its obligations respecting insurance coverage set forth in this Agreement (as may be adjusted in accordance with Section 17.05) or is unable to enforce and collect any such insurance for failure to assert Claims in accordance with the terms of the insurance policies, then for purposes of determining the Concessionaire’s liability and the limits thereon or determining reductions in compensation due from the Department to the Concessionaire on account of available insurance, the Concessionaire will be treated as if it has elected to self-insure up to the full amount of insurance coverage which
would have been available had the Concessionaire performed such obligations and not committed such failure.

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

Section 17.07 Restoration; Insurance Proceeds

(a) If all or any part of any of the Project Assets will be destroyed or damaged during the Term in whole or in part by fire or other casualty of any kind or nature (including any casualty for which insurance was not obtained or obtainable), ordinary or extraordinary, foreseen or unforeseen, the Concessionaire will:

(i) give the Department notice thereof promptly after the Concessionaire receives actual notice of such casualty

(ii) except (A) in the case of destruction or damage caused by a Compensation Event (in which case the provisions of Section 14.01 will apply) or (B) as otherwise provided in Section 20.03, at its sole cost and expense (whether or not insurance proceeds, if any, are equal to the estimated cost of repairs, alterations, restorations, replacement and rebuilding (the “Casualty Cost”)), proceed diligently to restore the Project to its pre-casualty condition;

(iii) deposit all insurance proceeds received by the Concessionaire in connection with any restoration with a Depository (such insurance proceeds, together with any interest earned thereon, the “Restoration Funds”); provided, that the procedures of this Section 17.07(a)(iii) will only apply to casualty events for which the cost of restoration exceeds $5,000,000, adjusted annually by the percentage increase in CPI.

(b) Subject to Section 17.07(a)(ii), if the Concessionaire (i) fails or neglects to commence the diligent restoration of the Project or the portion thereof so damaged or destroyed, (ii) having so commenced such restoration, fails to diligently complete the same in accordance with the terms of this Agreement or (iii) prior to the completion of any such restoration, this Agreement expires or terminates in accordance with the terms of this Agreement, the Department may, but will not be required to, complete such restoration at the Concessionaire’s expense and will be entitled to be paid out of the Restoration Funds for the relevant restoration costs incurred by the Department. Subject to Section 17.07(a)(ii), in any case where this Agreement will expire or be terminated prior to the completion of the restoration, the Concessionaire will (A) account to the Department for all amounts spent in connection with any restoration which was undertaken, (B) immediately pay over or cause the Depository to pay over to the Department the remainder, if any, of the Restoration Funds received by the Concessionaire prior to such termination or cancellation and (C) pay over or cause the Depository to pay over to the Department, within five Business Days after receipt thereof, any Restoration Funds received by the Concessionaire or the
Depositary subsequent to such termination or cancellation. The Concessionaire’s obligations under this Section 17.07(b) will survive the expiration or termination of this Agreement.

(c) Subject to the satisfaction by the Concessionaire of all of the terms and conditions of this Section 17.07, the Concessionaire will cause the Depositary, with prior written notice to the Department, to pay to the Concessionaire from time to time, any Restoration Funds, but not more than the amount actually collected by the Depositary upon the loss, together with any interest earned thereon, to be utilized by the Concessionaire solely for the restoration, such payments to be made as follows:

(i) prior to commencing any restoration, the Concessionaire will furnish to the Department for its approval the estimated cost, estimated schedule and detailed plan for the completion of the restoration, each prepared by an architect or engineer;

(ii) the Restoration Funds will be paid to the Concessionaire in installments as the restoration progresses, subject to Section 17.07(c)(iii), based upon requisitions to be submitted by the Concessionaire to the Depositary, with a copy to the Department, in compliance with Section 17.07(d), showing the cost of labor and materials purchased for incorporation in the restoration, or incorporated therein since the previous requisition, or the amounts payable or paid to the Contractor, as the case may be, and due and payable or paid by the Concessionaire; provided, that if any Lien caused by a Concessionaire Party is filed against the Project or any part thereof in connection with the restoration (other than a Permitted Encumbrances (but not including clause (c) of the definition thereof)), the Concessionaire will not be entitled to receive any further installment until such Lien is satisfied or discharged (by bonding or otherwise); provided further, that notwithstanding the foregoing, but subject to the provisions of Section 17.07(c)(iii), the existence of any such Lien will not preclude the Concessionaire from receiving any installment of Restoration Funds so long as such Lien will be discharged with funds from such installment and at the time the Concessionaire receives such installment the Concessionaire delivers to the Department and the Depositary a release of such Lien executed by the holder of such Lien and in recordable form;

(iii) the amount of each installment to be paid to the Concessionaire will be the aggregate amount of Casualty Costs theretofore incurred by the Concessionaire minus the aggregate amount of Restoration Funds theretofore paid to the Concessionaire in connection therewith; provided, that all disbursements to the Concessionaire will be made based upon an architect’s or engineer’s certificate for payment in accordance with industry standards, and disbursements may be made for advance deposits for materials and Contractors to the extent that such disbursements are customary in the industry and that the unapplied portion of the funds held by the Depositary, together with other funds available to the Concessionaire for such Restoration, as certified by the Concessionaire, are sufficient to complete the restoration; and

(iv) except as provided in Section 17.07(b), upon completion of and payment for the restoration by the Concessionaire, subject to the rights of any Collateral Agent, the Depositary will pay the balance of the Restoration Funds, if any, to the Concessionaire;
provided, that if the insurance proceeds are insufficient to pay for the restoration (or if there will be no insurance proceeds), the Concessionaire will nevertheless be required to make the restoration and provide the deficiency in funds necessary to complete the restoration as provided in Section 17.07(a)(iii).

(d) The following will be conditions precedent to each payment made to the Concessionaire as provided in Section 17.07(c):

(i) the Concessionaire will have furnished the Department with estimates of costs and schedule and a detailed plan for the completion of the restoration, as provided for in Section 17.07(c)(i);

(ii) the Concessionaire will have furnished the Department a certificate stating that the materials and other items which are the subject of the requisition have been delivered to the Project (except with respect to requisitions for advance deposits permitted under Section 17.07(c)(iii)), free and clear of all Liens (other than Permitted Encumbrances), and no unsatisfied or unbonded mechanic’s or other Liens have been claimed, except for any Lien that will be discharged, by bonding or otherwise, with funds to be received pursuant to such requisition (provided, that a release of such Lien is delivered to the Depositary in accordance with Section 17.07(c)(ii));

(iii) the restoration will be carried out under the supervision of the relevant architect or engineer, who is licensed in the State and has met all of the requirements of the Virginia Department of Professional and Occupational Regulation applicable to an architect or engineer and who may be a licensed employee of the Concessionaire or a Contractor, and there will be submitted to the Depositary and the Department the certificate of such architect or engineer stating that:

(A) the sum then requested to be withdrawn either has been paid by the Concessionaire or is due and payable to Contractors, engineers, architects or other Persons (whose names and addresses will be stated), who have rendered or furnished services or materials for the work and giving a brief description of such services and materials and the principal subdivisions or categories thereof and the several amounts so paid or due to each of such Persons in respect thereof, and stating in reasonable detail the progress of the work up to the date of such certificate;

(B) no part of such expenditures has been made the basis, in any previous requisition (whether paid or pending), for the withdrawal of Restoration Funds or has been made out of the Restoration Funds received by the Concessionaire;

(C) the sum then requested does not exceed the value of the services and materials described in the certificate;

(D) other than amounts for disbursements for advance deposits for materials and Contractors, the work relating to such requisition has been performed in accordance with this Agreement;
(E) the balance of the Restoration Funds held by the Depositary or available from other sources will be sufficient upon completion of the restoration to pay for the same in full, and stating in reasonable detail an estimate of the cost of such completion; and

(F) in the case of the final payment to the Concessionaire, the restoration has been completed in accordance with this Agreement.

(e) If the Concessionaire obtains Performance Bonds or performance Letters of Credit related to a restoration (which the Concessionaire may or may not obtain in its discretion), the Concessionaire will name the Department and the Concessionaire and the Collateral Agent, as their interests may appear, as additional obligees or transferee beneficiaries (as applicable), and will deliver copies of any such bonds or letters of credit to the Department promptly upon obtaining them. The Department will only have the right to exercise remedies under any such bonds or letters of credit so long as the Concessionaire or a Lender is not pursuing remedies thereunder.

(f) The requirements of this Section 17.07 are for the benefit only of the Department, and no Contractor or other Person will have or acquire any claim against the Department as a result of any failure of the Department actually to undertake or complete any restoration as provided in this Section 17.07 or to obtain the evidence, certifications and other documentation provided for herein.

(g) Restoration Funds deposited with a Depositary will be invested and reinvested in direct obligations of and obligations fully guaranteed by, the United States of America or any agency or instrumentality of the United States of America, the obligations of which are backed by the full faith and credit of the United States of America, or in other “permitted investments” under the Project Financing Agreements, and all interest earned on such investments will be added to the Restoration Funds.

(h) The Department acknowledges and agrees that any Restoration Funds not applied to a restoration as provided in this Section 17.07 will be subject to the Lien or Liens of any Collateral Agent.

Section 17.08 Performance Security

(a) Performance Security – Equity Funding Guaranties. The Concessionaire will cause each Equity Member to provide an equity funding guaranty from each of the Fluor Guarantor and the Transurban Guarantor (each, an “Equity Funding Guaranty”) which guarantees the funding of capital contributions of the Equity Members in accordance with the terms of the Equity Funding Agreements. Subject to the provisions of the Direct Agreement, the Project Financing Agreements will include a provision granting the Department the right to direct the Collateral Agent to draw upon the applicable Equity Funding Guaranty with respect to any amounts that the relevant Equity Member has failed to fund when due and payable (whether at the scheduled date or upon acceleration upon an event of default under the Project Financing
Agreements), and that the proceeds of such draw will be deposited in a project account as designated by the Collateral Agent in accordance with the Project Financing Agreements.

(b) **Performance Security – Design-Build Letter of Credit.**

(i) The Concessionaire will require the Design-Build Contractor to furnish a Letter of Credit (the “Design-Build Letter of Credit”) in an amount not less than seven and one-half percent (7.5%) of the price of the Design-Build Contract. The Design-Build Letter of Credit will provide that it may be transferred by the Concessionaire to the Department, as beneficiary, with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the Design-Build Contract.

(ii) Upon the Concessionaire’s receipt from the Department of the Substantial Completion Certificate, the Design-Build Letter of Credit may be reduced to an amount not less than three percent (3%) of the price of the Design-Build Contract. If the Punch List has not been completed within 60 Days after the Final Acceptance Deadline, the Concessionaire agrees to draw on the Design-Build Letter of Credit at the written direction of the Department and to use the proceeds of such drawing to provide for the prompt completion of the items on the Punch List.

(c) **Performance Security – Design-Build Work Guarantee.** Concurrently with Financial Close or, if earlier, the commencement of Work under the Design-Build Contract, the Concessionaire will cause to be delivered to the Department, an executed copy of a guaranty agreement of the Fluor Guarantor, in substantially the form set forth in Exhibit F (the “Design-Build Work Guarantee”), in which the Fluor Guarantor guarantees the performance of the Design-Build Contractor’s obligations under the Design-Build Contract. In addition to and notwithstanding the Design-Build Work Guarantee required to be delivered pursuant to the preceding sentence, the Concessionaire will ensure that the Design-Build Contract will include customary provisions limiting the Design-Build Contractor’s liability to not less than 40% of the aggregate dollar value of the Work to be performed thereunder.

(d) **Additional Requirements**

(i) Unless otherwise specified in this Agreement, a draw on any Performance Security will not be conditioned on prior resort to any other security of, or provided for the benefit of, any Concessionaire Party. If the Department receives proceeds of a draw on any Performance Security in excess of the relevant obligation, the Department will promptly refund the excess to the Concessionaire (or to its designee) after all relevant obligations are satisfied in full.

(ii) The Concessionaire will obtain and furnish all Performance Security and replacements thereof at its sole cost and expense, and will pay all charges imposed in connection with the Department’s presentment of sight drafts and drawing against any Performance Security or replacements thereof.
(iii) In the event the Department makes a permitted assignment of its rights and interests under this Agreement, the Concessionaire will cooperate so that concurrently with the effectiveness of such assignment, either replacement Performance Security for, or appropriate amendments to, the outstanding Performance Security will be delivered to the assignee naming the assignee as replacement beneficiary, at no cost to the Concessionaire.

(iv) The obligations of the Concessionaire during the Term to reimburse the issuer for draws under any Performance Security may be secured by a Financing Assignment if it encumbers the entire Concessionaire’s Interest.

(e) Applicability to Project Enhancements and Major Maintenance. The Concessionaire will require its contractors to furnish the Major Maintenance Performance Security with respect to Project Enhancements and Major Maintenance during the Term if and to the extent required by the Project Financing Agreements or, if there are no Project Financing Agreements, as may be reasonably required by the Department. The Major Maintenance Performance Security will name the Department a permitted assignee or transferee beneficiary (as applicable), with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the O&M Contract.

ARTICLE 18.

OWNERSHIP AND ACCESS TO RECORDS

Section 18.01 Maintenance of Records

The Concessionaire will maintain or cause to be maintained proper books, records and accounts in which complete and correct entries will be made of its transactions in accordance with GAAP or any other generally accepted accounting standards which are acceptable to the Department. Such books and records will be maintained at a location situated within the contiguous United States of America as designated by the Concessionaire by delivery of notice of such location to the Department. Further, the Concessionaire will maintain or cause to be maintained such books, records and accounts in accordance with applicable Law, including Laws applicable to the Project as a result of the costs of the Project being financed in part with State funds, federal-aid funds and State bond proceeds.

Section 18.02 Public Records

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

(b) If the Concessionaire believes that any Work Product or any document subject to transmittal to or review by the Department under the terms of this Agreement or a Project Agreement contains proprietary or confidential information or trade secrets that are exempt or protected from disclosure pursuant to Law, the Concessionaire will use its reasonable efforts to identify such information prior to such transmittal or review and the Concessionaire and the Department will confer on appropriate means of ensuring compliance with such Law prior to transmittal or review. Upon the written request of either party, the Concessionaire and the Department will mutually develop a protocol for the transmittal, review and disclosure of Work Product or other documents produced or obtained by the Concessionaire so as to avoid violations of any Law and to protect, consistent with the requirements of Law, appropriate information from disclosure.

Section 18.03 Ownership of Work Product

(a) All Work Product (including records thereof in software form), including reports, studies, data, information, logs, records and similar terms, which is prepared or procured by or on behalf of the Department or its other contractors, whether before or after the Agreement Date, will be and remain the exclusive property of the Department; provided, that the Department will make available to the Concessionaire, without charge, and without representation or warranty of any kind, any documents in the possession of the Department relating to the planning, design, engineering and permitting of the Project and any Project Enhancement that the Concessionaire elects to or is directed to carry out.

(b) Prior to the expiration or earlier termination of this Agreement, all Work Product prepared by or on behalf of the Concessionaire will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of this Agreement for any reason, including termination by the Concessionaire for a Department Default, (i) the Concessionaire will promptly turn over to the Department a copy of all Work Product the Concessionaire owns and (ii) subject to Section 18.04, all such Work Product will be considered the sole and exclusive property of the Department (other than Proprietary Work Product, with respect to which the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license in connection with the Project), without compensation due the Concessionaire or any other party. The Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any Proprietary Work Product, subject to Section 18.02. The Concessionaire will continue to
have a full and complete right to use any and all duplicates or other originals of such Proprietary Work Product in any manner it chooses.

Section 18.04 Ownership of Proprietary Intellectual Property

(a) All Proprietary Intellectual Property of the Concessionaire will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of, or any assignment by the Concessionaire of its rights under, this Agreement for any reason whatsoever, the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire solely in connection with the Project. The Department will not at any time sell any such Proprietary Intellectual Property or use or allow any party to use any such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project (except as permitted on other State Highways in accordance with Section 18.04(b)). Subject to Section 18.02, the Department will not disclose any Proprietary Intellectual Property of the Concessionaire (other than to its concessionaires, Contractors, employees, attorneys and agents in connection with the development and operation of the Project who agree to be bound by any confidentiality obligations of the Department relating thereto), and the Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such Proprietary Intellectual Property.

(b) The Department will have the right to purchase from the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire on any other tolled State Highway owned and operated by the Department or other State agency on commercially reasonable terms. The Concessionaire will continue to have the full and complete right to use, sell or license to other Persons any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

(c) With respect to any Proprietary Intellectual Property owned by a Person other than the Concessionaire or the Department, the Concessionaire will obtain from such owner, concurrently with execution of any Contract or purchase order with such owner, both for the Concessionaire and the Department, nonexclusive, nontransferable, irrevocable, fully paid up (other than with respect to ongoing maintenance and support fees) licenses to use such Proprietary Intellectual Property solely in connection with the Project, of at least identical scope, purpose, duration and applicability as the licenses granted by Section 18.04(a); provided, that the foregoing requirement will not apply to standard, pre-specified manufacturer licenses of mass-marketed products (including software products) or equipment where the license cannot be extended to the Department using commercially reasonable efforts or to other licenses of products or equipment where the products or equipment are not reasonably necessary for the operation or maintenance of the Project. The Concessionaire will use commercially reasonable efforts to obtain from such owner a right in favor of the Department to purchase from such owner’s Proprietary Intellectual Property on any other tolled State Highway owned and operated by the Department or other State agency on commercially reasonable terms. The limitations on sale
and disclosure by the Department set forth in Section 18.04(a) will also apply to the Department’s licenses in such Proprietary Intellectual Property.

(d) The Concessionaire Marks may appear on some of the Project Assets, including supplies, materials, stationery and similar consumable items at the Project on the last Day of the Term. The parties agree that the Concessionaire will remain the owner or licensee, as applicable, of the Concessionaire Marks at the end of the Term, and the Concessionaire may remove, at its expense, the Concessionaire Marks prior to the end of the Term. If the Concessionaire fails to do so, the Department will be entitled to remove the Concessionaire Marks and, in such case, the Department will be entitled to payment of its Allocable Costs in so doing from the Concessionaire. The Department acknowledges and agrees that it will have no right, title, interest or license in the Concessionaire Marks.

(e) On or before the Agreement Date, the Department will grant to the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use any Proprietary Intellectual Property of the Department that has been developed for the Project, solely in connection with the development, construction, operation, maintenance and other incidental activities of the Project. The Concessionaire will not at any time sell such Proprietary Intellectual Property or use or allow any party to use such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project. On or before the Agreement Date, the Department will also assign in favor of the Concessionaire the Department’s rights with respect to any license by the Department’s software suppliers (to the extent permitted by, and subject to the terms of, such license) for the use of any Proprietary Intellectual Property for the Project, together with an assignment of the Department’s rights under any escrow for the Source Code and Source Code Documentation relating to such Proprietary Intellectual Property, which assignments will be reasonably satisfactory to the Concessionaire. The Concessionaire will not disclose any such Proprietary Intellectual Property (other than to its Contractors, employees, attorneys, agents and Affiliates in connection with the Project who agree to be bound by any confidentiality obligations of the Concessionaire relating thereto), and the Concessionaire will enter into a confidentiality agreement reasonably requested by the Department with respect to any such Proprietary Intellectual Property. The Department will continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

Section 18.05 Escrow Documents

(a) General. Prior to the Agreement Date, the Concessionaire, the Department and the Escrow Agent will have executed and delivered the Escrow Agreement to implement the provisions of this Section 18.05. The Concessionaire will submit to the Department for its review and approval the following materials (collectively, the “Escrow Documents”): one copy of all documentary information generated with respect to (i) the expected costs of the Work (which uses the estimating methodology actually used by the Design-Build Contractor) available to the Concessionaire under the Design-Build Contract (the “Construction Escrow Documents”) and (ii) the components of, and formulae for, the Initial Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model, including, without limitation, forecast revenue and expected non-financial costs of the Project during the Term included in the Initial
Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model (the “Financing Escrow Documents”). The Concessionaire will deliver the Construction Escrow Documents to the Department within 14 Days following the Agreement Date and will deliver the Financing Escrow Documents not later than the Agreement Date.

(b) Format and Contents.

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

(ii) The Escrow Documents will be submitted in English and clearly itemize the estimated costs of performing each item of the Project, including financing, administrative and related costs. Cost items will be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review.

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

(iv) The Construction Escrow Documents will identify all costs. If detailed costs are not available to the Concessionaire, estimated unit costs are acceptable without a detailed cost estimate, provided, that labor, equipment, materials and subcontracts, as applicable, are specified, and provided further, that indirect costs, contingencies, and mark-up, as applicable, are allocated.

(c) Submittal.

(i) The Concessionaire will submit the Escrow Documents in sealed containers, the Construction Escrow Documents in one and the Financing Escrow Documents in another, to the Department, which containers have been clearly marked on
the outside with the Concessionaire’s name, reference to the Project, and the words “I-95 HOV/HOT Lanes Project Construction Escrow Documents” or “I-95 HOV/HOT Lanes Project Financing Escrow Documents” as applicable.

(ii) On or before the Agreement Date, representatives of the Department, assisted by members of the Concessionaire’s staff who are knowledgeable in how the Escrow Documents were prepared, will have examined, organized and inventoried the Escrow Documents. This examination was to ensure that the Escrow Documents are legible and complete. It did not include review of, and does not constitute approval of proposed construction methods, estimating assumptions, or interpretations of any Project Agreements, including the Design-Build Contract. Such examination will not alter any condition or term of any Project Agreement.

(iii) Timely submission of complete Escrow Documents as of the Agreement Date is an essential element of the Concessionaire’s responsibility and a prerequisite to the execution and delivery of this Agreement by the Department.

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

(d) Updating of the Escrow Documents. Upon each update of the Initial Base Case Financial Model, Adjusted Financial Model and Base Case Financial Model Update in accordance with this Agreement (other than any such update that does not change the Financial Formulas or forecast assumptions), such update will be submitted by the Concessionaire to the Escrow Agent promptly and in any event within seven Days after an update has not been disputed or any such dispute has been resolved for inclusion as part of the Financing Escrow Documents. For the avoidance of doubt, previous undisputed versions of the Escrow Documents will remain in escrow with the Escrow Agent.

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

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

The Concessionaire will bear the cost for storing the Escrow Documents
(f) Examination.

(i) Subject to the terms of the Escrow Agreement, the Escrow Documents may be examined by the Department and the Concessionaire at any time deemed necessary by the Department or the Concessionaire and the Department may delegate review of the Escrow Documents to members of its staff or to Consultants; provided, that, unless a Consultant is bound by a confidentiality agreement or other obligations to keep the Escrow Documents confidential, each such Consultant will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such examination. No other person will have access to the Escrow Documents. The Department will provide advance notice of any such examination to the Design-Build Contractor, and the Design-Build Contractor will have the right to be present during an examination of the Construction Escrow Documents; provided, however, that such right will not in any way limit the Department’s right to review the Construction Escrow Documents if the Design-Build Contractor does not attend such examination. Notwithstanding the foregoing, the Escrow Documents and information contained therein may be used:

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

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

(C) in any dispute resolution procedure commenced hereunder.

(ii) Access to the documents will take place in the presence of duly designated representatives of both the Department and the Concessionaire, except that, if the Concessionaire refuses to be present or to cooperate in any other way in the review of the documents, the Department may upon notice to the Concessionaire, review such documents without the Concessionaire being present.

(g) Ownership. The Escrow Documents are, and will always remain, the property of the Concessionaire, subject to joint review by the Department and the Concessionaire, as provided herein. The Department stipulates and expressly acknowledges that the Escrow Documents constitute trade secrets. This acknowledgement is based on the Department’s express understanding that the information contained in the Escrow Documents is not known outside the Concessionaire’s business, is known only to a limited extent and only by a limited number of employees of the Concessionaire, is safeguarded while in the Concessionaire’s possession, is extremely valuable to the Concessionaire and could be extremely valuable to the Concessionaire’s competitors by virtue of its reflecting Concessionaire’s contemplated techniques of design and construction. The Department further acknowledges that the Concessionaire expended substantial sums of money in developing the information included in the Escrow Documents and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. The Department further acknowledges that the Escrow Documents and the information contained therein are made available to the Department
only because such action is an express prerequisite to the execution and delivery of this Agreement. The Department further acknowledges that the Escrow Documents include a compilation of the information used in the Concessionaire’s business, intended to give the Concessionaire an opportunity to obtain an advantage over competitors who do not know of or use the contents of the documentation.

(h) Final Disposition and Return of Escrow Documents. The Construction Escrow Documents will be returned to the Concessionaire upon the earlier to occur of (i) completion of the Design-Build Work, including tender of final payment and resolution of all claims or disputes arising under the Design-Build Contract or (ii) termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement. The remaining Escrow Documents will be returned upon termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement.

Section 18.06 Source Code Escrow

(a) The Department and the Concessionaire acknowledge that the Concessionaire and/or the Concessionaire’s Software suppliers may not wish to disclose directly to the Department at the time of installation the Source Code and Source Code Documentation which is Proprietary Intellectual Property of the Concessionaire and/or the Concessionaire’s software suppliers, as public disclosure could deprive the Concessionaire and/or the Concessionaire’s software suppliers of commercial value, but that the Department must be ensured access to such Source Code and Source Code Documentation in either of the following circumstances:

(i) in the case of Source Code and Source Code Documentation that is a Contractor’s Proprietary Intellectual Property, if this Agreement is terminated for Concessionaire Default or upon assignment by Concessionaire of its rights pursuant to this Agreement, the Department assumes the contract or subcontract with such Software supplier, and either (A) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Software supplier occurs or (B) the Software supplier fails or ceases to provide services as necessary to permit continued use of the software by the Department as contemplated by this Agreement; or

(ii) in the case of Source Code and Source Code Documentation that is the Concessionaire’s Proprietary Intellectual Property, (A) this Agreement is terminated for Concessionaire Default, (B) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Concessionaire occurs or (C) the Concessionaire fails or ceases to provide services as necessary to permit continued use of the software by the Department as contemplated by this Agreement.

(b) By no later than the Service Commencement Date, the Department and the Concessionaire will establish one or more escrows (the “Source Code Escrows”) with the Escrow Agent on terms and conditions reasonably acceptable to the Department and to the Concessionaire into which such Source Code and Source Code Documentation will be escrowed, including all relevant commentary, explanations and other documentation, as well as instructions
to compile such Source Code and Source Code Documentation and all modifications, additions or substitutions made to such Source Code and Source Code Documentation.

(c) The escrow provided for herein will survive any termination of this Agreement regardless of the reason.

(d) The Concessionaire will pay the reasonable costs and expenses of the Escrow Agent related to the Source Code Escrows.

**Section 18.07 Inspection and Audit Rights**

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

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

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

(d) In addition, the Concessionaire, at its expense, will cause a reputable independent auditor to annually audit its books and records relating to the Project, according to GAAP or any other generally accepted accounting standards, which are acceptable to the Department. The
Concessionaire will cause the independent auditor to deliver the audit report to the FHWA and the Department promptly after it is completed, but in any event within 120 Days of the end of each of the Concessionaire’s fiscal years.

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

(f) No audit rights will extend to the make-up of any lump sum amount or unit price or rate under the Design-Build Contract once such amount, price or rate has been agreed.

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

ARTICLE 19.

DEFAULTS AND REMEDIES

Section 19.01 Concessionaire Defaults

The occurrence of any one or more of the following events during the Term will constitute a “Concessionaire Default” pursuant to this Agreement:

(a) any representation or warranty made by the Concessionaire herein or in any other Project Agreement to which the Concessionaire and the Department are parties is false or misleading in any respect on the date made and a material adverse effect upon the Project or the Department’s rights or obligations under the Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof, with cure regarded as complete only when the adverse effects are remedied;

(b) the Concessionaire fails to comply with, perform or observe any other material obligation, covenant, agreement, term or condition in this Agreement or any Project Agreement to which the Department and the Concessionaire are parties (provided, that a debarment pursuant
to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a Concessionaire Default), which failure materially and adversely affects the Department’s rights or obligations under this Agreement or any other VDOT Project Agreement, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; provided, that the maximum cure period may be extended one time for any such failure to a final date if (i) at least 30 Days prior to the end of the maximum 180-Day cure period, the Concessionaire delivers a written work plan to the Department outlining the actions by which the Concessionaire will cure such failure and setting forth a final date by which the Concessionaire will cure such failure and (ii) the Department approves such work plan within 30 Days in its reasonable discretion; provided, that in all cases and regardless of the duration of the cure period, (A) the Concessionaire is proceeding with all due diligence to cure or cause to be cured such failure, (B) the failure is capable of being cured within a reasonable period of time, and (C) such failure is in fact cured within such period of time; provided further, that this Section 19.01(b) will not apply to events covered by other provisions of this Section 19.01; and provided, further, that any failure to comply with, perform or observe any obligation that is covered by the Non-Compliance Points system will constitute a Concessionaire Default only as provided in Section 11.05(c):

(c) the Concessionaire fails to pay to the Department when due any undisputed amount in excess of $100,000, adjusted annually by the percentage increase in CPI, payable to the Department pursuant to this Agreement or any other VDOT Project Agreement or to deposit funds to any reserve account in the amount and within the time period required by this Agreement, and such failure, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof;

(d) other than a Permitted Closure, the Concessionaire closes all or part of the HOT Lanes to traffic, at any time following Service Commencement, other than in accordance with the terms of this Agreement, and such closure continues without cure for a period of ten Days following the date the Department delivers to the Concessionaire written notice thereof;

(e) (i) the Concessionaire fails to achieve Substantial Completion of the Project by the Long Stop Date, as such date may be extended pursuant to this Agreement or (ii) in the case where a new Long Stop Date has been established pursuant to Section 8.15 hereof, the Concessionaire fails to diligently implement the Substantial Completion Recovery Plan;

(f) the Concessionaire fails to maintain, or to cause to be maintained, in effect the insurance, guarantees, letters of credit or other performance security as and when required pursuant to this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same and such failure continues without cure for a period of ten Business Days following the date the Department delivers to the Concessionaire written notice thereof;
(g) this Agreement or all or any portion of the Concessionaire’s Interest is Transferred, or there occurs a Change in Control, in contravention of Section 25.01;

(h) after exhaustion of all rights of appeal, (i) there occurs any suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the Concessionaire, any affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905 or successor regulation of similar import), or Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor whose work is not completed, from bidding, proposing or contracting with any Federal or State department or agency or (ii) the Concessionaire, Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor who have ongoing Work, or any of their respective officers, directors, or Administering Employees have been convicted of, or plead guilty or nolo contendere to, a violation of Law for fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the State, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail); provided, that a debarment pursuant to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a Concessionaire Default. If the offending Person is an officer, director or Administering Employee, cure will be regarded as complete when the Concessionaire proves that such Person has been removed from any position or ability to manage, direct or control the decisions of the Concessionaire, Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor (as applicable) or to perform Work; and if the Person debarred or suspended or subject to an agreement for voluntary exclusion is an affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905 or successor regulation of similar import), Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor, cure will be regarded as complete when the Concessionaire replaces such Person in accordance with this Agreement;

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

(j) within 90 Days after the commencement of any proceeding against the Concessionaire or any Concessionaire Financial Party seeking any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar Law, such proceeding has not been dismissed, or, within 90 Days after the appointment, without the consent or acquiescence of such Concessionaire or Concessionaire Financial Party, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of such Concessionaire or Concessionaire Financial Party or of all or any substantial part of its properties
or of the Project or any interest therein, such appointment has not been vacated or stayed on appeal or otherwise, or, within 90 Days after the expiration of any such stay, such appointment has not been vacated;

(k) a levy under execution or attachment has been made against all or any part of the Project or any interest therein (including the Concessionaire’s Interest) as a result of any Lien (other than a Lien relating to permitted Concessionaire Debt) created, incurred, assumed or suffered to exist by the Concessionaire or any Person claiming through it, and such execution or attachment has not been vacated, removed or stayed by court order, bonding or otherwise within a period of 60 Days, unless such levy resulted from actions or omissions of the Department or its Representatives; and

(l) after the sixth full month following the Service Commencement Date, the Concessionaire (i) fails to deliver an OSPS Improvement Plan meeting the requirements set forth in Section 5.08(b) at the time specified in Section 5.08(b) and such failure continues without cure for a period of 30 Days following the date on which the Department delivers to the Concessionaire notice of such failure, or (ii) fails to use commercially reasonable efforts to comply with any of the provisions set forth in an OSPS Improvement Plan submitted pursuant to Section 5.08(b), and such failure to use commercially reasonable efforts continues without cure for a period of 30 Days following the date on which the Department delivers notice of such failure to the Concessionaire.

Section 19.02 Department Remedies upon Concessionaire Default

Upon the occurrence of a Concessionaire Default, the Department may, subject to the provisions of the Direct Agreement, do any or all of the following as the Department, in its sole discretion, will determine:

(a) the Department may terminate this Agreement and any other Project Agreements to which the Department and the Concessionaire are both parties, to the extent provided in Section 20.05;

(b) if the Concessionaire Default is by reason of the failure to pay any undisputed monies to a third party, the Department may (but will have no obligation to) make payment on behalf of the Concessionaire of such monies, and any amount so paid by the Department will be payable by the Concessionaire to the Department within five Days after demand, including accrued interest at the Bank Rate from the date such payment is made by the Department to the repayment date; provided, that (i) the Department will not incur any liability to the Concessionaire for any act or omission of the Department or any other Person in the course of remediying or attempting to remedy any Concessionaire Default and (ii) the Department’s cure of any Concessionaire Default will not waive or affect the Department’s rights against the Concessionaire by reason of the Concessionaire Default;

(c) the Department may cure the Concessionaire Default (but this will not obligate the Department to cure or attempt to cure a Concessionaire Default or, after having commenced to cure or attempted to cure a Concessionaire Default, to continue to do so), and all costs and
expenses reasonably incurred by the Department in curing or attempting to cure the Concessionaire Default, including the Department’s Allocable Costs, will be payable by the Concessionaire to the Department within five Days of demand, including accrued interest at the Bank Rate from the date such costs or expenses were incurred to the repayment date; provided, that (i) the Department will not incur any liability to the Concessionaire, and the Concessionaire hereby irrevocably waives and releases any liability of the Department to the Concessionaire, for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default and (ii) the Department’s cure of any Concessionaire Default will not waive or affect the Department’s rights against the Concessionaire by reason of the Concessionaire Default;

(d) except as provided in Section 19.02(e) below, the Department will not incur any liability to the Concessionaire for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default, and the Department’s cure of any Concessionaire Default will not affect the Department’s rights against the Concessionaire by reason of the Concessionaire Default.

(e) without notice and without awaiting lapse of the period to cure, in the event of a Concessionaire Default under Section 19.01(d) (closure of all or any part of the Project or any lane in violation of this Agreement), or any failure to perform a Safety Compliance Order and the Concessionaire Default or failure to perform the Safety Compliance Order results in or prolongs an Emergency or danger to persons or property, the Department may enter and take control of the Project or applicable portion thereof to the extent the Department finds it necessary to rectify the closure, Emergency or danger, and may suspend construction Work and/or close or cause to be closed the portion of the Project affected by the Emergency or danger, until such time as such breach or failure is cured, or the Department terminates this Agreement. In the event of such action by the Department, the Department may, subject to Law, distrain against any of the materials and equipment purchased exclusively for the Project that are situated on the Project and the Concessionaire waives any statutory protections and exemptions in connection therewith. Further, the Concessionaire will pay to the Department on demand the Department’s Allocable Costs in connection with the exercise of the Department’s rights pursuant to this Section 19.02(e). So long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a breach or failure, such action will not be deemed unlawful or a breach of this Agreement, will not expose the Department to any liability to the Concessionaire and will not entitle the Concessionaire to any other remedy, it being acknowledged that the Department has a high priority, paramount public interest in providing and maintaining continuous public access to the Project Assets and in protecting public and worker safety. The foregoing will not, however, protect the Department from the Concessionaire’s lawful Claims for recovery for third party bodily injury or property damage arising out of any such Department action, if and to the extent (i) (A) the Department was mistaken in believing such a breach or failure occurred, or (B) such injury or property damage was caused by the Department’s gross negligence, recklessness or willful misconduct, and (ii) the third party liability is not insured and not required to be insured pursuant to this Agreement. Immediately following rectification of such breach or failure, as determined by the Department,
acting reasonably, the Department will relinquish control and possession of the Project or applicable portion thereof back to the Concessionaire; and

(f) the Department may exercise any of its other rights and remedies provided for hereunder or the other Project Agreements or at law or in equity, except where a specific remedy is expressly provided for herein.

Section 19.03 Financial Close Liquidated Damages

No liquidated damages will be assessed for failure to achieve Financial Close by the Financial Close Deadline.

Section 19.04 Department Default

The occurrence of any one or more of the following events during the Term will constitute a “Department Default” pursuant to this Agreement:

(a) any representation or warranty made by the Department herein or in any other Project Agreement to which the Department and the Concessionaire are parties is false or misleading in any respect on the date made and a material adverse effect upon the Project or the Concessionaire’s rights or obligations under such Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Concessionaire delivers to the Department written notice thereof, with cure regarded as complete only when the adverse effects are remedied;

(b) the Department fails to comply with, perform or observe any material obligation, covenant, agreement, term or condition in this Agreement or any other Project Agreement to which it is a party, which failure materially adversely affects the Concessionaire’s Interest, and such failure continues without cure for a period of 90 Days following the date the Concessionaire delivers to the Department written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; provided, that in the latter case, (i) the Department is proceeding with all due diligence to cure or cause to be cured such failure, (ii) the failure is capable of being cured within a reasonable period of time and (iii) such failure is in fact cured within such period of time; or

(c) subject to Section 25.19, the Department fails to pay to the Concessionaire when due any undisputed amount in excess of $100,000, adjusted annually by the percentage increase in CPI, payable to the Concessionaire pursuant to this Agreement, and such failure continues without cure for a period of 90 Days following the date on which the Concessionaire delivers to the Department written notice thereof.

Section 19.05 Concessionaire Remedies upon Department Default

(a) Upon the occurrence of a Department Default pursuant to this Agreement, the Concessionaire may by notice to the Department declare the Department to be in default and
may, subject to the provisions of Section 19.05(b), do any or all of the following as the Concessionaire, in its discretion, will determine:

(i) the Concessionaire may terminate this Agreement and any Project Agreements to which the Concessionaire and the Department are both parties, to the extent provided in Section 20.04; and

(ii) the Concessionaire may exercise any of its other rights and remedies provided for under this Agreement or at Law, subject to any limitations thereon set forth in this Agreement, including Section 25.09 and Section 25.19.

(b) If the Department’s failure constitutes a Delay Event or Compensation Event, the Concessionaire’s sole recourse will be to seek remedies pursuant to Article 13 and Article 14.

ARTICLE 20.

TERMINATION; HANDBACK

Section 20.01 Termination Upon Expiration of Term

Unless earlier terminated in accordance with the terms of this Article 20, all the rights and obligations of the parties hereunder will cease and terminate, without notice or demand, on the last Day of the Term. Not later than 180 Days preceding the end of the Term, the Concessionaire and the Department will develop a plan (the “Transition Plan”) to assure the orderly transition of the Project to the Department or its designee (which Transition Plan is in addition to the adjustments and changes to the Life Cycle Maintenance Plan under Section 20.02). The parties will then diligently implement the Transition Plan in accordance with the Technical Requirements.

Section 20.02 Handback Obligations and Reserve

(a) Upon the end of the Term, the Concessionaire shall hand-back the Project to the Department, at no charge to the Department, with asset condition having a remaining life of the greater of: (i) five years; or (ii) life within its normal lifecycle (collectively referred to as the “Handback Requirements”). In addition, if requested by the Department, the Concessionaire will dismantle the HOT Lanes toll system as required to convert the HOT Lanes back to HOV Lanes; provided that the Department shall notify the Concessionaire at least one year prior to the end of the Term if the HOT Lanes are to be converted back to HOV Lanes. Any such dismantling of the HOT Lanes toll system shall be at Concessionaire’s sole cost and expense.

(b) Beginning 20 years prior to the expiration of the Term and every five years thereafter, the Concessionaire and the Department will jointly conduct inspections of the Project Assets, for the purposes of jointly (i) determining and verifying the condition of all Project Assets and their residual lives, and (ii) determining, revising and updating the Life Cycle Maintenance Plan to reflect the Handback Requirements.
(c) Beginning five years prior to the expiration of the Term, the Concessionaire and the Department will jointly conduct annual inspections of the Project Assets to ensure that the Handback Requirements will be met.

(d) The Concessionaire shall diligently perform and complete all work contained in the Life Cycle Maintenance Plan prior to reversion of the Project back to the Department, based on the required adjustments and changes to the Life Cycle Maintenance Plan resulting from the inspections and analysis under Section 20.02(b) and (c). The Concessionaire shall complete all such work prior to the end of the Term.

(e) Starting five years prior to the expiration of the Term, the Concessionaire shall post to the Department a ten-year irrevocable Letter of Credit or a Performance Bond for a period of five years after expiration of the Term in an amount equal to 50% of the nominal lifecycle cost expended in the previous five years of the Term pursuant to the most recent Life Cycle Maintenance Plan approved by the Department. This Letter of Credit or Performance Bond may be drawn upon by the Department only in the event that subsequent to termination or expiration of the Term, the Project Assets are found to fail to address the Handback Requirements and in the amount required to address such failures up to the full amount of the Letter of Credit or Performance Bond.

(f) The Department will determine whether the Project Assets meet the Handback Requirements based on routine inspections up to five years after termination or expiration of the Term (“Handback Period”). If the Concessionaire disagrees with the Department’s determination of the condition of the Project Assets during the Handback Period, the Concessionaire may, at its own expense, retain an engineer to inspect the facility and review the findings of the Department. Resolution of any disagreement will be subject to the dispute resolution procedures set forth in Article 21.

Section 20.03 Termination for a Significant Force Majeure Event

(a) If a Significant Force Majeure Event occurs, then

   (i) the Concessionaire may elect to terminate this Agreement unless the Department elects, within 14 Days following receipt of the Concessionaire’s written notice of election to terminate, to treat the Significant Force Majeure Event as a Compensation Event; and

   (ii) the Department may elect to terminate this Agreement unless the Concessionaire elects, within 60 Days following the Significant Force Majeure Event, to restore any resulting damage or destruction at the Concessionaire’s sole cost and expense and furnishes a restoration plan acceptable to the Department with respect to such damage or destruction;

provided, that a party will exercise its right to terminate this Agreement pursuant to this Section 20.03(a) by delivering to the other party written notice of its election to terminate this Agreement (“Significant Force Majeure Termination Notice”).
(b) If the Concessionaire has elected to restore the Project in accordance with *Section 20.03(a)(ii)*, it will promptly carry out the restoration of the Project in accordance with the terms of this Agreement and the restoration plan approved by the Department.

(c) If this Agreement is terminated pursuant to Section 20.03(a), the Department will pay to the Concessionaire the Significant Force Majeure Termination Amount.

**Section 20.04 Termination for Failure to Achieve Financial Close; Termination Based on Excess Interest Rate Fluctuation**

(a) **Failure to Achieve Financial Close by Financial Close Deadline.** If the Concessionaire fails to achieve Financial Close by the Financial Close Deadline, either party may, at its sole discretion, elect to terminate this Agreement and any other Project Agreement to which it is a party. If a party elects to terminate pursuant to this Section 20.04(a), such party will provide written notice of termination to the other party, and such termination will be effective immediately upon delivery of such notice. In the event of such termination, the Department will pay the Concessionaire the Non-Financial Close Termination Amount.

(b) **Liability Upon Termination.** In the event of any termination under this Section 20.04, the Department will have no liability to the Concessionaire under this Agreement or any other Project Agreement other than the Non-Financial Close Termination Amount, and the Concessionaire will not be entitled to any Concessionaire Damages.

**Section 20.05 Termination for Concessionaire Default**

(a) **Subject to the provisions of the Direct Agreement, at any time after the occurrence and during the continuance of a Concessionaire Default, the Department is entitled to terminate this Agreement and any other Project Agreement to which the Department and the Concessionaire are both parties.**

(b) **If the Department elects to terminate pursuant to this Section 20.05, the Department will deliver to the Concessionaire and the Collateral Agent written notice of its election to terminate, which termination will take effect not less than 60 Days after the delivery of such notice.**

(c) **In the event of termination pursuant to this Section 20.05, the Department will pay to the Concessionaire in accordance with Section 25.19, the Concessionaire Default Termination Amount.**

(d) **A termination by the Department for Concessionaire Default or any other termination of this Agreement by the Department which is later determined by the court of proper jurisdiction to be wrongful or in violation of this Agreement will be deemed to have been a termination for Department Default pursuant to Section 20.06 for the sole purpose of calculating the compensation owed to the Concessionaire by the Department.**
Section 20.06 Termination for Department Default

(a) Subject to the provisions of this Section 20.06, the Concessionaire is entitled to terminate this Agreement and any other Project Agreement to which the Concessionaire and the Department are both parties in the event of a Department Default.

(b) If the Concessionaire elects to terminate pursuant to this Section 20.06, the Concessionaire will deliver to the Department a written notice of intent to terminate this Agreement. Upon receipt of such notice of intent to terminate, the Department will be entitled to cure such Department Default by providing the Concessionaire with a written work plan within the 90-Day period after the Department receives the written notice of intent to terminate. The work plan will outline the actions by which the Department will ensure future compliance with the obligation, covenant, agreement, term or condition in this Agreement that the Department failed to perform or observe. The work plan will be subject to the Concessionaire’s written approval (which approval will not be unreasonably withheld, delayed or conditioned).

(c) If (i) the Department fails to provide the Concessionaire with the work plan required pursuant to Section 20.06(b) or (ii) the Department fails to comply in any material respect with the work plan approved by the Concessionaire pursuant to Section 20.06(b) and in the case of this clause (ii), such failure continues without cure for 60 Days following the date the Concessionaire delivers to the Department written notice thereof, the Concessionaire may terminate this Agreement by delivering to the Department written notice of its election to terminate, which termination will take effect not less than 30 Days after the delivery of such notice.

(d) In the event of a termination pursuant to this Section 20.06, the Department will pay to the Concessionaire the Department Default Termination Amount.

Section 20.07 Other Termination

(a) If this Agreement is terminated by the Department or the State prior to the end of the Term, other than pursuant to Sections 19.02, 20.03, 20.04, 20.05 or 20.06, or is canceled, rescinded or voided during the Term, subject to Section 25.19, the Department will pay to the Concessionaire the Other Termination Amount. A termination as contemplated by this Section 20.07 shall not be effective unless and until Project Value has been determined pursuant to Section 20.11.

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

Section 20.08 Concessionaire Actions Upon Termination

(a) On delivery of notice of termination of this Agreement or the Concessionaire’s rights hereunder for any reason prior to the expiration of the Term, the provisions of this Section 20.08 will apply. The Concessionaire will timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due
to the Concessionaire or the Department on account of termination. In connection with the expiration of the Term, certain provisions of this Section 20.08, as specified, will apply.

(b) The Concessionaire will conduct all discussions and negotiations to determine the amount of any termination compensation, and will share with the Department all data, documents and information pertaining thereto, on an Open Book Basis.

(c) Except as otherwise specified in this Agreement, within 30 Days after receipt of a notice of termination, or, if applicable, not later than 120 Days before expiration of the Term, the Concessionaire will meet and confer with the Department for the purpose of developing an interim transition plan for the orderly transition of Work, demobilization and transfer to the Department of control of the Project and Project Right of Way. The parties will use diligent efforts to complete preparation of the interim transition plan within 15 Days after the date the Concessionaire receives the notice of termination or, if applicable, not later than 15 Days before expiration of the Term. The parties will use diligent efforts to complete a final transition plan within 30 Days after such date. The transition plan will be in form and substance acceptable to the Department in its good faith discretion and will include and be consistent with the other provisions and procedures set forth in this Section 20.08, all of which procedures the Concessionaire will promptly follow, regardless of any delay in preparation or acceptance of the transition plan.

(d) Upon receipt of a notice of termination, or, if applicable, before expiration of the Term, the Concessionaire will take all action that may be necessary, or that the Department may reasonably direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, parts, supplies and other property. For the avoidance of doubt, during the period from its receipt of a notice of termination until the expiration of the Term, the Concessionaire will continue to perform its obligations and be entitled to receive Toll Revenues pursuant to this Agreement.

(e) The Concessionaire will deliver to the Department on the date of expiration of the Term or on the effective date of any earlier termination:

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

(ii) possession and control of the Project and Project Assets (other than the Department Shared Assets), free and clear of any and all Liens created, incurred or suffered by the Concessionaire, any Concessionaire Party or any Affiliate or anyone claiming under any of them; provided, that release of the Liens of the Lenders will be subject to payment of termination compensation owing by the Department;
all other intangible personal property used or owned by the Concessionaire and relating to or derived from the Project and the Work; and

(iv) a notice of termination of this Agreement and the Concessionaire’s Interest, in the form reasonably required by the Department, executed and acknowledged by the Concessionaire.

(f) If, as of the date on which the notice of termination is delivered, the Concessionaire has not completed construction of all or part of the Project, the Department may, subject to the provisions of the Direct Agreement, elect, by written notice to the Concessionaire and the Design-Build Contractor delivered within 90 Days after the date on which the notice of termination is delivered, to continue in effect the Design-Build Contract or to require the termination of such agreement. If the Department does not deliver written notice of election within such time period, the Department will be deemed to elect to require termination of the Design-Build Contract. If the Department elects to continue the Design-Build Contract in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire’s right, title and interest in and to the Design-Build Contract, and the Department will assume in writing the Concessionaire’s obligations thereunder that arise from and after the end of the Term. If the Department elects (or is deemed to elect) to require termination of the Design-Build Contract, then the Concessionaire will:

(i) unless the Department has granted Replacement Agreements to a Lender or its Substituted Concessionaire, take such steps as are necessary to terminate the Design-Build Contract, including notifying the Design-Build Contractor that the Design-Build Contract is being terminated and that the Design-Build Contractor is to immediately stop work and stop and cancel orders for materials, services or facilities unless otherwise authorized in writing by the Department;

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

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

(iv) subject to the prior written approval of the Department, settle all outstanding liabilities and all Claims arising out of the Design-Build Contract;

(v) cause the Design-Build Contractor to execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Design-Build Contractor’s right, title and interest in and to (A) all third party agreements and permits, except Contracts for performance of the Design-Build Work; provided, that the Department assumes in writing all of the Design-Build Contractor’s obligations thereunder that arise after the effective date of termination.
and (B) all assignable warranties and Claims held by the Design-Build Contractor against other Contractors and other third parties in connection with the Project or the Work; provided that the Design-Build Contractor will be entitled to retain its rights and remedies with respect to Work performed prior to the effective date of termination; and

(vi) carry out such other directions as the Department may give for suspension or termination of Work performed under the Design-Build Contract.

(g) If, as of the date notice of termination is delivered, the Concessionaire has entered into any other Contract for the design, construction, permitting, installation and equipping of the Project, the Department will elect, by written notice to the Concessionaire, to continue in effect such Contract or to require its termination. If the Department elects to continue the Contract in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire’s right, title and interest in and to the Contract, and the Department will assume in writing the Concessionaire’s obligations thereunder that arise from and after the effective date of termination. If the Department elects to require termination of the Contract, then the Concessionaire will take actions comparable to those set forth in Section 20.08(f) with respect to the Contract.

(h) If, as of the date notice of termination is delivered, the Concessionaire has entered into any operations or maintenance Contract, the Department will elect, by written notice to the Concessionaire, to continue it in effect or require its termination; provided, that if a Lender is entitled to Replacement Agreements following termination, the Department will not elect to terminate any such Contract until the Lender’s right to Replacement Agreements expires without exercise. If the Department elects to continue any such Contract in effect, then on or about the effective date of termination (or promptly after any later election to terminate) the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire’s right, title and interest in and to the Contract, and the Department will assume in writing the Concessionaire’s obligations thereunder that arise from and after the effective date of termination.

Section 20.09 Liability After Termination; Consequences of Termination

(a) If this Agreement is terminated by reason of a Concessionaire Default or a Department Default or any other Project Agreement is terminated for default thereunder, such termination will not excuse the defaulting party from any liability arising out of such default as provided in the Project Agreements. If any outstanding Claim of the Concessionaire against the Department that is independent of the event of termination and determination of the termination compensation is resolved prior to payment of the termination compensation (if any), the parties will adjust the termination compensation by the amount of the unpaid award, if any, on the Claim. Notwithstanding the foregoing, any termination of this Agreement will automatically extinguish any Claim of the Concessionaire to payment of Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination; provided, however, that (i) Claims for
any such Net Cost Impacts that cannot reasonably be avoided by the Concessionaire will not be extinguished, and (ii) the foregoing will not limit any Claim of the Concessionaire for interest on unpaid amounts owing or to become owing by the Department as provided herein.

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

(c) The Department will, as of the effective date of termination of this Agreement or the Concessionaire’s rights hereunder, whether due to expiration or earlier termination of the Term, assume full responsibility for the Project or, if Substantial Completion has not been achieved or other Work has otherwise not been completed as of such date, be permitted to assume full responsibility for such outstanding Work, and as of such date, the Concessionaire will have no liability or responsibility for such Work, as the case may be, occurring after such date; provided, that the Department and the Concessionaire will remain fully responsible for all of their respective obligations or liabilities pursuant to this Agreement or any other Project Agreement arising before the effective date of termination and those obligations pursuant to this Agreement or other Project Agreements which survive termination.

(d) Each of the Concessionaire and the Department will be liable for all costs, expenses and other amounts for which it is liable or responsible hereunder incurred up to the effective date of termination of this Agreement or the Concessionaire’s rights hereunder, whether due to expiration or earlier termination of the Term, and the Concessionaire will not be liable for any costs, expenses and amounts incurred in connection with the Project or the Work on and after such date, except to the extent such costs, expenses and amounts are properly included in the measure of any damages due to the Department arising from a default by the Concessionaire pursuant to this Agreement. The amount of any termination compensation is subject to reduction and offset for such damages.

(e) Regardless of the Department’s prior actual or constructive knowledge thereof, no contract or agreement to which the Concessionaire is a party (unless the Department is also a party thereto) as of the effective date of termination will bind the Department, unless the Department elects to assume such contract or agreement in writing. Except in the case of the Department’s express written assumption, no such contract or agreement will entitle the contracting party to continue performance of work or services respecting the Project following the effective date of termination, or to any Claim, legal or equitable, against the Department.

(f) As of the effective date of termination of this Agreement, whether due to expiration or earlier termination of the Term, the Permit and all of the Concessionaire’s Interest will automatically terminate and expire, and all Liens created, permitted or suffered by the Concessionaire will be automatically extinguished, provided however, that the foregoing will not prohibit the Concessionaire from assigning its right to receive termination payments to the Lenders.
Section 20.10 Exclusive Termination Remedies

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

(b) Article 19 and this Article 20 set forth the entire and exclusive provisions and rights of the Department and the Concessionaire regarding termination of this Agreement, and any and all other rights at law or in equity to terminate or to payment of compensation upon termination are hereby waived to the maximum extent permitted by Law. The parties hereto agree that, upon any termination of this Agreement, the payments provided herein will constitute the Concessionaire’s sole compensation (and the Concessionaire shall have no further liability to the Department except as otherwise provided herein) pursuant to this Agreement and in the event the Department or any designee or licensee of the Department imposes tolls for travel on the Project after termination of this Agreement, neither the Concessionaire nor any beneficiary or Lender as a result of a Financing Assignment will be entitled to any further compensation in respect thereof. In furtherance of the foregoing, the parties hereto agree that the provisions of Section 56-568B of the Code of Virginia will not apply to the Project after the termination of this Agreement.

Section 20.11 Determination of Project Value

(a) In the event the Department owes the Concessionaire an amount calculated by reference to the Project Value, Project Value will be determined according to the following procedures:

(i) within 30 Days after a party requests the appointment of an appraiser, the Department and the Concessionaire will confer in good faith to mutually appoint an independent third-party appraiser to determine the Project Value by written appraisal. This appraiser must be nationally recognized and experienced in appraising similar assets;

(ii) if the parties are unable to agree upon such a single appraiser within such 30-Day period, then within ten Days thereafter the Department and the Concessionaire will each appoint an independent third-party appraiser and both such appraisers will be instructed jointly to select, within 15 Days after they are appointed, a third independent third-party appraiser who is nationally recognized and experienced in appraising similar assets to make the appraisal referred to above;

(iii) if the appraisers appointed by the parties are unable to appoint an independent third-party appraiser under Section 20.11(a)(ii) within 60 Days after a party has requested the appointment of an appraiser under Section 20.11(a)(i), then either party may petition the Circuit Court for the City of Richmond to appoint an independent third-party appraiser having such reputation and experience;
(iv) each party will pay the costs of its own appraiser. The Department and the Concessionaire will pay in equal shares the reasonable costs and expenses of the third independent appraiser;

(v) each party will diligently cooperate with the appraiser, including promptly providing the appraiser with data and information regarding the Project, Project Right of Way, asset condition, historical cost and revenue data, and other information the appraiser may request that is in the possession of or reasonably available to the party. Each party will provide the appraiser with access to the party’s books and records regarding the Project on an Open Book Basis; and

(vi) once appointed, the independent third-party appraiser will conduct an appraisal of the Project Value and deliver to both parties a draft appraisal report and draft valuation. The appraisal will determine Project Value as of the effective date of termination of the Agreement, based on the then condition of the Project (but without regard to any damage or loss resulting from a Department Default). The appraiser will appraise Project Value by taking into account the terms and conditions of this Agreement, projected cash flows and projected costs of the Project for the remainder of the projected Term had this Agreement not been terminated, as determined by the appraiser. For the avoidance of doubt, the calculation of Project Value is the sum of the fair market value of the projected Distributions for the remainder of the Term without taking into consideration any terminations pursuant to Article 20 and the fair market value of any Concessionaire Debt outstanding as of the date of the calculation, and will include Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination. In conducting the appraisal, and before issuing a draft appraisal report, the independent appraiser will afford reasonable and comparable opportunity to each party to provide the appraiser with information, data, analysis and reasons supporting each party’s view on the Project Value. The parties will have 15 Days after receipt of the draft appraisal report to comment thereon. After the opportunity to comment has expired, the independent third-party appraiser will consider and evaluate all comments, prepare a final appraisal report stating the Project Value, and deliver the final appraisal report to both parties.

(b) If either party disagrees with the Project Value, either party may invoke the dispute resolution procedures set forth in Article 21, by delivery of notice to the other party within 60 Days following receipt of the appraiser’s report. Failure to invoke the dispute resolution procedures within such time period will conclusively constitute acceptance of the Project Value.
ARTICLE 21.

DISPUTE RESOLUTION

Section 21.01 General

(a) The parties will attempt to resolve any Disputes arising out of this Agreement at the Project level through good faith negotiations between designated representatives. The Department, the Concessionaire, the Design-Build Contractor, all subcontractors and the FHWA are firmly committed to the following principles:

(i) trust and open communications are encouraged and expected by all participants;

(ii) all of the participants move quickly to address and resolve issues at the lowest possible level by approaching problems from the perspectives and needs of all of the participants involved;

(iii) all of the participants have identified common goals and respect each other’s individual goals and values; and

(iv) all of the participants create an atmosphere conducive to cooperation and teamwork in finding better solutions to potential problems and issues at hand.

(b) If the Dispute cannot be resolved at the Project level in accordance with Section 21.01(a) above, then either party will have the right to submit the Dispute to the Steering Committee for resolution. The Steering Committee will convene a meeting within ten Days of notification by either party of any unresolved Dispute. After the meeting has convened, the Steering Committee will have seven Days to resolve the Dispute.

(c) If the Steering Committee has not resolved the Dispute pursuant to Section 21.01(a)(i), then either party may request non-binding mediation of the Dispute or any other form of alternative dispute resolution process that is mutually acceptable to both parties. If the Dispute has not been resolved within 60 Days after the initiation of mediation proceedings or, if both parties do not agree to mediation, the other form of alternative dispute resolution process, either party will have the right to proceed in accordance with Section 21.02. The first face-to-face meeting between the mediator and both parties will be deemed to be the initiation of mediation.

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

Section 21.02 Litigation; Venue

(a) All litigation between the parties arising out of or pertaining to this Agreement or its breach will be filed, heard and decided in the Circuit Court for the City of Richmond, Virginia, Division I, which will have exclusive jurisdiction and venue.
(b) As permitted by Section 56-569 of the Code of Virginia, the parties agree that any requirement that the State Corporation Commission issue a declaratory judgment regarding a material default (as defined in Section 56-568 of the Code of Virginia) pursuant to such Section 56-569, as a prerequisite to exercising any remedy set forth in this Agreement or such Section 56-569, will not apply to this Agreement.

(c) Satisfaction of the procedures set forth in Section 21.01 will be a condition precedent to instituting a legal action in court; provided, that if the Department determines, in its sole discretion, that a Dispute involves an issue that poses an immediate and serious threat to the public health, safety and welfare, the Department will be entitled to take whatever steps it deems appropriate and to initiate litigation of the matter in court without first submitting the Dispute to the dispute resolution procedures of this Agreement.

Section 21.03 Conduct During Pendency of Dispute

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

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

Section 21.04 Costs of Dispute Resolution

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

(b) The fees and costs of any mediator will be borne equally by each party.

ARTICLE 22.

RESERVED RIGHTS

Section 22.01 Exclusions from the Concessionaire’s Interest

The Concessionaire’s rights and interests in the Project have been granted to the Concessionaire under the Permit in order to enable it to accomplish the Project Purposes. Subject to Section 22.04, the Concessionaire’s rights and interests consist only of those expressly granted by this Agreement and other Project Agreements and specifically exclude all Reserved Rights.

Section 22.02 Department Reservation of Rights

(a) The Department may, at any time at its sole cost and expense, devote, use or take advantage of the Reserved Rights for any public purpose without any financial participation
whatsoever by the Concessionaire. The Department hereby reserves to itself all ownership, development, maintenance, repair, replacement, operation, use and enjoyment of, and access to, the Reserved Rights. The Department will owe no compensation or damages on account of its exercise of Reserved Rights, unless such exercise qualifies as a Compensation Event.

(b) In addition to any rights it has, the Department reserves (for itself and its representatives, as well as others claiming by, through or under the Department) the right and will have the right to enter the Project Assets and each and every part thereof at all reasonable times in the following circumstances:

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

(ii) in the event of any circumstance or event that is reasonably believed by the Department to have caused an impairment to the continuous operation of the HOT Lanes as a public highway, and if the Department in its discretion determines that the Concessionaire is not then taking all necessary steps to respond to or to rectify such circumstance or event, to take, at such times as the Department determines necessary in its discretion and with notice to the Concessionaire if practicable under the circumstances, such actions as the Department determines may be necessary to respond to or to rectify such circumstance or event or to restore the operation of the Project, and all costs and expenses incurred by the Department in connection with or related to such actions will be paid by the Concessionaire.

(c) The Concessionaire acknowledges and agrees that all rights to own, lease, sell, assign, transfer, utilize, develop or take advantage of the Reserved Rights are hereby reserved to the Department, and the Concessionaire will not engage in any activity infringing upon the Reserved Rights.

Section 22.03 Disgorgement

If a Concessionaire Default concerns a breach of the provisions of Section 22.01 or Section 22.02, in addition to any other remedies pursuant to this Agreement, the Department will be entitled to disgorgement of all profits from the prohibited activity and to sole title to and ownership of the prohibited assets and improvements.
Section 22.04 Alternate Treatment of Reserved Rights

Notwithstanding Section 22.01 and Section 22.02, the Department may elect in its sole discretion to treat any development of improvements respecting Reserved Rights that it undertakes as Project Enhancements, in which case all of the provisions of Section 12.02 will apply.

Section 22.05 Naming Rights

(a) The Department hereby grants the Concessionaire the naming rights for the Project, subject to (i) approval of any such name by the Department, which approval will not be unreasonably withheld, conditioned or delayed, and (ii) compliance with Law and Governmental Approvals. The Concessionaire will request the Department’s approval of a name for the Project in writing and no such approval will be effective unless and until provided in writing by the Department; provided, that the failure of the Department to respond in writing to such request within 21 Days following receipt of the Concessionaire’s request will be deemed the Department’s approval thereof. The Concessionaire may sub-license any such rights to the O&M Contractor.

(b) If the Concessionaire changes the name of the HOT Lanes, the Concessionaire will pay the Department for the cost of changing names on signs maintained by the Department pursuant to the Technical Requirements.

(c) For purposes of the Permit Fee calculation, any revenues received by the Concessionaire with respect to the naming rights granted to the Concessionaire under this Section 22.05 will be treated as Gross Revenues.

ARTICLE 23.

REPRESENTATIONS, WARRANTIES AND FINDINGS

Section 23.01 Department Representations and Warranties

The Department hereby represents and warrants to the Concessionaire as follows:

(a) the Department is an agency of the State and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with, and subject to the terms and conditions of this Agreement and other Project Agreements to which the Department is a party;

(b) each person executing this Agreement or any other Project Agreement on behalf of the Department to which the Department is a party has been or at such time will be duly authorized to execute each such document on behalf of the Department;

(c) neither the execution and delivery by the Department of this Agreement and the other Project Agreements executed concurrently herewith to which the Department is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will
result in a default under or violation of (i) any other agreements or instruments to which it is a party or by which it is bound or (ii) to its knowledge, any Law, where such violation will have a material adverse effect on the ability of the Department to perform its obligations under this Agreement;

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

(e) as of the Agreement Date, no agreement, contract, option, commitment or other right exists which binds, or which in the future may become binding on, the Department to sell, transfer, convey, dispose of or encumber the Project. The Department has not granted or assigned any interest in Gross Revenues to any other party other than the Concessionaire pursuant to this Agreement;

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

(g) the Department has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Department is a party;

(h) the Department is in material compliance with all Laws and Governmental Approvals applicable to its obligations in connection with this Agreement; and

(i) other than with respect to portions of the Project Right of Way not yet acquired as of the Agreement Date, the Department has good and sufficient title and interest to the Project Right of Way, free and clear of all Liens or other exceptions to title, except Permitted Encumbrances.

Section 23.02 Concessionaire Representations and Warranties

The Concessionaire hereby represents and warrants to the Department as follows:

(a) the Concessionaire is a duly organized limited liability company created under the laws of the State of Delaware, is qualified to conduct business in the State, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute and perform each and all of its obligations under the Project Agreements;
(b) as of the Agreement Date, the membership interests in the Concessionaire are owned in 90% holdings by DRIVe USA Investments LLC and 10% holdings by Fluor and no other Person has a membership interest in the Concessionaire;

(c) the Concessionaire has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Concessionaire is a party;

(d) each person executing this Agreement or any other Project Agreement on behalf of the Concessionaire has been or will at such time be duly authorized to execute each such document on behalf of the Concessionaire;

(e) this Agreement and each Project Agreement to which the Concessionaire or a Concessionaire Financial Party is a party have been duly authorized, executed and delivered by the Concessionaire or the Concessionaire Financial Party and constitutes a valid and legally binding obligation of the Concessionaire or the Concessionaire Financial Party (as the case may be), enforceable against it in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;

(f) neither the execution and delivery by the Concessionaire of this Agreement and the other Project Agreements to which the Concessionaire is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or a violation of (i) the governing instruments of the Concessionaire or any other agreements or instruments to which it is a party or by which it is bound or (ii) to its knowledge, any Law, where such violation will have a material adverse effect on the ability of the Concessionaire to perform its obligations under this Agreement;

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

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

(i) none of the Concessionaire, any affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905), or the Design-Build Contractor or their affiliates (as so defined) is suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any Federal or State department or agency;
(j) to the best of the Concessionaire’s knowledge after diligent inquiry, no event which, with the passage of time or the giving of notice, would constitute a Concessionaire Default has occurred;

(k) to the best of the Concessionaire’s knowledge after diligent inquiry, no event which, with the passage of time or the giving of notice, would constitute a Delay Event or a Compensation Event under this Agreement has occurred;

(l) the Initial Base Case Financial Model (i) was prepared by or on the Concessionaire’s behalf in good faith, (ii) fully discloses all Financial Model Formulas, and all cost, revenue and other financial assumptions and projections that the Concessionaire used or is using in making its decision to enter into this Agreement, (iii) fully discloses all Financial Model Formulas disclosed to the Lenders under the Project Financing Agreements and (iv) as of the Agreement Date, represents the projections that the Concessionaire believes in good faith are realistic and reasonable for the Project; provided, that such projections are based upon a number of estimates and assumptions and are subject to significant business, economic and competitive uncertainties and contingencies and that, accordingly, no representation or warranty is made that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results;

(m) on or before the Agreement Date, the Concessionaire has delivered to the Department an audit report and an opinion of the Financial Model Auditor addressed to the Department to the effect that the Base Case Financial Model and the Financial Model Formulas reflect the terms of this Agreement and that the Financial Model Formulas and the Base Case Financial Model are suitable for use herein in connection with Compensation Events, Delay Events and early termination procedures, and covering such other matters as may have been reasonably requested by the Department, all in form and substance acceptable to the Department; and

(n) All Early Work performed by Fluor and Transurban prior to the Agreement Date was performed in accordance with (i) Law; (ii) Governmental Approvals; and (iii) prudent industry practices, methods, techniques and standards and using the degree of care that would be expected to be exercised by a prudent, skilled and experienced developer engaged in the same kinds of undertakings and under the same or similar circumstances, conditions, scope and limitations (including limitations on access to the Project Right of Way and limitations agreed with the Department as to the scope of the work to be undertaken prior to the Agreement Date) as those applying to such work.

Section 23.03 Department’s Findings Under the Act

The Department, as the Responsible Public Entity with respect to the Project, makes the following findings:

(a) the actions taken by the Department pursuant to the Act facilitate the development, design, construction, management, operation and maintenance of the Project and the timely development of any Project Enhancements, and such public need may not be wholly
satisfied by existing methods of procurement in which qualifying transportation facilities are developed and/or operated;

(b) there is a public need to construct and operate a qualifying transportation facility (as defined in Section 56-557 of the Code of Virginia) of the type of the Project;

(c) the Permit granted hereunder authorizing the Concessionaire to develop, design, construct, manage and operate and maintain the Project, including the development of any Project Enhancements, may result in their availability to the public in a more timely, more efficient and less costly fashion, thereby serving the public safety and welfare;

(d) the Project, its interconnections with existing transportation facilities, and the Concessionaire’s plans for the development, design, construction, operation and maintenance of the Project are reasonable and compatible with the State transportation plan and with local comprehensive plans;

(e) the estimated cost of developing, designing, constructing, operating and maintaining the Project is reasonable in relation to similar transportation facilities;

(f) the Concessionaire’s plans will result in the timely construction and operation and maintenance of the Project and in the development of any Project Enhancements;

(g) the Department will continue to have fee title or good and valid interest to the Project and the Project will remain open for use by members of the public as a public road upon payment of the applicable tolls;

(h) through this Agreement, the Department intends to encourage investment in the State by the Concessionaire to facilitate the development, construction, operation and maintenance of the Project and the development of any Project Enhancements; and

(i) the terms and conditions of this Agreement serve the public purpose of the Act.

ARTICLE 24.

CONTRACTING PRACTICES AND PUBLIC WELFARE CONSIDERATIONS

Section 24.01 Obligation to Refrain from Discrimination

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

**Section 24.02 Contracting**

(a) **General.** The Concessionaire may perform the Work through use of its own personnel, materials and equipment, or by contracting to Persons with the expertise, qualifications, experience, competence, skills and know-how to perform the responsibilities being contracted in accordance with all Law, all Governmental Approvals, and the terms, conditions and standards set forth in this Agreement.

(b) **Design-Build Contractor.** The Concessionaire has entered into the Design-Build Contract. Notwithstanding its use of the Design-Build Contractor, the Concessionaire remains responsible for the Design-Build Work during the Term in accordance with this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement or removal of the Design-Build Contractor.

(c) **Shared Facilities Agreement.** The Concessionaire has entered into the Shared Facilities Agreement with CBE for the use of the Express Operations Center. In connection therewith, the Concessionaire agrees to provide to the Department copies of all notices received or given by the Concessionaire pursuant to the Shared Facilities Agreement, unless otherwise mutually agreed to by the parties.

(d) **O&M Contractor.**

(i) Subject to the Department’s approval, which will not be unreasonably withheld, the Concessionaire may contract with one or more separate O&M Contractors with the expertise, qualifications, experience, competence, skills and know-how to perform the operations and maintenance obligations of the Concessionaire in accordance with this Agreement; provided, that the Department’s approval will not be required with respect to any Contractor with respect to the O&M Work (other than the O&M Contractor) (A) whose Contract price is less than $4 million adjusted annually by the percentage increase in CPI and (B) is prequalified with the Department in accordance with the Department’s Rules Governing Prequalification Privileges. Notwithstanding its use of an O&M Contractor, the Concessionaire remains ultimately responsible for the operation and maintenance of the Project during the Term in accordance with this Agreement. The O&M Contractor will be subject at all times to the direction and control of the Concessionaire, and any delegation to an O&M Contractor does not relieve the Concessionaire of any of its obligations, duties or liability pursuant to this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement, removal or resignation of an O&M Contractor. Subject to the Direct Agreement, any agreement between the Concessionaire and any O&M Contractor will by its terms terminate, without penalty, at the election of the Department upon five Days’ notice to such O&M Contractor upon the termination of this Agreement. The O&M Contractor will have no interest in or rights pursuant to this Agreement or the Project.
(ii) Each O&M Contractor and its Contract will comply with this Section 24.02. In addition, the material terms of the proposed Contract of the O&M Contractor must be consistent with the corresponding duties and obligations of the Concessionaire pursuant to this Agreement and the other Project Agreements.

(iii) The O&M Contractor and its Affiliates may contract to receive or recover overhead costs (“O&M Overhead Costs”) that are consistent with Part 31 of the Federal Acquisition Regulation principles and will provide the Department with a report on these costs. Any such O&M Overhead Costs will not include excluded costs of the nature described in subsection (b) of the definition of Operating Costs and will include only those costs that provide a direct and measurable benefit to the Project when compared with projects of similar scope and complexity. Any O&M Overhead Costs charged by an Affiliate of the O&M Contractor will be arms-length and commercially reasonable.

(e) Replacement of Design-Build Contractor or O&M Contractor. Before entering into any Contract replacing the initial Design-Build Contractor or O&M Contractor, as applicable, the Concessionaire will submit a true and complete copy of the proposed Contract for the Department’s review and approval, subject to the following:

(i) the Department may disapprove such proposed Contract if such Contract or the Work to be performed thereunder does not comply, or is inconsistent, in any material respect with the applicable requirements of this Agreement; and

(ii) the Department may disapprove, in its sole discretion, of the replacement Contractor after taking into account the following factors:

(A) the financial strength and integrity of the proposed Contractor, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;

(B) the capitalization of the proposed Contractor or any parent guarantor, as applicable;

(C) the experience of the proposed Contractor and each of its direct Contractors in constructing or operating toll roads or highways and performing other projects;

(D) the presence of any actions, suits or proceedings, at law or in equity, or before any Governmental Authority, pending or, to the best of such Contractor’s knowledge, threatened against such Contractor, that would or could reasonably be expected to have a material adverse effect on its ability to perform its obligations under the Contract;

(E) the background of the proposed Contractor, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees
and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person’s past or present performance on other projects); and

(F) the Contractor’s compliance with any of the other provisions of this Section 24.02.

(f) Each Contract for the performance of the Work that the Concessionaire executes at a minimum:

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

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

(iii) will require the Contractor to carry out its scope of work in accordance with Law, the Technical Requirements, all Governmental Approvals, Good Industry Practice and the terms, conditions and standards set forth in this Agreement;

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

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

(vi) will include express requirements that, if the Department succeeds to the Concessionaire’s rights under the subject Contract (by assignment or otherwise), then the relevant Contractor agrees that it will (A) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer, service provider), (B) permit audit thereof by the Concessionaire, and provide progress reports to the Concessionaire appropriate for the type of Contract it is performing sufficient to enable the Concessionaire to provide the reports it is required to furnish the Department pursuant to this Agreement and (C) allow the Department, to assume the benefit of the Concessionaire’s Contract rights and the work performed thereunder, with liability only for those remaining obligations accruing after the date of assumption, but excluding any monetary claims or obligations that the Concessionaire may have against such Contractor that existed prior to the Department’s assumption of such Contract;
(vii) will not be assignable by the Contractor without the Concessionaire’s prior written consent; provided, that the foregoing will not limit permitted subcontracting of the Work;

(viii) will expressly require the Contractor to participate in meetings between the Concessionaire and the Department, upon the Department’s reasonable request, concerning matters pertaining to such Contractor or its work; provided, that all direction to such Contractor will be provided by the Concessionaire; and provided further, that nothing in this Section 24.02(f)(viii) will limit the authority of the Department to give such direction or take such action which in the opinion of the Department is necessary to remove an immediate and present threat to the safety of life or property;

(ix) will expressly provide that all Liens and claims of any Contractors at any time will not attach to any interest of the Department in the Project or the Project Right of Way; and

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

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

(h) The Concessionaire will include provisions in each Contract for the performance of the Work that the Concessionaire executes requiring the Contractor: (i) to maintain all licenses required by Law; (ii) if the Department makes a direct payment under such Contract, to comply with the requirements of the eVA Business to Government Vendor System or its successor; and (iii) to include in Contracts for the performance of the Work that such Contractor executes the provisions set forth in this Section 24.02(h).

(i) The Concessionaire will include provisions in each Contract for the performance of the Work that the Concessionaire executes (i) naming the Department as a third-party beneficiary of all Contractor representations and warranties contained in such Contract and (ii) requiring the Contractor to include in Contracts for the performance of the Work that such Contractor executes to name the Department as a third-party beneficiary of all Contractor representations and warranties contained in such Contract; provided, that the Department will have the right to exercise its rights under such representations and warranties only so long as the Concessionaire, the Contractor or a Lender is not pursuing remedies thereunder.
(j) The Concessionaire will not contract any part of the Design-Build Work or the O&M Work to a Contractor who is not prequalified with the Department in accordance with the Department’s Rules Governing Prequalification Privileges, unless otherwise indicated in this Agreement. This restriction does not apply to contract specialty items, consultants, manufacturers, suppliers, haulers or snow removal service providers.

(k) The appointment of Contractors will not relieve the Concessionaire of its responsibility hereunder or for the quality of work, materials and services provided by it. The Concessionaire will at all times be held fully responsible to the Department for the acts and omissions of its Contractors and persons employed by them and no Contract entered into by the Concessionaire will impose any obligation or liability upon the Department to any such Contractor or any of its employees. Further, absent the Department’s express written consent, no Contract or delegation of Work thereunder will affect the obligation of the Concessionaire to directly communicate with the Department and to oversee the Work of the Contractor. Nothing in this Agreement will create any contractual relationship between the Department and a Contractor.

(l) The Concessionaire will not enter into or materially amend an Affiliate Contract without notice to and consent of the Department, which consent will not be unreasonably withheld or delayed if the Contract is entered into in the ordinary course of business and the Concessionaire demonstrates to the Department’s satisfaction that the Affiliate Contract is on overall terms no less favorable or unfavorable to the Concessionaire than terms the Concessionaire could obtain in an arm’s-length transaction for comparable services with a Person that is not an Affiliate of the Concessionaire; provided, that no consent will be required for (i) reasonable overhead sharing fees and reimbursement of third-party costs payable to an Affiliate for legal, accounting, tax, computer and other centralized management services provided to the Concessionaire in lieu of the Concessionaire having its own employees for such functions; or (ii) the joint ownership of assets or property used for the operation or maintenance of the Project and other projects owned or operated by Affiliates of the Concessionaire so long as the cost of such assets and properties are reasonably shared and documented.

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

(n) Upon entering into a Contract for the Design-Build Work or O&M Work in excess of $100,000, the Concessionaire will provide the Department with a copy of such Contract and, if such Contract is with an Affiliate of the Concessionaire, a list of all Contracts in effect to which such Affiliate is a party and under which all or a substantial portion of the Affiliate’s responsibilities or obligations under its Contract are delegated to its Contractor. The Concessionaire will allow the Department ready access to all Contracts and records regarding Contracts, including amendments and supplements to Contracts and guarantees thereof.

(o) As soon as the Concessionaire identifies a potential Contractor for a potential Contract described in the first sentence of Section 24.02(n), but in no event later than five Days after Contract execution, the Concessionaire will notify the Department in writing of the name, address, phone number and authorized representative of such Contractor.

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

(a) Disadvantaged Business Enterprise (DBE).

(i) General.

(A) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the DBE program, where applicable.

(B) The Concessionaire and each Contractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Concessionaire and each Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the Concessionaire and each Contractor to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as set forth in Section 24.03(a)(v).

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, in an effort to comply with 49 CFR Part 26, the Department has established a goal of 10% for DBE participation.
The Department and the Concessionaire agree to manage the foregoing goals as follows:

1. the Concessionaire will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Concessionaire’s approach to meeting the DBE participation goals set forth in this Section 24.03(a);

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

3. the Concessionaire will be responsible for either achieving or making Good Faith Efforts to achieve the goal of 10% for DBE participation by providing maximum contracting opportunities for DBE businesses;

4. the Concessionaire will provide to the Department each calendar quarter documentation of all executed Contracts and payments to DBE businesses;

5. the Concessionaire will have the opportunity to establish DBE sub-contracting work packages; and

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

During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the applicable DBE objectives. The Department will assist the Concessionaire in meeting the Design-Build Work goals by offering assistance to include the following items:

1. the parties will jointly conduct outreach meetings for DBE firms;

2. the Department will identify to the Concessionaire DBE firms that are eligible to bid on the specific bid item groups; and

3. the Department will provide access to technical and managerial assistance to eligible DBE firms, including in part, through the VDOT/GEC Civil Rights Team and the Business Opportunity Workforce Development Center based upon available funds.
(D) The Concessionaire acknowledges that the Department’s assistance and cooperation will not eliminate or reduce the Concessionaire’s responsibility to achieve the Design-Build Work goals for DBE participation or demonstrate Good Faith Efforts. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the Project. The Concessionaire is expected to meet the goal or demonstrate that Good Faith Efforts have been made. The Concessionaire will submit quarterly reports of Good Faith Efforts documentation, and DBE payments on form C-63 to the Department Representative.

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

(iii) O&M Work. During performance of the O&M Work, when contracting for such work the Concessionaire will encourage the participation of DBE firms in the Project. The Concessionaire will set annual goals and make Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The annual and long-term participation DBE goals for the Concessionaire in contracting for the O&M Work is 2%.

(iv) DBE Reporting and Assessment.

(A) The Concessionaire will report quarterly, within 15 Days after each calendar quarter ends, to the Chief of Administration on the Concessionaire’s efforts to (1) satisfy the DBE goals set forth in this Section 24.03(a) or (2) demonstrate Good Faith Efforts to accomplish the DBE goals set forth in this Section 24.03(a).

(B) The Chief of Administration will assess, confirm and communicate to the Concessionaire within 30 Days after receiving each quarterly report whether the Concessionaire has (1) satisfied the DBE goals, (2) demonstrated Good Faith Efforts, or (3) failed to satisfy the requirements of clause (1) and (2) of this Section 24.03(a)(iv)(B).

(v) Failure to Demonstrate DBE Good Faith Efforts Related to Design-Build Work.

(A) If the Chief of Administration notifies the Concessionaire pursuant to Section 24.03(a)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work
for a quarterly period, the Concessionaire will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals.

(B) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for two consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(a)(iv), the Concessionaire will prepare and submit, at the Concessionaire’s sole cost and expense, a DBE Performance Improvement Plan for the Department’s review and approval. The DBE Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of clause (1) and (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work. The Concessionaire will submit the DBE Performance Improvement Plan within 15 Days after receiving notice from the Chief of Administration pursuant to Section 24.03(a)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B). The Concessionaire will pay the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire’s compliance with the DBE Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work.

(C) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(a)(iv), the Department may debar or disqualify the Key Members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.03(a)(v).

(D) If the Chief of Administration determines at any time that the Concessionaire has satisfied the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work performed to date with respect to the applicable calendar quarter, then any prior determinations by the Chief of Administration of the Concessionaire’s failure to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and the Concessionaire’s failure to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals will be disregarded, the Concessionaire will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure to satisfy the requirements of clause (1)
of Section 24.03(a)(iv)(B) and a failure to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals will be pursuant to the provisions set forth in Section 24.03(a)(v)(A).

(E) Any decision or action taken by the Chief of Administration or the Department pursuant to Section 24.03(a) is subject to the dispute resolution procedures set forth in Article 21.

(b) Small, Women-Owned and Minority Business (SWaM).

(i) General.

(A) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the SWaM program, where applicable.

(B) The Concessionaire shall not and will not permit its Contractors to discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Concessionaire shall carry out applicable requirements of Executive Order 33 (2006), in the award and administration of this Agreement and the award and administration of subcontracts pursuant to this Agreement.

(C) Failure by the Concessionaire to carry out the requirements in this Section 24.03(b) relating to SWaM participation will subject the Concessionaire to only the remedies set forth in Section 24.03(b)(v) and shall not result in a Concessionaire Default.

(D) If debarment occurs as a result of the Department's exercise of such remedies, such debarment shall not result in a Concessionaire Default.

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, in an effort to support Executive Order 33 (2006), the Department has established a goal of 19% for SWaM participation.

(B) The Department and the Concessionaire agree to manage the foregoing goals as follows:

(1) the Concessionaire will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Concessionaire’s approach to meeting the SWaM participation goals set forth in this Section 24.03(b);

(2) the Concessionaire will have dedicated resources to the SWaM inclusion program to ensure compliance with Executive Order 33 (2006), the DBE/SWaM Plan, nondiscrimination provisions, technical assistance
activities, communication of subcontracting and generate reports specific to SWaM utilization;

(3) the Concessionaire will be responsible for either achieving or making Good Faith Efforts to achieve the goal of 19% for SWaM participation by providing maximum contracting opportunities for SWaM businesses;

(4) the Concessionaire will provide to the Department each calendar quarter documentation of all executed Contracts and payments to SWaM businesses;

(5) the Concessionaire will have the opportunity to establish SWaM-only statement of work packages; and

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

(C) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the applicable SWaM objectives. The Department will assist the Concessionaire in meeting the Design-Build Work goals by offering assistance to include the following items:

(1) the parties will jointly conduct outreach meetings for SWaM firms;

(2) the Department will identify to the Concessionaire SWaM firms that are eligible to bid on the specific bid item groups; and

(3) the Department will provide access to technical and managerial assistance to eligible SWaM firms, including in part, through the VDOT/GEC Civil Rights Team and the Business Opportunity Workforce Development Center based upon available funds.

(D) The Concessionaire acknowledges that the Department’s assistance and cooperation will not eliminate or reduce the Concessionaire’s responsibility to achieve the Design-Build Work goals for SWaM participation or demonstrate Good Faith Efforts. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the Project. The Concessionaire is expected to meet the goal or demonstrate that Good Faith Efforts have been made. The Concessionaire will submit quarterly reports of Good Faith Efforts documentation, and, SWaM payments on form C-63 to the Department Representative.
When there is a contract goal for the Design-Build Work, the Concessionaire and the Concessionaire Parties must make Good Faith Efforts to meet the goal either through obtaining enough SWaM participation or documenting the Good Faith Efforts it made to do so. The Department must seriously consider the Concessionaire’s documentation of Good Faith Efforts. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for the Concessionaire.

(iii) O&M Work. During performance of the O&M Work, when contracting for such work the Concessionaire will encourage the participation of SWaM firms in the Project. The Concessionaire will set annual goals and make Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The Concessionaire will provide its participation on such matters to the Department Representative, and the Department may include those participation rates, as appropriately adjusted, with its own towards the State’s long-term goal established pursuant to the Office of the Governor’s Executive Order 33 (2006). The annual and long-term participation SWaM goal for the Concessionaire in contracting for the O&M Work is 4%.

(iv) SWaM Reporting and Assessment.

(A) The Concessionaire will report quarterly, within 15 Days after each calendar quarter ends, to the Chief of Administration on the Concessionaire’s efforts to (A) satisfy the SWaM goals set forth in this Section 24.03(b) or (B) demonstrate Good Faith Efforts to accomplish the SWaM goals set forth in this Section 24.03(b).

(B) The Chief of Administration will assess, confirm and communicate to the Concessionaire within 30 Days after receiving each quarterly report whether the Concessionaire has (1) satisfied the SWaM goals, (2) demonstrated Good Faith Efforts, or (3) failed to satisfy the requirements of clause (1) and (2) of this Section 24.03(b)(iv)(B).

(v) Failure to Demonstrate SWaM Good Faith Efforts Related to Design-Build Work.

(A) If the Chief of Administration notifies the Concessionaire pursuant to Section 24.03(b)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for a quarterly period, the Concessionaire will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals.

(B) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for two consecutive quarters based on the determinations by the Chief of
Administration pursuant to Section 24.03(b)(iv), the Concessionaire will prepare and submit, at the Concessionaire’s sole cost and expense, a SWaM Performance Improvement Plan for the Department’s review and approval. The SWaM Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of clause (1) and (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work. The Concessionaire will submit the SWaM Performance Improvement Plan within 15 Days after receiving notice from the Chief of Administration pursuant to Section 24.03(b)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B). The Concessionaire will pay the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire’s compliance with the SWaM Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work.

(C) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(b)(iv), the Department may debar or disqualify the Key Members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.03(b)(v).

(D) If the Chief of Administration determines that the Concessionaire has satisfied the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work performed to date, then any prior determinations by the Chief of Administration of the Concessionaire’s failure to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and the Concessionaire’s failure to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals will be disregarded, the Concessionaire will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and a failure to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals will trigger the provisions set forth in Section 24.03(b)(v)(A).

(E) Any decision or action taken by the Chief of Administration or the Department pursuant to Section 24.03(b) is subject to the dispute resolution procedures set forth in Article 21.
Section 24.04 Public Safety and Welfare

The parties recognize and agree that protection of the health, safety and welfare of the public and all persons engaged in connection with the performance of the Concessionaire’s obligations pursuant to this Agreement is a priority. Accordingly, the Concessionaire will comply with the following provisions, along with all other Laws and the Technical Requirements:

(a) the Concessionaire will comply, and will require all Contractors to comply, with all construction safety and health standards established by Law, including the State and Federal Occupational Health and Safety Acts. Neither the Concessionaire nor any Contractor will require any worker to work in surroundings or under working conditions that are unsanitary, hazardous or dangerous to their health or safety, as determined under construction safety and health standards promulgated by the U.S. Secretary of Labor in accordance with Section 107 of the Contract Work Hours and Safety Standards Act; and

(b) the Department will be entitled to require the Concessionaire to suspend any Work or other activities related to the Project, which, in the sole discretion of the Department, presents a risk to the public health, safety or welfare, and to take such other actions as the Department may require to prevent such risk; provided, that if it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then the suspension order and other actions will be treated as a Department Change pursuant to Section 14.02.

Section 24.05 Labor, Employment and DBE/SWaM Related Matters

The Concessionaire will comply, and will cause its Contractors to comply, with the provisions set forth in the Labor, Employment and DBE/SWaM Related Matters attached as Exhibit AA.

Section 24.06 Federal Immigration Reform and Control Act

In accordance with Section 2.2-4311.1 of the Code of Virginia, the Concessionaire certifies that it does not and agrees that it will not, during the Term, knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986. The Concessionaire further agrees that it will require all of its Contractors to certify that they do not and will not knowingly employ an unauthorized alien as defined by such Act.
ARTICLE 25.

MISCELLANEOUS

Section 25.01 Transfers by the Concessionaire

(a) Lock-Up Period. During the Lock-up Period, the Concessionaire will not, without the Department’s approval, Transfer, or otherwise permit the Transfer of, any or all of the Concessionaire’s Interest to or in favor of any Person (a “Transferee”) or permit any Person to:

(i) Transfer, or otherwise dispose of 50% or more of any direct or indirect ownership interest in the Concessionaire;

(ii) grant any security interest, Lien or other encumbrance over its direct or indirect ownership interest in the Concessionaire;

(iii) enter into any agreement in respect of any direct or indirect ownership interest in the Concessionaire or in respect of any votes attached to any such shares held by such Person in the Concessionaire, in each case (A) other than customary shareholder, partnership or organizational agreements among the Equity Members as of the Agreement Date solely with respect to the governance and management of the Concessionaire or (B) other than agreements for Transfers of less than 50% of any direct or indirect ownership interest in the Concessionaire; or

(iv) agree, whether or not subject to any condition precedent or subsequent, to do any of the foregoing.

Notwithstanding the foregoing, this Section 25.01 will not prohibit or restrict the following:

(A) a Transfer to the Collateral Agent or trustee or such Person’s nominee or transferee, as permitted in connection with the exercise of rights and remedies under the Project Financing Agreements, or a Transferee permitted or approved under the Direct Agreement;

(B) any other Transfer identified in clauses 1 through 8 of the definition of Change in Control; or

(C) any agreement to make any of the Transfers described in the preceding clauses (A) and (B) of this Section 25.01(a).

(b) Post Lock-Up Period. Following the Lock-up Period, the Concessionaire will not Transfer, any or all of the Concessionaire’s Interest to or in favor of a Transferee, unless:

(i) the Department has approved such proposed Transferee based upon a determination in accordance with Section 25.01(c) (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement); and
(ii) the proposed Transferee (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement) enters into an agreement with the Department in form and substance reasonably satisfactory to the Department wherein the Transferee acquires the rights and assumes the obligations of the Concessionaire and agrees to perform and observe all of the obligations and covenants of the Concessionaire pursuant to this Agreement.

(c) The Department’s approval of a proposed Transferee may be withheld only if the Department determines that the proposed Transfer is prohibited by Law or such proposed Transferee is not capable of performing the obligations and covenants of the Concessionaire pursuant to this Agreement, which determination may be based upon, or take into account, one or more of the following factors:

(i) the financial strength and integrity of the proposed Transferee, and its direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;

(ii) the capitalization of the proposed Transferee;

(iii) the experience of the proposed Transferee and each of its direct Contractors in operating toll roads or highways and performing other projects; and

(iv) the background of the proposed Transferee, each of its direct Contractors, and their direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person’s past or present performance on other projects).

If the Department is not satisfied that these conditions are met, it may condition its consent on provision of reasonable additional security or other reasonable arrangements.

(d) Except for a Transfer of all the Concessionaire’s Interest to the Collateral Agent upon its exercise of remedies under the Financing Assignments or to a Transferee that is permitted or has been approved under the Direct Agreement, no Transfer of all or any of the Concessionaire’s Interest will be made or have any force or effect if at the time of such Transfer there has occurred a Concessionaire Default that has not been remedied or an event that with the lapse of time, the giving of notice or otherwise would constitute a Concessionaire Default, unless the Transferee is prepared to cure such Concessionaire Default in accordance with the Direct Agreement.

(e) A Change in Control of the Concessionaire will be deemed to be a Transfer of the Concessionaire’s Interest for purposes of this Section 25.01.

(f) Any Transfer or other sale, transfer, disposition or other transaction made in violation of this Section 25.01 will be null and void ab initio and of no force and effect.
Section 25.02 Ethical Standards

(a) The Concessionaire has adopted and provided copies to the Department of its written policies establishing ethical standards of conduct for all its directors, officers and supervisory or management personnel in dealing with the Department and employment relations. Such policies including any amendments or modifications will include standards of ethical conduct concerning the following:

(i) restrictions on gifts and contributions to, and lobbying of, any State Party and any of their respective commissioners, directors, officers and employees;

(ii) protection of employees from unethical practices in the selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

(iii) protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false Claim), unethical or unsafe actions or failures to act by the Concessionaire or its personnel or any Contractors;

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

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

(vi) adherence to the Department’s organizational conflict of interest rules and policies pertaining to the hiring of any consultant which has assisted the Department in connection with the negotiation of this Agreement or the conduct of Oversight Services for the Project.

(b) The Concessionaire will cause its directors, members, officers and supervisory and management personnel, and require those of its Contractors, to adhere to and enforce the adopted policy on ethical standards of conduct. The Concessionaire will establish reasonable systems and procedures to promote and monitor compliance with the policy.
(c) Without limiting the foregoing provisions of this Section 25.02, the Concessionaire further agrees: (i) no gifts, gratuities, or favors of any nature whatsoever will be given or offered by any Concessionaire Party to personnel of the Department; and (ii) no Concessionaire Party will employ any personnel of the Department for any services during the Term, without the prior written consent of the Department. If the Department determines, after investigation, that a Concessionaire Party or any of its employees, representatives, or agents of any person acting in its behalf have violated this provision, the Concessionaire Party may, at the discretion of the Department, be disqualified from bidding on future contracts with the Department for a period of six months from the date of the Department’s determination of such a violation. Any implicated employees, agents, or representatives of the Contractor may be prohibited from working on any contract awarded by the Department for the period of disqualification.

Section 25.03 Assignment by the Department

The Department may, subject to giving the Concessionaire not less than 90 Days prior written notice or as required by Law, transfer and assign its interests, in whole or in part, in the Project, this Agreement and any other Project Agreements to any other public agency or public entity of the State as permitted by Law; provided, that the assignee (a) has assumed all of the Department’s obligations, duties and liabilities pursuant to this Agreement and the Project Agreements then in effect and has provided the Concessionaire with reasonable assurance of its legal authority and sufficient financial resources to honor and perform same and (b) will not be required to have financial resources in excess of those then available to the Department.

Section 25.04 Authorized Representatives

(a) Each of the Concessionaire and the Department hereby designates the following individuals as its initial Concessionaire Representative(s) and Department Representative(s), respectively, to administer this Agreement on its respective behalf:

(i) For the Concessionaire:

President
95 Express Lanes LLC
6440 General Green Way
Alexandria, Virginia 22312

(ii) For the Department:

Chief Engineer
Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219

(b) The Concessionaire Representatives and the Department Representatives will be reasonably available to each other during the Term and will have the authority to issue
instructions and other communications on behalf of the Concessionaire and Department, respectively, and will be the recipient of notices and other written communications from the other party pursuant to this Agreement (except any notice initiating or relating to the dispute resolution procedures of Article 21 will be given in accordance with Section 25.05). However, such Representatives will not have the authority to make decisions or give instructions binding upon the Concessionaire or the Department, except to the extent expressly authorized by the Concessionaire or the Department, as the case may be, in writing. In the event the Concessionaire or the Department designates different Representatives, it will give the other party written notice of the identity of and contact information for the new Concessionaire Representative(s) or Department Representative(s), as the case may be.

Section 25.05 Notices

(a) Whenever under the provisions of this Agreement it will be necessary or desirable for one party to serve any notice, request, demand, report or other communication on another party, the same will be in writing and will not be effective for any purpose unless and until actually received by the addressee or unless served (i) personally, (ii) by independent, reputable, overnight commercial courier, (iii) by facsimile transmission, where the transmitting party includes a cover sheet identifying the name, location and identity of the transmitting party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein or (iv) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

If to the Department:

Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219
Attention: Commissioner of Highways
Facsimile: (804) 786-2940

With copies to:

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

If to the Concessionaire:

95 Express Lanes LLC
Section 25.06 Binding Effect

Subject to the limitations of Section 25.01 and Section 25.03, this Agreement will be binding upon and will inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the parties hereto, such reference also will be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such party, as if in every case so expressed.

Section 25.07 Relationship of Parties

(a) The relationship of the Concessionaire to the Department will be one of an independent contractor, not an agent, partner, lessee, joint or co-venturer or employee, and neither the Department nor the Concessionaire will have any rights to direct or control the activities of the other or their respective Affiliates, contractors or consultants, except as otherwise expressly provided in this Agreement.

(b) Officials, employees and agents of the Concessionaire or the Department will in no event be considered employees, agents, partners or representatives of the other.
Section 25.08 No Third-Party Beneficiaries

Nothing contained in this Agreement is intended or will be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement, except rights expressly contained herein for the benefit of the Lenders, the Collateral Agent and/or State Indemnitees.

Section 25.09 Limitation on Consequential Damages

Except as expressly provided in this Agreement to the contrary, neither party will be liable to the other for punitive damages or special, indirect, incidental or consequential damages of any nature, whether arising in contract, tort (including negligence) or other legal theory. The foregoing limitation will not, however, in any manner:

(a) prejudice the Department’s right to recover liquidated damages from the Concessionaire as provided in this Agreement;

(b) limit the Concessionaire’s liability for any type of damage arising out of the Concessionaire’s obligation to indemnify, protect, defend and hold each State Indemnitee harmless from Third Party Claims under Article 15 and Section 16.03 of this Agreement;

(c) limit the Concessionaire’s liability for any type of damage to the extent covered by the proceeds of insurance required hereunder; or

(d) limit the amounts expressly provided to be payable by the Department or the Concessionaire pursuant to this Agreement.

Section 25.10 Waiver

(a) No waiver by any party of any right or remedy pursuant to this Agreement or the other Project Agreements will be deemed to be a waiver of any other or subsequent right or remedy pursuant to this Agreement or the other Project Agreements. The consent by one party to any act by the other party requiring such consent will not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

(b) No act, delay or omission done, suffered or permitted by one party or its agents will be deemed to waive, exhaust or impair any right, remedy or power of such party pursuant to this Agreement or any other Project Agreement, or to relieve the other party from the full performance of its obligations pursuant to this Agreement and the other Project Agreements.

(c) No waiver of any term, covenant or condition of this Agreement will be valid unless in writing and executed by the obligee party.

(d) The acceptance of any payment or payment by a party will not (i) waive any preceding or then-existing breach or default by the other party of any term, covenant or condition of this Agreement, other than the other party’s prior failure to pay the particular amount or part
thereof so accepted, regardless of the paid party’s knowledge of such preceding or then-existing breach or default at the time of acceptance of such payment or payment or (ii) continue, extend or affect (A) the service of any notice, any suit, arbitration or other legal proceeding or final judgment, (B) any time within which the other party is required to perform any obligation or (C) any other notice or demand.

(e) No custom or practice between the parties in the administration of the terms of this Agreement will be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of this Agreement.

Section 25.11 No Brokers

Except for any financial adviser or investment banker whose fee will be paid by the party retaining such adviser or banker (or in the case of a Concessionaire Financial Party, by such party or the Concessionaire), each party represents and warrants that it has not dealt with any real estate or business opportunity broker or agent or any finder in connection with this Agreement. Each party agrees, to the extent permitted by Law, to indemnify, protect, defend with counsel acceptable to the other party and hold harmless the other party against any Claim for commission, finder’s fee or like compensation asserted by any real estate or business opportunity broker, agent, finder or other Person claiming to have dealt with the indemnifying party in connection with this Agreement.

Section 25.12 Governing Law; Compliance with Law and Federal Requirements

(a) This Agreement will be governed by and construed in accordance with the Laws of the State applicable to contracts executed and to be performed within the State.

(b) The Concessionaire will keep fully informed of and comply and require its Contractors to comply with Law. The Concessionaire will execute and file the documents, statements, and affidavits required under any Law required by or affecting this Agreement or the execution of the Work. The Concessionaire will permit examination of any records made subject to such examination by such Law.

(c) The Concessionaire will comply and require its Contractors to comply with all Laws applicable to the Project as a result of the costs of the Project being financed in part with State funds, federal-aid funds and State bond proceeds, including the applicable Federal Requirements attached as Exhibit U.

(d) The Concessionaire acknowledges and agrees that the USDOT will have certain approval rights with respect to the Project, including the right to provide certain oversight and technical services with respect to the Work. The Concessionaire will cooperate with USDOT and provide such access to the Project and information as USDOT may request in the exercise of USDOT’s duties, rights and responsibilities in connection with the Project.
Section 25.13 Use of Police Power

Nothing in this Agreement limits the authority of the Department to exercise its regulatory and police powers granted by Law.

Section 25.14 Survival

The dispute resolution procedures, the indemnifications, limitations, releases, obligations to pay termination compensation and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the Work will survive the expiration or earlier termination of this Agreement and/or the completion of the Work.

Section 25.15 Subpoena

Except as provided for in Section 33.1-4 of the Code of Virginia, the Concessionaire may subpoena any Department personnel; provided, that the Concessionaire will pay for such personnel’s time at its fully burdened rate (including overhead and fringe benefits), together with all out-of-pocket expenses incurred, no later than 30 Days after the Concessionaire’s receipt of an invoice reasonably documenting the amount of such time provided.

Section 25.16 Construction and Interpretation of Agreement

(a) The language in all parts of this Agreement will in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any party. The parties hereto acknowledge and agree that this Agreement has been prepared jointly by the parties and has been the subject of arm’s length and careful negotiation over a considerable period of time, that each party has been given the opportunity to independently review this Agreement with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of this Agreement, this Agreement will not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction will be utilized.

(b) If any court of competent jurisdiction issues a final, non-appealable judicial order finding that a term or provision of this Agreement is invalid or unenforceable, the remainder of this Agreement will not be affected thereby and each other term and provision of this Agreement will be valid and enforceable to the fullest extent permitted by Law. It is the intention of the parties to this Agreement, and the parties hereto agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the parties in good faith will supply as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

(c) The captions of the articles and sections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.
(d) References in this instrument to this “Agreement” mean, refer to and include this instrument as well as any riders, exhibits, addenda and attachments hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking “herein,” “hereunder” or “pursuant hereto” (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument will be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. All references to a subsection or clause “above” or “below” refer to the denoted subsection or clause within the section in which the reference appears. Unless expressly provided otherwise, all references to Articles and Sections refer to the Articles and Sections set forth in this Agreement. Unless otherwise stated in this Agreement or the Project Agreements, words which have well-known technical or construction industry meanings are used in this Agreement or the Project Agreements in accordance with such recognized meaning. Wherever the word “including,” “includes” or “include” is used in this Agreement or the Project Agreements, except where immediately preceded by the word “not”, it will be deemed to be followed by the words “without limitation”. Wherever reference is made in the Project Agreements to a particular Governmental Authority, it includes any public agency succeeding to the powers and authority of such Governmental Authority.

(e) As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

(f) The Project Agreements are intended to be complementary and consistent and to be read together as a complete agreement. In the event of any conflict or inconsistency between the Articles of this Agreement and the exhibits to this Agreement, the conflict or inconsistency will be resolved by applying the following order of document precedence, from highest to lowest:

(i) Change Orders and amendments to the articles of this Agreement and Definitions;
(ii) the Articles of this Agreement and Definitions;
(iii) Project Description and Scope Documentation;
(iv) the Technical Requirements, as amended; and
(v) the other exhibits to this Agreement, as amended.

(g) A Project Agreement to which the Department is not a party will have no effect upon the terms and conditions of this Agreement or the construction or interpretation thereof.
(h) Any standard or specification with which the Concessionaire is required to comply by a provision of this Agreement during the Construction Period, shall be the specific edition or version identified in the Technical Requirements, and the Concessionaire shall not be required during the Construction Period to comply with any newer, updated or revised edition or version unless the parties so agree or the Concessionaire is so directed by the Department as a Department Change.

Section 25.17 Counterparts

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

Section 25.18 Entire Agreement; Amendment

(a) THIS AGREEMENT AND THE PROJECT AGREEMENTS TO WHICH THE DEPARTMENT AND THE CONCESSIONAIRE ARE BOTH PARTIES CONSTITUTE THE ENTIRE AND EXCLUSIVE AGREEMENT BETWEEN THE PARTIES RELATING TO THE SPECIFIC MATTERS COVERED HEREIN AND THEREIN. ALL PRIOR WRITTEN AND PRIOR OR CONTEMPORANEOUS VERBAL AGREEMENTS, UNDERSTANDINGS, REPRESENTATIONS AND/OR PRACTICES RELATIVE TO THE FOREGOING, INCLUDING THE INTERIM AGREEMENT, ARE HEREBY SUPERSEDED, REVOKED AND RENDERED INEFFECTIVE FOR ANY PURPOSE. THIS AGREEMENT MAY BE ALTERED, AMENDED OR REVOKED ONLY BY AN INSTRUMENT IN WRITING SIGNED BY EACH PARTY HERETO, OR ITS PERMITTED SUCCESSOR OR ASSIGNEE, EXCEPT TO THE EXTENT THE DEPARTMENT HAS THE RIGHT TO AMEND BY DEPARTMENT CHANGE OR DIRECTIVE LETTER PURSUANT TO ARTICLE 14. NO VERBAL AGREEMENT OR IMPLIED COVENANT WILL BE HELD TO VARY THE TERMS HEREOF, ANY STATUTE, LAW OR CUSTOM TO THE CONTRARY NOTWITHSTANDING.

(b) This Agreement and the other Project Agreements attempt to set forth in full all requirements applicable under the Act as to the development, operation, maintenance, repair, management and financing of the Project and attempt to define in full the rights and responsibilities of each party in connection therewith. To the extent requirements and rights and responsibilities have not been addressed in this Agreement and the other Project Agreements, the parties agree to carry out their respective responsibilities in the spirit of cooperation contemplated by the Act, recognizing that they may not have defined in a sufficient detail or anticipated fully all activities necessary for the full implementation of the Project.

Section 25.19 Payment of Concessionaire Damages and Other Amounts by the Department

(a) THE DEPARTMENT’S PAYMENT OF ANY CONCESSIONAIRE DAMAGES, LOSSES OR ANY OTHER AMOUNTS DUE AND OWING BY THE DEPARTMENT PURSUANT TO THIS AGREEMENT WILL BE SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY AND ALLOCATION BY THE CTB.
Upon determination of Concessionaire Damages or such other amounts due and owing by the Department, the Department will with all practical dispatch consistent in all respects with Law and its obligations pursuant to this Agreement:

(i) deliver to the Governor and the Director of the Department of Planning and Budget of the State, before December 1 with respect to any such payment requested to be appropriated by the next regular session of the General Assembly, a statement of the amount of any such payment due or expected to be due and a request that the Governor include in his budget to be delivered to the next session of the General Assembly a provision that there be appropriated such amounts for such purpose to the extent required, from any legally available funds;

(ii) use its diligent efforts to have (A) the Governor include, in each biennial or any supplemental budget the Governor presents to the General Assembly, the amounts set forth in any statement delivered pursuant to (i) above, (B) the General Assembly appropriate and reappropriate, as applicable, such amounts to or on behalf of the Department for the purpose of paying any Concessionaire Damages or other amounts due and owing by the Department to the Concessionaire pursuant to this Agreement, and (C) the CTB allocates such appropriated amounts as applicable for payment to the Concessionaire; and

(iii) notify the Concessionaire promptly upon becoming aware of any failure by (A) the Governor to include such amounts in his budget delivered to the next session of the General Assembly, (B) the General Assembly to appropriate such amounts during such next session of the General Assembly or (C) the CTB to so allocate such amounts for payment to the Concessionaire.

(b) The parties hereto agree and acknowledge that, subject to appropriation, such obligation of the Department to pay the Concessionaire Damages and other amounts was and is a material inducement and consideration for the execution and delivery of this Agreement by the Concessionaire.

(c) The Department will pay any sum due pursuant to Section 20.03, Section 20.05, Section 20.06 or Section 20.07 within 60 Days after the date of determination of the applicable termination compensation amount; provided, in each case, that the Department may defer payment of such sum for an additional 270 Days if it reasonably determines that such additional period is necessary in order to obtain funds to pay such sum; provided further, that any payment of such sum will be made together with interest thereon (A) at the average earnings rate on the State’s Transportation Trust Fund or any successor thereto during the period that runs from the date such sum would have otherwise become due to the date that is 60 Days thereafter and (B) after such period, at the Bank Rate until the date of payment thereof; except that to the extent such payment is based on the Concessionaire Debt or the amounts required for the Concessionaire to achieve the Base Case Equity IRR, such amounts will be re-calculated as of the date of payment.
(d) The Department will proceed to make payment to the Concessionaire of the undisputed amount of any sum due pursuant to Section 20.03, Section 20.05, Section 20.06 or Section 20.07 without regard to the dispute resolution procedures.

Section 25.20 Taxes

The Concessionaire is solely responsible for the payment of Taxes accrued or arising out of the performance of its obligations pursuant to this Agreement.

Section 25.21 Payments to Department or Concessionaire

(a) Except as otherwise expressly provided herein or in any Project Agreement, payments due to the Department or the Concessionaire hereunder, as applicable, will be due and payable within 30 Days of receipt by the Concessionaire or the Department, as applicable, of an invoice therefor, together with any supporting documentation.

(b) Each party will be entitled to deduct, offset or withhold from any amounts due from one party to the other party any amounts then due and owing from such other party.

(c) Except as otherwise provided, neither party is required to pay amounts due that are being contested in accordance with the dispute resolution procedures described in Article 21.

Section 25.22 Interest on Overdue Amounts

Any amount not paid when due pursuant to this Agreement will bear interest from the date such payment is due until payment is made (after as well as before judgment) at a variable rate per annum at all times equal to the Bank Rate (except as provided otherwise in Section 25.19(c)), which interest will be payable on demand. Interest will be compounded annually and payable on the date on which the related overdue amount is paid.
IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Comprehensive Agreement Relating to the I-95 HOV/HOT Lanes Project as of the date first written above.

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

By: ____________________________
   Gregory A. Whirley, Sr.
   Commissioner of Highways

95 EXPRESS LANES LLC,
a Delaware limited liability company

By: ____________________________
Name: __________________________
Title: ___________________________
95 EXPRESS LANES LLC.
a Delaware limited liability company

By: [Signature]

Name: Michelle La Plante
Title:
COMPREHENSIVE AGREEMENT

RELATING TO THE I-95 HOV/HOT LANES PROJECT

DATED AS OF JULY 31, 2012

BY AND BETWEEN

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

AND

95 EXPRESS LANES LLC,
a Delaware limited liability company

**THE VIRGINIA DEPARTMENT OF TRANSPORTATION RESERVES THE RIGHT TO MODIFY ANY OF THE TERMS PRESENTED IN THIS DRAFT COMPREHENSIVE AGREEMENT**
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This COMPREHENSIVE AGREEMENT RELATING TO THE I-95 HOV/HOT LAKES PROJECT (this “Agreement”) is made and entered into as of July 31, 2012 by and between the VIRGINIA DEPARTMENT OF TRANSPORTATION (the “Department”), an agency of the Commonwealth of Virginia (the “State”), the address of which Department is 1401 East Broad Street, Richmond, Virginia 23219; and 95 EXPRESS LANES LLC, a Delaware limited liability company (the “Concessionaire”), the address of which is 6440 General Green Way, Alexandria, Virginia 22312.

ARTICLE 1.

RECITALS

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

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

WHEREAS, pursuant to the Act, on September 24, 2003, Clark/Shirley submitted an unsolicited conceptual proposal to the Department for the Proposed Project. In accordance with the Department’s Act guidelines then in effect, the Department posted and published notice of the conceptual proposal and solicited competing proposals. On March 17, 2004, Fluor (as defined herein) submitted a conceptual proposal to the Department for the development, design, financing, construction, operation and maintenance of the HOT Lanes on I-95.

WHEREAS, both competing proposals were referred to an initial review committee (the “Initial Review Committee”) for preliminary review.

WHEREAS, following a determination by the Initial Review Committee that the conceptual proposals offered by both proposers merited further review, the Commonwealth Transportation Board on January 20, 2005 adopted a resolution approving both such conceptual proposals for further evaluation. The Deputy Secretary of Transportation invited both proposers to submit detailed proposals for consideration by the Public-Private Transportation Advisory Panel (the “Advisory Panel”) in accordance with the Department’s Act guidelines.

WHEREAS, on June 3, 2005, Clark/Shirley and Fluor and Transurban (as defined herein), which was identified as a subcontractor in Fluor’s conceptual proposal, submitted detailed proposals to the Advisory Panel for consideration.

WHEREAS, the Advisory Panel evaluated the detailed proposals, and on November 1, 2005, recommended to the Acting Commissioner that the detailed proposal submitted by Fluor and Transurban be further developed pursuant to the Act.
WHEREAS, on October 24, 2006, the Department, Fluor Virginia, Inc. and Transurban (USA) Development Inc. entered into an Interim Agreement, which was amended as of May 6, 2008, and further amended by an Amendment No. 2 dated as of March 23, 2012, each by and among the Department, Fluor Enterprises, Inc. (the successor-in-interest to Fluor Virginia, Inc.) ("Fluor") and Transurban (USA), Inc. ("Transurban") (as so amended, the “Interim Agreement”).

WHEREAS, on January 7, 2009, the FHWA issued a Categorical Exclusion for the Proposed Project. The FHWA approved the Department’s Special Experimental Project 14 work plan on June 27, 2006.

WHEREAS, on February 2, 2011, the Department (i) reduced the scope of the Proposed Project by eliminating the originally planned construction of six miles of HOV/HOT lanes on I-395 and planned upgrades to specific interchanges and (ii) changed the name of the Proposed Project to the I-95 HOV/HOT Lanes Project.

WHEREAS, on November 7, 2011, the Department submitted to FHWA the Environmental Assessment, and requested that FHWA issue a FONSI for the Project.

WHEREAS, FHWA reviewed the Environmental Assessment and other information and issued the FONSI on December 5, 2011.

WHEREAS, the Department, the Concessionaire, Fluor and Transurban entered into an agreement dated as of the date hereof terminating the Interim Agreement.

WHEREAS, the Department and the Concessionaire desire to herein set forth the terms to develop and operate the Project pursuant to a long-term concession arrangement granted to the Concessionaire by the Department by this Agreement.

AGREEMENT

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

ARTICLE 2.

DEFINITIONS

All capitalized terms used in this Agreement, but not expressly defined in this Agreement, have the respective meanings set forth in Exhibit A attached to this Agreement.
ARTICLE 3.

BASIC ROLES AND RESPONSIBILITIES

Section 3.01 Basic Agreement

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

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

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

(d) The Concessionaire may retain Contractors to perform certain of its responsibilities pursuant to this Agreement, subject to the terms and conditions of this Agreement. Performance of any of the Work by a Contractor will satisfy the obligation of the Concessionaire to perform such Work; provided that any such Work performed will be binding on the Concessionaire and the foregoing shall not relieve the obligation of the Concessionaire to manage such Contractor. Except with regard to Limited Notices to Proceed, notices relating to Substantial Completion pursuant to Section 8.08(e), notices relating to Final Acceptance pursuant to Section 8.09(b), and notices relating to Service Commencement pursuant to Section 9.02(a), the making of any submittals or the giving of any notices to the Department by the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work) will satisfy the obligation of the Concessionaire to make such submittal or give such notice; provided that any such submittal made or notice given by the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work) will be binding on the Concessionaire and the foregoing shall not relieve the obligation of the Concessionaire to manage the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work). In any such event, the Concessionaire will remain fully and primarily responsible for the performance of the Work, the making of submittals or the giving of any notices by any Contractors.

(e) The Department will be entitled to exercise such oversight of the activities of the Concessionaire and its Contractors in accordance with this Agreement, but will also be entitled to rely upon the Concessionaire to directly manage, oversee and resolve disputes involving its Contractors, without the involvement of the Department (except as otherwise provided in this Agreement).
The Department will use reasonable efforts in performing its rights and duties under this Agreement to minimize any disruption to or impairment of the performance of the Concessionaire’s rights and obligations under this Agreement; provided, that nothing in this Section 3.01(f) will limit the Department’s rights and obligations under this Agreement.

Section 3.02 Project Agreements

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

(a) Escrow Agreement attached as Exhibit D;
(b) Design-Build Contract attached as Exhibit E;
(c) Design-Build Work Guarantee attached as Exhibit F;
(d) Operations and Maintenance Agreement attached as Exhibit I; and
(e) Shared Facilities Agreement attached as Exhibit X.

Section 3.03 Nature of Parties’ Interests Pursuant to This Agreement

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

(b) The Department and the Concessionaire acknowledge their mutual intent that, despite the Department’s retention of fee title to (or other good and valid real property interest in) the Project Assets and the Project Right of Way, as a result of the Concessionaire’s rights and interests therein pursuant to the Permit granted to the Concessionaire under this Agreement, to the maximum extent permitted by Law, for federal income tax purposes the Concessionaire will be treated as having acquired (i) an ownership interest in those Project Assets that have an expected economic useful life equal to or less than the Term, (ii) an interest in the Project Right of Way and those Project Assets that have an expected economic useful life greater than the Term (with the amount allocable under this clause (ii) treated for purposes of section 467 as giving rise to rent that is allocated ratably to each year during the Term) and (iii) a franchise and license, permit, or other right within the meaning of section 197(d)(1)(F) and 197(d)(1)(D) of the Internal Revenue Code of 1986, as amended, and in that regard an amount equal to the Concessionaire’s cost of development, design, construction and start-up of the Project represents acquisition cost of such assets (the “Cost”), and no payment by the Department to the Concessionaire pursuant to Section 7.02 will be treated as part of the Cost. The Cost will be allocated for all income tax purposes in the manner determined by the Concessionaire, which allocation will be consistent with Section 1060 of the Internal Revenue Code of 1986, as amended and the Concessionaire will execute and file all income tax returns with the Internal Revenue Service in accordance with the requirements of the Internal Revenue Code.
Revenue Service in a manner consistent with such allocation, including Form 8594. The Department and the Concessionaire do not contemplate that the Department will be required to file any return with the Internal Revenue Service with respect to such allocation, but that if required to do so the Department will file such return in a manner consistent with such allocation.

Section 3.04 Quiet Possession and Enjoyment

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

ARTICLE 4.

GRANT OF PERMIT; TERM

Section 4.01 Grant of Permit

(a) Pursuant to the Act and subject to the terms and conditions of this Agreement, the Department grants to the Concessionaire the exclusive right, and the Concessionaire accepts (i) the obligation to develop, design, finance, construct, operate and maintain the Project and (ii) the right to establish, impose, charge, collect, use and enforce payment of tolls and related charges (the “Permit”).

(b) The Department’s grant of the Permit pursuant to Section 4.01(a), and the Concessionaire’s obligations with respect thereto pursuant to Section 4.01(a), are conditional upon Financial Close having occurred in accordance with Section 7.03; provided however that portions of the Work may be performed by the Concessionaire prior to Financial Close pursuant to Section 8.02 and Section 8.04.

(c) In consideration of the Permit granted to the Concessionaire by the Department pursuant to this Section 4.01, the Concessionaire will perform the Work at its own expense except as otherwise provided herein and pay (to the extent required) to the Department the Permit Fee in accordance with the Permit Fee calculation attached as Exhibit J.
Section 4.02 Term

This Agreement will take effect on the Agreement Date and will remain in effect, until the first to occur of (i) the 73rd anniversary of the Service Commencement Date or (ii) the effective date of the termination of this Agreement pursuant to Article 20 (the “Term”).

ARTICLE 5.

TOLLING

Section 5.01 Tolling of the Project

(a) Toll Revenues.

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

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

(b) Users of the HOT Lanes.

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

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

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

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

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

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

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

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

(i) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable administrative fees for account maintenance, account statements and customer service;

(ii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable amounts for the purchase or rental of transponders or other electronic tolling devices;

(iii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable, refundable security deposits for the distribution of transponders or other electronic toll devices;

(iv) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable video surcharges or other reasonable fees for permitted travel on the Project Assets by vehicles that are not equipped with a transponder or other available equipment allowing the processing of the applicable tolls through E-ZPass (or any successor to E-ZPass utilized on State Highways at that time); and

(v) reasonable fees, penalties and interest for toll violations, including costs of collection in accordance with Law; and
(vi) other incidental fees and charges reasonable and customary in connection with the services being provided at that time by the Concessionaire; provided, that the amount of any such other incidental fees and charges will not exceed the amount reasonably necessary for the Concessionaire to recover its Allocable Costs, directly incurred with respect to the items, services and work for which they are levied.

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

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

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

(g) Transaction Costs.

(i) Without limiting the immediately succeeding sentence, the Department or its agents will use commercially reasonable efforts to work with the Concessionaire to limit transaction costs charged to the Project by the Department, including charges for toll transaction account management services. The Department will not charge the Concessionaire or the Project any fees or other transaction amounts for toll transaction account management services, other than as set forth in the Electronic Toll Collection Agreement.
(ii) If the Department, or its successors or assigns, ceases to provide all or a material part of the ETC Services and as a result the Concessionaire incurs costs related to self-performing, or engaging a Contractor to perform, the ETC Services no longer provided by the Department, or its successors or assigns, then the Department agrees to pay the Concessionaire the amount of such reasonable costs. If the Concessionaire self-performs or contracts with a Contractor to provide ETC Services, the Department, or its successors or assigns, will provide the same access to customer accounts as if the Department continued to provide the ETC Services, if such access is permitted by Law and if the Concessionaire pays to the Department, or its successors or assigns, the reasonable costs of providing such access.

(h) Violations Processing Services.

(i) The Department has implemented and maintains a processing system for the enforcement of penalties for toll violations in Virginia for electronic toll collection systems on State Highways. The Concessionaire may, but is not obligated to, enter into an agreement with the Department to obtain the benefits of such enforcement system, in accordance with the Violation Processing Services Agreement in the form attached as Exhibit L. In consideration of such services, the Concessionaire will pay the Department its customary charges for such services in effect from time to time. For purposes of identifying and apprehending toll violators of the Project, provided it is authorized under Law, and any applicable agreements or arrangements, the Department will make available to the Concessionaire the benefits of any agreements or arrangements which the Department has in place with other state authorities or agencies that provide access to records in their possession relating to vehicle and vehicle owner data, and will coordinate with the Virginia State Police in accordance with Section 9.06(a) with respect to the provision of policing services, emergency services, traffic patrol and traffic law enforcement services on the Project.

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

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

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

**Section 5.02 Toll Rates**

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

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

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

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

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

(i) type, weight and occupancy of the vehicle;

(ii) number of axles;

(iii) time of day and/or week;

(iv) time and location of entry or exit to or from the HOT Lanes;

(v) traffic volume, vehicle speed, vehicle type; and

(vi) similar variables or combinations of such variables.

Notwithstanding the foregoing, (A) the Concessionaire may adopt and implement discount programs for different classes or groups of persons using the HOT Lanes under like conditions, subject to the provisions of Section 24.01 and (B) it is understood that dynamic tolling may result in vehicles that enter the HOT Lanes at different times being subject to different toll rates as well as in vehicles travelling on the same section of the HOT Lanes being subject to different toll rates.
Section 5.03 Reserved

Section 5.04 User Confidentiality

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

Section 5.05 Suspension of Tolls

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

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

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

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

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

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

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

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

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

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

Section 5.06 Disposition of Gross Revenues

(a) Gross Revenues will be used first to pay all due and payable Operating Costs, specifically including all amounts due to the Department pursuant to this Agreement (which amounts will be paid on a pari passu basis with all other operations and maintenance costs), before they may be used and applied for any other purpose.

(b) The Concessionaire will not use Gross Revenues to make any Distributions (or to pay any amount payable pursuant to an Affiliate Contract subject to approval but not approved by the Department pursuant to Section 24.02(l)), unless and until the Concessionaire first pays the following:

(i) any undisputed amounts due to the Department pursuant to the terms of this Agreement;
(ii) current and delinquent operating and maintenance costs (including any payments to Affiliates made solely in accordance with the applicable Affiliate Contracts entered into in accordance with Section 24.02(l));

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

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

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

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

In the event there are any disputed amounts due to the Department pursuant to the terms of this Agreement, the Concessionaire will maintain a cash reserve for such disputed amounts in accordance with GAAP or any other generally accepted accounting principles which are acceptable to the Department as a condition precedent to making any Distribution or payment to an Affiliate. If the Concessionaire makes any Distribution or payment to an Affiliate in violation of this Section 5.06(b), the same will be deemed to be held in trust by such Person for the benefit of the Department and the Collateral Agent, and will be payable to the Department or the Collateral Agent on demand. If the Department collects any such amounts held in trust, it will make them available for any of the purposes set forth above and, at the request of the Collateral Agent, deliver them to the Collateral Agent.

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

Section 5.07 Revenue Risk Related to Traffic Volume

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

(b) (i) From the period beginning on the second anniversary of the Service Commencement Date to December 31, 2030 (the “First Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of 35% of the total flow of all Permitted Vehicles in two consecutive Toll Sections that are then using such Toll Sections going in the same direction
for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “First Threshold HOV Percentage and Rate”) of 1,450 vehicles per hour per traffic lane; provided, however, that the Department will not be required to make any payment, in question pursuant to this Section 5.07(b)(i) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeds the First Threshold HOV Percentage and Rate.

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

(iii) From January 1, 2041 to the 40th anniversary of the Financial Close Date (the “Third Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of 38% of the total flow of all Permitted Vehicles in two consecutive Toll Sections that are then using such Toll Sections going in the same direction for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “Third Threshold HOV Percentage and Rate”) of 1,550 vehicles per hour per traffic lane; provided, however, that the Department will not be required to make any payments pursuant to this Section 5.07(b)(iii) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeded the Third Threshold HOV Percentage and Rate.

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

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

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

(vii) Notwithstanding the foregoing, this Section 5.07(b) will cease to apply on the first to occur of: (A) the date on which the Highest Revenue Share IRR has been reached and (B) the 40th anniversary of the Financial Close Date.

Section 5.08 Failure to Meet OSPS

(a) At any time after the second full month following the Service Commencement Date, the Concessionaire will notify the Department if the Concessionaire’s scheduled monthly report identifies an instance of the Project’s failure to meet the OSPS (as provided in the Technical Requirements). The notice will describe such failure in reasonable detail. The Department will notify the Concessionaire within 30 Days of its receipt of the Concessionaire’s report whether or not it requires an OSPS Improvement Plan (the “OSPS Improvement Plan”).
(b) Upon a notification from the Department pursuant to Section 5.08(a) that the Project requires an OSPS Improvement Plan, the Concessionaire (at its sole cost and expense) will prepare and submit the OSPS Improvement Plan to the Department for its approval. The OSPS Improvement Plan will not be required to propose a general strategy to improve overall OSPS compliance, but will be required to propose a strategy to address the specific reasons which the Concessionaire reasonably believes caused such failure as described in the Concessionaire’s report. The OSPS Improvement Plan will be delivered to the Department within 30 Days of the Department’s notice (or longer if mutually agreed to by the parties) and will cover the matters set forth in Section 5.08(a). The Department will review the OSPS Improvement Plan in accordance with the provisions of Section 10.05. The Concessionaire will diligently implement the elements of the approved OSPS Improvement Plan that are within the control of the Concessionaire promptly following the Department’s approval thereof and within the schedule set forth in such OSPS Improvement Plan.

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

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

(i) will not be higher than 55 mph;

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

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

Section 5.09 SAFETEA-LU Compliance

(a) The Department agrees to provide to FHWA the certifications required of a State agency under 23 U.S.C. §166 and acknowledges that it has entered into the Toll Agreement attached as Exhibit M. The delivery of a certification by the Department that the HOT Lanes do not comply with the applicable requirements of 23 U.S.C. §166, or such other federal, rule or regulation will not constitute a default by the Department under this Agreement.
(b) The Concessionaire agrees to maintain and operate the HOT Lanes, at all times, in compliance with the provisions of 23 U.S.C. §166 and 23 U.S.C. §129, successor provisions, all regulations promulgated thereunder, and the Toll Agreement. Accordingly, the Concessionaire will be responsible for the satisfaction of the requirements of 23 U.S.C. §166(b)(4), in accordance with the terms of this Agreement, and will otherwise coordinate its compliance efforts with the Department so as to enable the Department to provide the certifications required by Section 5.09(a).

Section 5.10 USDOT Reporting Requirements

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

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

(c) If the Concessionaire enters into one or more agreements with the USDOT in connection with the TIFIA Credit Assistance, TIGER Credit Assistance or other financing program, the Concessionaire agrees to provide the Department with executed versions of such agreements together with any agreements or instruments evidencing or securing the Concessionaire’s obligations thereunder, including any collateral pledge agreements. In Exhibit G, the Department is providing the Concessionaire with a listing of the reports, notices and other filings, copies of which are to be provided to the Department concurrently with the Concessionaire’s delivery (or receipt) thereof. The Concessionaire agrees to provide the Department with copies of such reports, notices and other filings made under such agreements as are requested by the Department pursuant to the preceding sentence; provided however, that the Concessionaire, in its reasonable discretion, may determine not to provide the Department with reports, notices and filings that it believes are not germane to the Project and the Department. The Concessionaire will provide within ten days after its receipt of a request by the Department, its rationale for not providing a report, notice or other filing requested by the Department pursuant to this Section 5.10(c).

(d) If the Concessionaire enters into a Project Financing Agreement with the Collateral Agent that provides for the collection and distribution of Gross Revenues, the Concessionaire agrees to provide to the Department, as soon as reasonably practicable after the Concessionaire’s actual receipt of the same, a copy of: any written notice of resignation or removal of the Collateral Agent; any written notice of the appointment of a successor Collateral Agent; any written notice of any merger of the Collateral Agent; any written notice of any transfer by the Collateral Agent of its rights under the Project Financing Agreements to an affiliate; and any written notice of any change in any Deposit Account Bank.
ARTICLE 6.

BASE CASE FINANCIAL MODEL

Section 6.01 Initial Base Case Financial Model and Base Case Financial Model

(a) The Concessionaire and the Department agree to the composition of the Initial Base Case Financial Model as of the Agreement Date, which is included in the Escrow Documents and which will be deposited with the Escrow Agent as described in Section 18.05.

(b) The Initial Base Case Financial Model will be updated upon Financial Close in accordance with Section 7.03(b)(i) through (vi) and will become the Adjusted Financial Model.

(c) The Adjusted Financial Model will be updated upon Financial Close in accordance with Section 7.03(b)(vii) and this Agreement and such update will become the Base Case Financial Model.

(d) The Concessionaire will not cause (or permit any other Person to cause) the Initial Base Case Financial Model, the Adjusted Financial Model or the Base Case Financial Model to contain any hidden data. The Concessionaire will furnish to the Department any password or other access rights for each of the Initial Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model.

Section 6.02 Base Case Financial Model Updates

(a) Other than in accordance with the terms of this Agreement, in no event will the Base Case Financial Model, the Adjusted Financial Model, the Adjusted Financial Model Update or any Base Case Financial Model Update be changed except with the prior written approval of both the Department and the Concessionaire. The Concessionaire will furnish to the Department any password or other access rights for the Base Case Financial Model Update or Adjusted Financial Model Update.

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

(i) upon submission of a notice of a Refinancing under Section 7.05;

(ii) within 60 Days after the delivery of a Delay Event Notice that extends the Guaranteed Substantial Completion Date;

(iii) within 60 Days after the delivery of a Compensation Event Notice;

(iv) within 60 Days after the delivery of a notice of a Net Cost Savings or positive Net Revenue Impact under Section 14.04;
(v) within 60 Days after the Concessionaire notifies the Department that it proposes to undertake a Concessionaire Project Enhancement; and

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

(c) Any proposed Base Case Financial Model Update shall become the Base Case Financial Model Update following its approval by the Department in accordance with Section 6.03.

(d) Within 150 Days following the end of each fiscal year, the most recent undisputed Base Case Financial Model Update (or, if there has been no undisputed Base Case Financial Model Update, the Base Case Financial Model) will be updated to reflect audited historical cash flows for the most recently audited fiscal year; provided, however, such Base Case Financial Model Update will not: (i) include changes in Financial Model Formulas, (ii) include changes in forecast cash flows or (iii) allow such historical information to flow through the Financial Model Formulas.

Section 6.03 Certain Adjustments

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

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

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

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

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

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

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

Section 6.04 Financial Model Disputes

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

(b) In the event of a Dispute, the Initial Base Case Financial Model, the immediately preceding Adjusted Financial Model or the immediately preceding Base Case Financial Model Update (as applicable) that is not being disputed (or, if there has been no undisputed Base Case Financial Model Update and no disputed Adjusted Financial Model, the Base Case Financial Model) will remain in effect until such Dispute is resolved or a new Adjusted Financial Model or a new Base Case Financial Model Update is issued and not disputed. If a proposed Base Case Financial Model, Adjusted Financial Model or Base Case Financial Model Update (as applicable) has not been disputed, or if any such Dispute has been so resolved, the proposed Base Case Financial Model, Adjusted Financial Model or Base Case Financial Model Update (as applicable) will serve as the Base Case Financial Model, new Adjusted Financial Model Update or the current Base Case Financial Model Update (as applicable) and will be submitted to the Escrow Agent in accordance with Section 18.05(d).

Section 6.05 Audit of Financial Model

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

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

ARTICLE 7.

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

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

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

(b) Each bond or promissory note evidencing Concessionaire Debt must include a conspicuous recital on its face to the effect that payment of the principal thereof and interest thereon does not constitute a claim against the Department’s fee simple title to or other good and valid real property interest in the Project Assets, the Project Right of Way, the Department’s interest hereunder or its interest and estate in and to the Project Assets or any part thereof, is not an obligation of any State Party, moral or otherwise, and neither the full faith and credit nor the taxing power of any State Party is pledged to the payment of the principal thereof and interest thereon.

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

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

(ii) a representation, warranty or other assurance as to (A) the ability of the Concessionaire to perform its obligations with respect to the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project or (B) the adequacy of the Gross Revenues to provide for payment of the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project.
(d) The Concessionaire will make or cause to be made Equity Contributions (the “Equity Contribution Amount”) equal to: (i) an amount equal to the Base Capital Contributions set forth in Section 2.2 of each Equity Funding Agreement (the “Base Equity Contributions”), as adjusted pursuant to this Agreement (the “Initial Equity Commitment Amount”); provided, however, that after the Agreement Date, the Concessionaire will not adjust the Initial Equity Commitment Amount without the approval of the Department in its sole discretion, (ii) an amount equal to the Contingent Capital Contributions set forth in Section 2.3 of each Equity Funding Agreement, as required pursuant to such Equity Funding Agreement (the “Contingent Capital Contribution Amount”); and (iii) $108,419,977 (the “Concessionaire TIFIA Protection Amount”), which is subject to adjustment or cancellation pursuant to Section 7.07.

Section 7.02 Public Funds

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

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

Section 7.03 Financial Close

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

(i) the Concessionaire has provided the Department: (A) a list of and proposed initial drafts of the Initial Project Financing Agreements and Financing Assignments set forth in Exhibit O and (B) a proposed initial draft of the Base Case Financial Model reflecting any changes in financing from the Initial Base Case Financial Model, contemporaneously with the distribution of such drafts to the Lenders and other parties to Financial Close for the Department’s review and comment, and has included the Department on all subsequent distributions of such drafts to the Lenders and other parties to Financial Close up and until the Concessionaire has furnished the proposed final drafts pursuant to Section 7.03(a)(ii);

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Design-Build Letter of Credit;

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

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

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

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

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

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

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

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

(L) the Equity Funding Agreements; and

(M) the Equity Funding Guaranties.

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

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

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

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

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

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

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

(iv) **PABs Interest Rate Protection.**

(A) (1) The Department will bear the risk and have the benefit of the first 25bps of change in PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate and (2) the Department and the Concessionaire will equally share the risk and the benefit in any change between 25bps and 100bps in the PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate to the actual PABs Interest Rate applicable to the PABs issued as of the Financial Close Date, and (3) the Concessionaire will bear the risk and have the benefit of any change in excess of 100 bps in PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate.
(B) If the PABs Interest Rate as of the Financial Close Date has changed from the Benchmark PABs Interest Rate, the Initial Base Case Financial Model will be updated in accordance with the Financial Close Adjustment Protocol set forth in Exhibit BB to reflect the PABs Interest Rate and to reflect the risk and benefit allocated to the Department (ignoring for this calculation any change in the Benchmark PABs Interest Rate the risk and benefit of which has been allocated to the Concessionaire) and used to adjust the Initial Public Funds Amount in accordance with the Financial Close Adjustment Protocol such that the Equity IRR is equal to the Initial Equity IRR.

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

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

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

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

(d) **Payments at Financial Close.**

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

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

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

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

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

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

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

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

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

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

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

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

(vii) each Financing Assignment will require that if the Concessionaire is in default under the Concessionaire Debt secured by the Financing Assignment or under the Financing Assignment and the Lender or Collateral Agent gives notice of such default to the Concessionaire, then the Collateral Agent will also give concurrent notice of such default to the Department. Each Financing Assignment also will require that the Collateral Agent deliver to the Department, concurrently with delivery to the Concessionaire or any other Person, every notice of election to sell, notice of sale or other notice required by Law or by the Financing Assignment in connection with the exercise of remedies under the Financing Assignment;
(viii) no Financing Assignment will grant to a Lender any right to apply funds deposited with the Depositary in accordance with Section 17.07, except for the express purposes for which the reserve or deposit is established;

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

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

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

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

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

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

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

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

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

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

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

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

(h) Each Financing Assignment will make the Department a third-party beneficiary to any provision thereof that creates or protects the rights and priorities of the Department to receive payments thereunder as provided for in this Agreement, including Section 5.06.

(i) The Concessionaire will cause all Project Financing Agreements to provide that amounts described in clauses (a), (c) and (d) of the definition of “Gross Revenues” must be deposited in one or more accounts held by the Collateral Agent or its agent under an account control or similar agreement pending disbursement; provided, that such funds may be invested in investments permitted by the Project Financing Agreements pending disbursement; and provided further that the Concessionaire is not precluded from transferring such amounts to a separate account to pay Operating Costs as permitted in the Project Financing Agreements.

Section 7.05 Refinancing Requirements

(a) Notice of Refinancing. The Concessionaire will provide the Department written notice of a Refinancing 75 Days before the date of such Refinancing (or, if such advance notice is not reasonably possible under the circumstances, such notice as is possible and in any event with reasonable time for the Department to review and, if applicable, provide its consent for such Refinancing as contemplated below). At the Department’s request, the Concessionaire will provide to the Department available details of the proposed Refinancing, including (i) details of the changes, if any, proposed to the Financial Model Formulas, (ii) the proposed Base Case Financial Model Update, (iii) any material changes in the Concessionaire’s obligations (including contingent obligations) to the Project Lenders, (iv) an outline detailing the changes and/or replacements, as the case may be, to the Project Financing Agreements then in effect and the Financing Assignments contemplated by the Refinancing, (v) a calculation of the anticipated Permit Fee, if any, generated from such Refinancing, in each case together with any supporting documentation, and (vi) any other details concerning the Refinancing that the Department may reasonably require to determine whether the Refinancing would, or could reasonably be expected to, have a material adverse effect on the Department, the Project or the ability of the Concessionaire to perform its obligations pursuant to this Agreement or any other Project Agreement, provided that, with respect to any refinancing meeting the requirements of clauses (i), (ii) or (iii) of Section 7.05(c), the Concessionaire will provide to the Department details to the extent reasonably required to establish that such proposed Refinancing satisfies the requirements of clauses (i), (ii) or (iii) of Section 7.05(c).

(b) Project Financing Agreements Related to Refinancings.

(i) The Concessionaire will deliver to the Department for access and review, initial and subsequent drafts of all proposed Project Financing Agreements
contemporaneously with the distribution of such drafts by and between the Concessionaire and the Lenders. The Department’s consent, when applicable, will be given not less than 15 Business Days prior to the proposed date of the Refinancing, provided, however, that there are no material changes in the terms of the relevant Project Financing Agreements provided to the Department and that the Department has been given reasonable time to provide its review and/or approval in the event that written notice was not provided to Department 75 Days before the date of the Refinancing.

(ii) The Concessionaire will deliver, not later than 15 Days after close of the Refinancing, to the Department executed copies of all Project Financing Agreements in connection with the Refinancing.

(c) Department’s Right to Approve Refinancing. Any Refinancing of Concessionaire Debt will be subject to the Department’s prior approval, which approval will not be unreasonably withheld or delayed; provided, that no such approval will be required if the Concessionaire first demonstrates to the Department that:

(i) the proposed Refinancing refines existing Concessionaire Debt and does not increase the Concessionaire Debt then outstanding other than by an amount equal to reasonable costs of closing the Refinancing, including lender fees, arranger fees and advisor fees, and the amount of any required reserves; or

(ii) the proposed Refinancing has been assigned a rating (which may include a non-public rating) by a Rating Agency (without regard to bond insurance, if any) which is no lower than BBB minus or Baa3 or equivalent rating; or

(iii) no portion of the proceeds of the Refinancing will be used to make Distributions or to pay non-capital costs and expenses (other than related costs of issuance and any required reserves).

With respect to any proposed Refinancing for which the Department’s approval is required, the Department shall not unreasonably withhold or delay its consent. Without limiting other reasonable grounds for withholding consent, the Department may withhold consent if it reasonably determines that:

(1) the information disclosed to it is not a true and complete disclosure of all relevant aspects of the Refinancing;

(2) any change or series of changes in the obligations of the Concessionaire due to the Refinancing would or reasonably could be expected to result in a material increase in the Department’s liabilities, obligations or risks under this Agreement and the other Project Agreements;

(3) the Refinancing would have a material adverse effect on the ability or commitment of the Concessionaire to perform its obligations under this Agreement and the other Project Agreements; or
(4) the proposed Refinancing would or reasonably could be expected to have a material adverse effect on the Concessionaire’s incentives and disincentives to fully comply with the standards and requirements applicable to the development, construction, operations and maintenance of the Project for which the Concessionaire is responsible pursuant to this Agreement and the other Project Agreements.

Section 7.07(e) sets forth additional restrictions on Refinancings and on the incurrence of Concessionaire Debt.

(d) Payment of Department Expenses.

(i) In connection with any Refinancing, the Concessionaire will pay the Department for the Department’s Allocable Costs incurred related to the Refinancing at the time of the closing of the Refinancing. The Department will provide the Concessionaire with an estimate of its expected costs related to such Refinancing; if there is a change in circumstances relating to the Refinancing following the submission of the Department’s initial estimate that is expected to result in higher expenses, then the Department will provide a revised estimate. For any Refinancings that do not close, the Department will be paid for its documented expenses for such Refinancings from and at the time of (or, at the Concessionaire’s option, at any time prior to) any subsequent successful Refinancings, and will be entitled to payment of interest on such expenses based on the Bank Rate calculated from the date on which such expenses were due and payable according to the first invoice issued by the Department for such expenses until paid by the Concessionaire.

(ii) The Department will provide the Concessionaire with an estimate of the expenses to be incurred by the Department related to the Refinancing, no later than 30 Days after the Department has provided its consent to such Refinancing pursuant to Section 7.05(b)(i), and a final estimate not less than five Days prior to the proposed date of the Refinancing.

(e) Other Requirements.

(i) Every Refinancing will be subject to the provisions of Section 7.01 and Section 7.03 and the other provisions of this Agreement pertaining to Concessionaire Debt and Financing Assignments.

(ii) Any reimbursement agreement and related documents that the Concessionaire enters into in connection with obtaining a letter of credit will, if they encumber the Concessionaire’s Interest, constitute a Financing Assignment and be treated as a Refinancing for all purposes pursuant to this Agreement. No such reimbursement agreement and related documents will encumber less than the entire Concessionaire’s Interest.

(iii) In connection with the consummation of any proposed Refinancing, the Department will, promptly upon the reasonable request of the Concessionaire or the
Collateral Agent or any Lender and such requesting party’s agreement to cover any costs incurred by the Department in connection with the requested action, review the Concessionaire’s written analysis of whether the Department is required to approve such Refinancing pursuant to Section 7.05(c) and confirm whether the Department believes its approval is required for such Refinancing.

(iv) In connection with the Initial Project Financing or any Refinancing, the Department will, promptly upon the request of the Concessionaire or the Collateral Agent, execute, acknowledge and deliver to the Concessionaire, or any of the parties specified by the Concessionaire, standard consents or certificates with respect to the Agreement, which may be qualified by materiality and/or to the best of the knowledge and belief of a designated representative of the Department; provided, however, that such consents or certificates do not limit, restrict or prejudice the Department’s rights under this Agreement or any other Project Agreement.

Section 7.06 Collateral Agent’s Rights

The Collateral Agent’s rights are set forth in the Direct Agreement.

Section 7.07 TIFIA Credit Assistance Protection

(a) Concessionaire Obligation to Execute and Deliver TIFIA Loan Documentation.

(i) The Concessionaire agrees to (A) exercise commercially reasonable efforts to reach financial close on any TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)), and (B) execute and deliver any TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) that the Concessionaire receives on or prior to March 31, 2013 within 45 days following its receipt thereof together with confirmation from the TIFIA Lender that it is ready to execute and deliver the TIFIA Loan Documentation. If the Concessionaire fails to execute and deliver, prior to March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)) (x) any TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) or (y) any TIFIA Loan Documentation containing terms consistent with the terms described in Exhibit H, but containing other terms and conditions that are inconsistent with the terms and conditions contained in TIFIA loan agreements and intercreditor agreements for Relevant Precedent, which inconsistent terms and conditions are reasonably expected to have a material adverse effect on the Concessionaire’s financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile, and the Department has agreed to perform or cause to be performed such term or condition or otherwise resolve such inconsistent terms or conditions to the mutual satisfaction of the Concessionaire and the Department, each acting reasonably, in each case, within 45 days following its receipt by the Concessionaire, then such failure shall constitute a failure by the Concessionaire to comply with a material obligation of this
Agreement and shall entitle the Department to exercise its rights and remedies hereunder relating thereto; provided, that in the event the Department exercises its right to terminate this Agreement, notwithstanding anything to the contrary set forth in Section 20.05(c) or any other provision of this Agreement, the Department will pay to the Concessionaire, subject to Section 25.19, an amount equal to the aggregate of the following: (i) 100% of Concessionaire Debt then outstanding, plus (ii) all Demobilization Costs, less (iii) Credit Balances.

(ii) If the Concessionaire fails to execute and deliver, prior to March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)) (A) any TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) or (B) any TIFIA Loan Documentation containing terms consistent with the terms described in Exhibit H, but containing other terms and conditions that are inconsistent with the terms and conditions contained in the TIFIA loan agreements and intercreditor agreements for Relevant Precedent, which inconsistent terms and conditions are reasonably expected to have a material adverse effect on the Concessionaire’s financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile, and the Department has not agreed to perform or cause to be performed such term or condition or otherwise resolve such inconsistent terms or conditions to the mutual satisfaction of the Concessionaire and the Department, each acting reasonably, then in each case, the Department TIFIA Protection Amount will be decreased by an amount equal to $30,000,000 and the Concessionaire TIFIA Protection Amount will be increased by $30,000,000. For the avoidance of doubt, the Concessionaire may choose to execute and deliver the TIFIA Loan Documentation described in clause (B), in which case no adjustment to the Department TIFIA Protection Amount or the Concessionaire TIFIA Protection Amount will be made. The failure of the Concessionaire to enter into the TIFIA Loan Documentation pursuant to this Section 7.07(a)(ii)(B) will not be a Concessionaire Default and the Department will have no right to terminate this Agreement or exercise any other rights or remedies that may be available to the Department hereunder as a result thereof (other than as specifically provided in this Section 7.07(a)(ii)).

(iii) If the Concessionaire executes and delivers the TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(a) and Section 7.07(b)) on or before November 30, 2012, the Department TIFIA Protection Amount will be increased by an amount equal to $15,000,000 and the Concessionaire TIFIA Protection Amount will be decreased by $15,000,000; provided, however that any adjustments pursuant to this subsection (iii) shall occur only after adjustments are made pursuant to Section 7.07(b), if any.

(iv) If the Concessionaire executes and delivers the TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(a) and Section 7.07(b)) after
November 30, 2012 and on or before March 31, 2013, the Department TIFIA Protection Amount will be increased by an amount equal to $5,000,000 and the Concessionaire TIFIA Protection Amount will be decreased by $5,000,000; provided, however that any adjustments pursuant to this subsection (iv) shall occur only after adjustments are made pursuant to Section 7.07(b), if any.

(v) Notwithstanding the Concessionaire’s obligation to execute and deliver the TIFIA Loan Documentation containing TIFIA Commercial Terms within 45 Days following its receipt pursuant to Section 7.07(a)(i), if the TIFIA Loan Documentation containing TIFIA Commercial Terms has not been made available to the Concessionaire on or before March 31, 2013, the Concessionaire will have no further obligation to seek TIFIA Credit Assistance.

(b) Funding Adjustments at TIFIA Closing Date. If the Concessionaire enters into the TIFIA Loan Documentation on or before March 31, 2013, the Adjusted Financial Model will be updated to calculate a further change, positive or negative, in the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount using the following protocol (ignoring for these calculations any adjustments to the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount pursuant to Section 7.07(a)):

(i) first, if any change necessary to ensure compliance with the PABs Issuer’s terms to entering into the TIFIA Credit Assistance set forth in Section 6.30(d)(2) of the Senior Loan Agreement, resulted in a need to reduce the principal amount of the TIFIA Credit Assistance, the Adjusted Financial Model will be adjusted by updating for the amount of such reduction (and ignoring for this calculation the adjustments to any further reduction in the TIFIA Credit Assistance) and calculating an adjustment to each of the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the Second Funding Closing Amount is $300,000,000 and the Equity IRR is equal to the Adjusted Equity IRR;

(ii) then, if the TIFIA Credit Assistance requires a change to:

(A) the amortization profile (whether mandatory or scheduled);

(B) the revenue sharing / prepayment clauses; or

(C) the funding of the Debt Service Reserve Account or the Ramp-up Reserve Account, or the use or release requirements or required balance requirements thereof,

in each case, from the terms described in Exhibit H, and the cumulative effect of such changes is less favorable to the Concessionaire, the Adjusted Financial Model will be adjusted by updating for the actual TIFIA Credit Assistance repayment terms and calculating a further adjustment to each of the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the Second Funding Closing Amount is $300,000,000 and the Equity IRR is equal to the Adjusted Equity IRR;
(iii) then, the Adjusted Financial Model will be adjusted by updating for the actual TIFIA Interest Rate and calculating a further adjustment to each of the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the Second Funding Closing Amount is equal to $300,000,000 and the resulting Base Case Equity IRR is equal to the Adjusted Equity IRR; and

(iv) then, if the amount of the TIFIA Credit Assistance is less than the Benchmark TIFIA Credit Assistance Amount, the Adjusted Financial Model will be further adjusted by calculating adjustments to each of the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the Second Funding Closing Amount is $300,000,000 and the Equity IRR is equal to the Adjusted Equity IRR and will become the Adjusted Financial Model Update in accordance with Section 6.04.

(c) Department Participation and Assistance. The Concessionaire acknowledges that the Department will actively participate in negotiating the terms of the TIFIA Loan Documentation that would reasonably be expected to contain terms and conditions that are inconsistent with the terms described in Exhibit H and other terms and conditions contained in the TIFIA Loan Documentation that are materially inconsistent with Relevant Precedent, or such inconsistent terms and conditions could be reasonably expected to have a material adverse effect on the Department’s financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile. The Concessionaire will use reasonable commercial efforts to coordinate documentation development and meetings regarding the terms of the TIFIA Credit Assistance with the Department in a manner that allows the Department to be aware of and actively involved in the content and commercial terms of the TIFIA Loan Documentation. The Department acknowledges that such involvement will not cause a delay of the Second Funding Closing Date. The Department also acknowledges that on occasion, impromptu and/or “one-on-one” discussions between the Concessionaire and the TIFIA Lender may be required to advance the negotiation of the TIFIA Credit Assistance in a timely manner, and the Concessionaire acknowledges that the outcome of any such discussions will be promptly relayed to the Department. The Concessionaire will deliver copies of all documents and materials it receives from, and sends to, the TIFIA Lender in connection with the negotiation, execution and delivery of any TIFIA Loan Documentation promptly after the receipt or transmission thereof by the Concessionaire. If the TIFIA Lender proposes terms and conditions for the TIFIA Credit Assistance that are more burdensome than corresponding terms and conditions described in Exhibit H that could be reasonably expected to have a material adverse effect on the Concessionaire’s financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile, the Department will use reasonable commercial efforts to assist the Concessionaire’s efforts to improve such terms and conditions.

(d) TIFIA Protection Amount Funding.

(i) The Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount, as adjusted in accordance with the foregoing terms, will become non-contingent and unconditionally payable upon the earlier to occur of (A) the closing date for the TIFIA Loan and (B) March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)) (the “Second Funding Closing Date”).
Subject to the following sentence, the Department TIFIA Protection Amount shall be deposited in immediately available funds to the VDOT Funding Account as soon as practicable on or after the Second Funding Closing Date, but in no event later than 90 days following the Second Funding Closing Date, and the Concessionaire TIFIA Protection Amount will be paid by the Equity Sponsors pursuant to the Equity Funding Agreements effective as of the Second Funding Closing Date, and the parties will provide prompt written notice to the Trustee of such increase. If the Department TIFIA Protection Amount is not deposited to the VDOT Funding Account on the Second Funding Closing Date, the Department will deposit additional amounts necessary to reimburse the Concessionaire for all costs incurred with respect to the Project as a result of the delay in funding.

(ii) If the Department TIFIA Protection Amount is a negative amount (the “Department Credit Amount”) as a result of the adjustments pursuant to this Section 7.07, the Department will not be required to make the Department TIFIA Protection Amount, the Public Funds Amount will be decreased by an amount equal to the Department Credit Amount, and the parties will provide written notice to the GARVEE Trustee or the Trustee, as relevant, to transfer an amount equal to the Department Credit Amount to or to the order of the Department within 10 days after the later of (A) the giving of such notice to the GARVEE Trustee or the Trustee, as relevant, or (B) the Second Funding Closing Date. If the Concessionaire TIFIA Protection Amount is a negative amount as a result of the adjustments pursuant to this Section 7.07, the Concessionaire TIFIA Protection Amount will be zero, the Equity Contribution Amount payable by the Equity Sponsors under the Equity Funding Agreements will be automatically reduced by such amount effective as of the Second Funding Closing Date, and the parties will provide prompt written notice to the Trustee of such reduction.

(e) **Restriction on Refinancing.** In the event that the Concessionaire fails to enter into the TIFIA Loan Documentation on or before March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)), during the period ending on the tenth (10th) anniversary of the Financial Close Date, the Concessionaire will not incur any Concessionaire Debt or refinance, replace or refund all or any part of the outstanding PABs, that results in an increase to the principal amount of Concessionaire Debt then outstanding without the Department’s prior approval, such approval to be given in the Department’s sole discretion; provided that such restriction shall not apply to (A) purchase money obligations incurred to finance discrete items of equipment used in connection with the Project that are not integral to the Project, (B) current accounts payable arising, and accrued expenses incurred, in the ordinary course of business which are payable in accordance with customary practices that are not overdue by more than ninety (90) days (unless subject to a good faith contest), and (C) the incurrence of Concessionaire Debt for the purposes described in clauses (i) through (iii) of Section 6.30(b)(1) of the Senior Loan Agreement, or for the purposes described in clause (iv) of Section 6.30(b)(1) of the Senior Loan Agreement so long as such incurrence does not result in the Concessionaire Debt in an amount greater than the principal amount of the then existing Concessionaire Debt (net of any deposits required to satisfy any increased reserve requirements with respect to the Concessionaire Debt being incurred, any payments to the Department required...
under this Agreement, and costs of issuance not to exceed 3% of the principal amount of such indebtedness).

ARTICLE 8.

DESIGN AND CONSTRUCTION OF THE PROJECT

Section 8.01 General Obligations of the Concessionaire

(a) The Concessionaire will furnish all design, construction and other services, provide all materials, equipment and labor to perform the Work reasonably inferable from this Agreement and perform the Work in accordance with this Agreement.

(b) Except as otherwise expressly provided in this Agreement, the Department makes no warranties or representations as to any surveys, data, reports or other information provided by the Department or other Persons, including the data and other information set forth in Exhibit S (Known Geotechnical Conditions) and Exhibit T (Known Pre-Existing Hazardous Substances), concerning surface or subsurface conditions, the existing condition of the roadway and other Assets, drainage, the presence of Utilities, Hazardous Substances, contaminated ground water, archeological, paleontological and cultural resources, and endangered and threatened species, affecting the Project Right of Way or surrounding locations. The Concessionaire acknowledges that such information is for the Concessionaire’s reference only and has not been verified by the Department, and that the Concessionaire will be responsible for conducting all surveys, studies and assessments as it deems appropriate for the Project; provided, that the foregoing will not limit the Concessionaire’s rights with respect to Compensation Events and Delay Events.

(c) Except as otherwise expressly provided in this Agreement, the Concessionaire will bear the risk of all conditions occurring on, under or about the Project Right of Way on which the Work is performed, including:

(i) physical conditions of an unusual nature that differ materially from those ordinarily encountered in the area;

(ii) changes in surface topography;

(iii) variations in subsurface moisture content;

(iv) Utility facilities;

(v) Hazardous Substances, including contaminated groundwater;

(vi) any archeological, paleontological or cultural resources; and

(vii) any species listed as threatened or endangered under Federal or State endangered species Law;
provided, that the foregoing will not limit the Concessionaire’s rights with respect to Compensation Events and Delay Events.

(d) The Concessionaire will be responsible for coordinating and scheduling the Work with other separate contractors working in the Project Right of Way in accordance with the Technical Requirements. Except in the case of a Department-Caused Delay, the Department will not be liable for any delays, disruptions or damages caused by such contractors.

(e) The Concessionaire Representative and the Department Representative will be reasonably available to each other and will have the necessary authority, expertise and experience required to oversee and communicate with respect to the Work.

(f) Prior to and during the construction, the Concessionaire will provide information to the public concerning the Project, any Project Enhancements or any other construction activities in accordance with the Technical Requirements.

(g) The Concessionaire will prepare and submit to the Department for its review and approval the Project Development Plans in accordance with the requirements and times set forth in the Technical Requirements.

(h) The Concessionaire will not enter into any agreement with any Governmental Authority with jurisdiction over any Governmental Approval, Utility Owner, railroad, property owner or other third party having regulatory jurisdiction over any aspect of the Project or the Work or having any property interest affected by the Project or the Work that in any way purports to obligate the Department, or states or implies that the Department has an obligation, to the third party to carry out any activity during or after the end of the Term, unless the Department otherwise approves the same in writing in its sole discretion. Except in the case of an agreement approved by the Department pursuant to the preceding sentence, the Concessionaire has no power or authority to enter into any such agreement with a third party in the name or on behalf of the Department and the parties agree that any purported agreement to that effect will be null and void.

(i) The Concessionaire will be responsible for performing and completing all Work that the Concessionaire is obligated to perform for or on behalf of third parties relating to the Project in accordance with its agreement with such third parties and subject to any dispute resolution with such third parties and without prejudicing the Concessionaire’s rights under any such agreements.

Section 8.02 Limited Notices to Proceed to Perform Certain Work

(a) The Concessionaire may request that the Department issue one or more Limited Notices to Proceed (“LNTP”) authorizing the Concessionaire to commence certain portions of the Work as set forth in this Section 8.02. Prior to issuance of a LNTP, the parties will agree upon the conditions to the issuance of such LNTP, as well as the scope, schedule and payment terms (if applicable) for such portion of the Work.
(b) The Concessionaire will deliver notice to the Department upon the satisfaction of the agreed conditions to the issuance of any LNTP and request that the Department issue such LNTP for the applicable portion of the Work. The Department will endeavor to respond to such request, within 21 Days following receipt of such request by the Department, by delivery to the Concessionaire of the applicable LNTP or notice of the conditions that the Department believes, in its reasonable discretion, to have not been satisfied. The Concessionaire will have a reasonable opportunity to address those deficiencies and re-submit a notice to the Department or, if the Concessionaire does not agree with the Department’s assessment, to refer the matter to the dispute resolution procedures pursuant to Article 21. If the Concessionaire has not received a response within such 21-Day period, such failure by the Department to respond will be deemed approval, but will not be deemed a waiver of the Department’s other rights or the Concessionaire’s other obligations, including compliance with Good Industry Practice, the Technical Requirements, Governmental Approvals and Law.

(c) To the extent any elements of the Early Work or payment therefor have not been completed or paid in full by the Department prior to the Agreement Date, the Concessionaire is authorized to complete such Early Work in accordance with this Agreement and payment therefor will be made under this Agreement (including for any such Early Work performed by the Concessionaire but not paid by the Department prior to the Agreement Date). Any Early Work performed and/or approved prior to the Agreement Date shall, upon execution of this Agreement, be deemed to have been performed by the Concessionaire and/or approved pursuant to, and subject to the terms and conditions of, this Agreement.

Section 8.03 Conditions Precedent for Notices to Proceed

(a) Notice to Proceed with Design Work. Except with respect to Early Work approved and undertaken pursuant to Section 8.02(c) and except as may be authorized in a LNTP, the Concessionaire will not commence any design Work unless and until the following conditions have been satisfied (or the Department has advised that it will waive such conditions) and the Department has delivered notice to that effect to the Concessionaire (such notice being referred to as the “Design Work Notice to Proceed”):

(i) the Concessionaire will have delivered to the Department and obtained its approval of the schedule of submissions described in Section 8.04(b);

(ii) the Department has approved the following Project Development Plans: (A) Concessionaire Management Plan; (B) Document Management Plan; (C) Quality Management System Plan; (D) Design Quality Management Plan; (E) Public Information and Communications Plan; and (F) DBE/SWaM Plan;

(iii) there exists no court order which restrains, enjoins or delays performance of the Work;

(iv) the Concessionaire certifies to the Department that all representations and warranties of the Concessionaire set forth in Section 23.02 remain true in all material respects;
(v) the Concessionaire certifies to the Department that all insurance policies required under Section 17.01(a) specified in the Design Work Notice to Proceed for the Work, except with respect to the builder’s risk insurance, have been obtained and will be in full force and effect, and in the case of Project-specific policies, the Concessionaire has delivered to the Department duplicate originals or copies thereof certified by the Concessionaire’s insurance broker to be true and correct copies of the originals; and

(vi) there exists no Concessionaire Default for which the Concessionaire has received notice from the Department, and the Concessionaire certifies to the Department that, to the best of its knowledge after diligent inquiry, there exists no condition, which with the lapse of time or delivery of notice to the Concessionaire, or both, would constitute a Concessionaire Default.

The delivery of the Design Work Notice to Proceed will not constitute authorization to commence construction activities.

(b) Notice to Proceed for Construction. In addition to the conditions set forth in Section 8.03(a), the Concessionaire will not commence construction of the Project Assets unless and until the following conditions have been satisfied (or the Department, in its discretion, waives such conditions) and the Department has delivered notice to that effect to the Concessionaire (such notice being referred to as the “Construction Notice to Proceed”):

(i) the Concessionaire has delivered to the Department correct and complete copies of all Design Public Hearing Documentation and Construction Documentation required for the commencement of construction in accordance with this Agreement and the Technical Requirements, and the Concessionaire has received from the Department any prior written approvals thereof required by this Agreement and Federal Requirements;

(ii) all Governmental Approvals (including any applicable Department approvals and Federal approvals and agreements) necessary for the commencement of construction have been acquired (and copies provided to the Department), and the Concessionaire has satisfied all applicable pre-construction requirements of the Governmental Approvals;

(iii) all rights of access or other property rights necessary for the commencement of construction have been obtained;

(iv) the Department has approved the following: (A) Baseline Schedule (B) Construction Quality Management Plan; (C) Maintenance of Traffic Plan; (D) Environmental Management Plan; (E) ROW Acquisition and Relocation Plan; (F) Health, Safety and Security Plan; and (G) Utilities Plan; and

(v) the builder’s risk insurance policy required under Section 17.01(a) has been obtained and will be in full force and effect, and the Concessionaire has delivered to
the Department a duplicate original or copy thereof certified by the Concessionaire’s insurance broker to be a true and correct copy of the original.

(c) The Concessionaire will deliver notice to the Department upon the satisfaction of the applicable conditions set forth in this Section 8.03 and request that the Department issue a Design Work Notice to Proceed or a Construction Notice to Proceed. The parties will comply with the submittal and review procedures set forth in Section 10.05 for the issuance of a Design Work Notice to Proceed or a Construction Notice to Proceed; provided that the deemed approval provisions of Section 10.05(c) will not apply to the issuance of a Design Work Notice to Proceed or a Construction Notice to Proceed.

(d) The Department may waive any condition precedent set forth in Section 8.03(a) and Section 8.03(b); provided, that no person or entity will be entitled to assume that the Department will waive or refuse to waive any condition precedent in the absence of strict compliance therewith. Unless the Department waives in writing (as distinguished from a deemed waiver) a condition precedent that requires action by the Concessionaire to be satisfied, the Concessionaire will remain bound to use diligent efforts to satisfy the condition precedent.

Section 8.04 Design Work

(a) Except as provided in Section 8.02(c) with respect to the Early Work, the Concessionaire will submit to the Department accurate and complete copies of all Design Documentation and Construction Documentation relating to the Work, which is required to be submitted, within three Days after such documentation is delivered to the Concessionaire by the Design-Build Contractor under the Design-Build Contract. Each submittal will comply with the applicable requirements of the Technical Requirements. The Department’s review of any submittal shall comply with the submittal and review procedures set forth in Section 10.05.

(b) The Concessionaire will provide the Department with a schedule of its proposed submittals of Design Documentation and Construction Documentation (which schedule will be updated periodically as necessary) so as to facilitate the Department’s coordination and review of such documents, and will complete quality control and quality assurance reviews of all Design Documentation and Construction Documentation to ensure that they are accurate and complete and comply with the requirements of this Agreement and the Technical Requirements prior to any submission to the Department.

(c) On or about the time of the scheduled submissions that require the Department’s review, comment or approval, the Concessionaire will meet with the Department and will identify during such meetings, among other things, the evolution of the design and any Deviations or other changes from any of the Technical Requirements, or, if applicable, previous design submissions. Minutes of the meetings will be maintained by the Concessionaire and provided to all attendees for review.

(d) Construction Documentation will set forth in detail drawings and specifications describing the requirements for construction of the Work, in full compliance with the Technical Requirements, Law and Governmental Approvals. The Construction Documentation will be
consistent with the latest set of interim design submissions; as such submissions may have been modified in writing in a design review meeting or as otherwise agreed upon in writing, and will be submitted after Concessionaire has obtained all requisite Governmental Approvals associated with the Work contained in such documents.

(e) The Department’s review, comment and/or approval of interim design submissions and the Construction Documentation are for the purpose of evaluating the Concessionaire’s compliance with the requirements of this Agreement and will be performed in accordance with the terms of this Agreement.

(f) Following the Department’s initial approval pursuant to this Section 8.04, the Concessionaire will have the right to amend, supplement or otherwise modify the Design Public Hearing Documentation, Design Documentation or the Construction Documentation or any part thereof, without the further approval of the Department; provided, that the Department’s approval will be required with respect to amendments, supplements or modifications that (i) constitute a material change in the scope of the Work or Deviations from any of the Technical Requirements, (ii) result in increases in the time to achieve Substantial Completion beyond the Guaranteed Substantial Completion Date, or (iii) except to the extent directly attributable to a Compensation Event, impose on the Department any new or increased costs, liabilities or obligations; provided, further, that the Concessionaire will provide the Department notice of all such proposed amendments, supplements and modifications regardless of whether the Department’s consent is required and will pay the Department, upon demand, for all the Allocable Costs it incurs to review and consider such proposed amendments, supplements or modifications that are subject to the Department’s approval.

(g) In the event the Concessionaire’s design differs from the schematic upon which the NEPA Documents were based, as between the Department and the Concessionaire, the Concessionaire will be fully responsible for all necessary actions, and will bear all risk of delay (except to the extent resulting from Delay Events) and all risk of increased cost (except to the extent resulting from Compensation Events), resulting from or arising out of any associated change in the Project Assets location and design, including (i) conducting all necessary environmental studies and preparing all necessary environmental documents in compliance with applicable Environmental Laws, (ii) obtaining and complying with all necessary new Governmental Approvals (including any modifications, renewals and extensions of the NEPA Documents and other existing Governmental Approvals) or third party approvals or agreements, and (iii) bearing all risk and cost of litigation. The Department and FHWA will independently evaluate all environmental studies and documents and fulfill the other responsibilities assigned to them by 23 CFR Part 771; provided, that the Concessionaire will fully pay the Department for the Allocable Costs it incurs to conduct further or supplemental environmental studies and to fulfill any other responsibilities assigned to it pursuant to 23 CFR Part 771.

(h) The design and construction of the Project Assets will accommodate certain improvements, projects and plans, all as set forth in the Technical Requirements.
Section 8.05 Acquisition of Project Right of Way; Utility Relocations; Railroad Easements

(a) Right of Way Acquisition Obligations. The Concessionaire will perform all Project ROW Acquisition Work necessary for the construction of the Project Assets including but not limited to all appraisals, appraisal reviews, negotiations with landowners and Utility Owners, relocation assistance and advisory services, and legal services. The Concessionaire will carry out such Work as follows:

(i) the Concessionaire will carry out the Work specified herein, in each case in accordance with the Technical Requirements and all applicable Laws;

(ii) the Concessionaire will acquire all Project Right of Way in accordance with the Technical Requirements and Law, including but not limited to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (the “Uniform Act”) and Titles 25.1 and 33.1 of the Code of Virginia;

(iii) the Concessionaire will submit a ROW Acquisition and Relocation Plan to the Department for its approval. Unless otherwise permitted in the Technical Requirements, the ROW Acquisition and Relocation Plan will not include parcels considered to be solely for the convenience of the Concessionaire, including those necessary to accommodate laydown, staging, temporary drainage and other construction methods in connection with the construction of the Project Assets. The ROW Acquisition and Relocation Plan will identify a schedule of right of way activities including the specific parcels to be acquired and all relocations. The ROW Acquisition and Relocation Plan will allow for the orderly relocation of displaced persons based on time frames not less than those provided by the Uniform Act. The parties will comply with the submittal and review procedures set forth in Section 10.05 with regards to the Department’s approval of the ROW Acquisition and Relocation Plan; provided that the deemed approval provisions of Section 10.05(e) will not apply to the approval of the ROW Acquisition and Relocation Plan. The ROW Acquisition and Relocation Plan will be updated as necessary during the Term;

(iv) the Concessionaire will exercise due diligence and use reasonable care in determining whether property to be acquired may contain wastes or other materials or hazards requiring remedial action or treatment to the extent the Concessionaire has access to such property and will otherwise comply with the Technical Requirements, including the undertaking of studies, assessments and tests required by the Technical Requirements;

(v) the Concessionaire will make direct payments of benefits to property owners for negotiated settlements, relocation benefits, and payments to be deposited with the court; and

(vi) the Concessionaire will prepare, obtain execution of, and record documents conveying title of the Project Right of Way to the State and deliver all executed and recorded general warranty deeds to the Department. For all property
purchased in conjunction with the Project, title will be acquired in fee simple except as may be specifically agreed to by the Department.

(b) **Condemnation.** The Concessionaire will use its best efforts (as such term is defined for this purpose in the Technical Requirements) (i) to acquire the Project Right of Way and any other real property or real property rights outside the Project Right of Way necessary for the construction and operation of the Project that are set forth in the ROW Acquisition and Relocation Plan by making *bona fide* efforts to purchase the Project Right of Way or such other real property or real property rights from the owners of such real property or real property rights for amounts not to exceed just compensation therefore and (ii) to settle claims with landowners amicably, each in accordance with Law. If, despite the Concessionaire’s best efforts, it is unable to reach a settlement with landowners within 30 Days, the Department will handle any necessary condemnation proceedings in accordance with the provisions of the Technical Requirements. Prior to the Department filing a condemnation proceeding, the Concessionaire will prepare all necessary paperwork and supporting documentation required for the proceeding and it will deliver that documentation to the Department. The Department then will file the condemnation proceeding(s) and handle such proceeding(s) in accordance with the Technical Requirements.

(c) **Certain Property Outside the Project Right of Way.** The Concessionaire will be responsible, at its own cost and expense, for the acquisition of, or for causing the acquisition of, any property, temporary easements or other property rights not included in the ROW Acquisition and Relocation Plan, including those necessary to accommodate laydown, staging, temporary drainage and other construction methods in connection with the construction of the Project Assets.

(d) **ROW Costs.**

(i) Except as provided in this Agreement, the Concessionaire will be responsible for performing all activities and services necessary for the acquisition of all Project Right of Way at its sole cost and expense as set forth in Exhibit CC.

(ii) If the aggregate ROW Costs exceed $275,000, the Concessionaire will pay the first $150,000 of such excess. If the aggregate ROW Costs exceed $425,000, the Department will pay any such excess. If the aggregate ROW Costs are less than $275,000, the Concessionaire will deposit an amount equal to the difference between such amount and the aggregate ROW Costs into the Project Enhancement Account.

(e) **Utility Relocations.**

(i) The Concessionaire, at its sole cost and expense, will perform all activities and services necessary for all Utility Relocations necessary to accommodate construction of the Project Assets.

(ii) The Concessionaire will perform Utility Relocations in accordance with the Technical Requirements. Subject to Law, the Department will provide to the Concessionaire the benefit of any provisions in recorded Utility or other easements.
affecting the Project which require the easement holders to relocate at their expense and the Department will reasonably assist Concessionaire in obtaining the benefit of all rights the Department has under any Utility easement, permit, or other right relating to Utility Relocations, it being understood that such assistance will not entail the initiation of or participation in legal actions or proceedings.

(f) Acquisition of Railroad Easements. The Department will obtain, at the Department’s sole cost and expense, any easements and other property rights necessary for the Work located on property owned by Norfolk Southern Corporation, and facilitate the negotiation of a construction agreement between the Concessionaire and Norfolk Southern Corporation (the “Railroad Easement”). Notwithstanding the foregoing, (i) the Concessionaire will pay the Department for Allocable Costs incurred by the Department in the Department’s efforts to obtain the Railroad Easement, to the extent such Allocable Costs are incurred by the Department as a result of any Concessionaire Party’s misconduct, negligence or other culpable act, error or omission and (ii) the Concessionaire will pay the costs of any Work performed on the Railroad Easement and reimburse Norfolk Southern Corporation any of its costs in connection therewith, all as provided in the Technical Requirements.

Section 8.06 Governmental Approvals

(a) The Concessionaire, at its sole cost and expense (except as otherwise provided herein), will obtain and maintain in full force and effect and comply with all Governmental Approvals necessary for the Work. Responsibility for and cost of obtaining Governmental Approvals necessitated by a Department Change or a Department Project Enhancement will be as agreed to and specified in the accompanying Change Order.

(b) The Department will provide reasonable assistance and cooperation to the Concessionaire, as requested by the Concessionaire, in obtaining Governmental Approvals relating to the Project and any revisions, modifications, amendments, supplements, renewals, reevaluations and extensions of Governmental Approvals.

(c) Except as otherwise provided in this Agreement, the Department will not unreasonably withhold or delay any Governmental Approval for which it is the issuing Governmental Authority with respect to the design, construction, operation or maintenance of the Project or any Project Enhancement. For the avoidance of doubt, the provisions of this Section 8.06(c) are not intended to supersede any provision of this Agreement or any other Project Agreement providing for the conditions to or time of approval of any such Governmental Approval, or any express right of the Department to withhold consent in its sole discretion.

(d) The Concessionaire will at all times and at its sole cost and expense comply with the NEPA Documents, including, without limitation, compliance necessitated by a change in the base design of the Project. If supplements to the NEPA Documents or additional NEPA Documents are needed following the Agreement Date, the Department will prepare the necessary documentation using data and other information provided by the Concessionaire, and the Concessionaire will pay the Department for its Allocable Costs incurred in the preparation of such documentation; provided, that the Department will pay for supplements to the existing
NEPA Documents or additional NEPA Documents necessitated by a Compensation Event or Department Project and for the Allocable Costs incurred by the Concessionaire in providing data and information relating to such supplements.

Section 8.07 Construction Work and Project Schedule

(a) The Initial Baseline Schedule will be the basis for monitoring the Concessionaire’s performance of the Work until such time as a Baseline Schedule has been approved by the Department in accordance with the Technical Requirements.

(b) The Concessionaire and the Department will conduct monthly progress meetings in accordance with the Technical Requirements. As part of, and in conjunction with, such meetings, the Concessionaire will provide the Department with any proposed update of the Baseline Schedule in accordance with the Technical Requirements. The parties further agree to abide by the terms and procedures set forth in the Technical Requirements pertaining to project management and coordination matters.

(c) Except as provided otherwise in this Agreement, the Concessionaire will be financially responsible for all damage to the Project Assets resulting from the Work. The Department will not be responsible for any construction means and methods of the Concessionaire or liability ensuing therefrom, unless such means and methods were directed by the Department pursuant to a Department Change or a Department Project Enhancement.

(d) Whenever required by the Department, the Concessionaire will provide in writing a general description of the arrangements and methods that the Concessionaire proposes to adopt for the execution of the Work. The Concessionaire will not significantly alter the Baseline Schedule, or such arrangements and methods, without informing the Department, and the Concessionaire will coordinate any such alterations to take into account the Department’s resources and the work to be carried out by the Department’s separate contractors, if any. The Concessionaire will not alter the Baseline Schedule except as permitted in the Technical Requirements.

(e) If any alteration (i) affects the Critical Path, (ii) adversely and materially affects the Department’s oversight resources or the Department’s separate contractors, or (iii) deviates from the Technical Requirements, the Concessionaire will not make such alteration without the prior approval of the Department.

(f) If the progress of the Work does not conform to the Baseline Schedule, as updated herein, the Concessionaire will submit a recovery schedule as required by the Technical Requirements, and will reasonably consider revisions to the Baseline Schedule proposed by the Department to achieve completion within the timeframe set forth in this Agreement.

Section 8.08 Substantial Completion

(a) The Concessionaire will achieve Substantial Completion on or before the Guaranteed Substantial Completion Date, subject to adjustment in accordance with this
Agreement; provided that failure to achieve Substantial Completion by the Guaranteed Substantial Completion Date, in and of itself, will not result in a default under Section 19.01, except as set forth in Section 19.01(e).

(b) The Department will issue a written certificate of Substantial Completion at such time as Substantial Completion occurs. If the Department approves the issuance of a Substantial Completion Certificate, the Department will provide with its Substantial Completion Certificate a Punch List of items to be completed to achieve Final Acceptance.

(c) Substantial Completion will have been achieved when each of the following conditions have occurred for the entire Project Assets:

(i) all lanes of traffic (including ramps, interchanges, overpasses, underpasses, and other crossings) set forth in the Construction Documentation are in their final configuration and available for normal and safe use and operation;

(ii) all major safety features are installed and functional, including, as required, shoulders, guard rails, striping and delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences, safety end treatments, terminal anchor sections and crash attenuators;

(iii) all required illumination for normal and safe use and operation is installed and functional in accordance with the Technical Requirements;

(iv) all required signs and signals for normal and safe use and operation are installed and functional in accordance with the Technical Requirements;

(v) the need for temporary traffic controls or for lane closures at any time has ceased (except for any then required for routine maintenance, and except for temporary lane closures in accordance with and as permitted by a Department-approved traffic management plan solely in order to complete Punch List items);

(vi) the Concessionaire has completed the toll commissioning process described in the Technical Requirements, and the ETTM System is completed, has passed all demonstration and performance testing in accordance with the Construction Documentation and the Technical Requirements, including demonstration of interoperability with E-ZPass or any successor to E-ZPass then utilized on State Highways, and is ready for normal operation unless the foregoing conditions have been previously satisfied under Section 9.02(a)(viii);

(vii) the TMS (if any) and safety features for TMS components are installed and functional; and

(viii) the Concessionaire has otherwise completed the Work in accordance with this Agreement, including the Technical Requirements, and with the Construction Documentation, such that the Project Assets are in a physical condition that it can be used
for normal and safe vehicular travel in all lanes and at all points of entry and exit, subject only to Punch List items.

(d) The parties will disregard the status of the landscaping and aesthetic features included in the Construction Documentation in determining whether Substantial Completion has occurred, except to the extent that its later completion will affect public safety or satisfaction of the criterion in Section 8.08(c).

(e) The Concessionaire will provide the Department with written notice of anticipated Substantial Completion at least 21 Days prior to the anticipated Substantial Completion Date. The parties will comply with the submittal and review procedures set forth in Section 10.05 in the determination of whether Substantial Completion has been achieved; provided that the deemed approval provisions of Section 10.05(e) will not apply to the determination of whether Substantial Completion has been achieved. During such 21-Day period, the Concessionaire and the Department will meet, confer and exchange information on a regular basis with the goal being the Department’s orderly, timely inspection of the Project Assets and review of the final Construction Documentation and the Department’s issuance of a Substantial Completion Certificate. In addition, the Department will conduct an inspection of the Project Assets and review of the final Construction Documentation, and such other matters as may be necessary to determine whether Substantial Completion is achieved and, not later than the expiration of such 21-Day period, will deliver a written report of findings and recommendations to the Concessionaire. The Department will provide the Concessionaire with a determination of whether or not Substantial Completion has been achieved (and if not, an explanation with reasonable specificity as to the reasons therefor) within such 21-Day period.

(f) If the Department has not notified the Concessionaire of such approval or disapproval within 21 Days after such Concessionaire notice (or 10 Days with respect to any resubmittal of the notice), and if the delay is not a result of a Concessionaire Party action or inaction, then such delay will constitute a Delay Event and a Compensation Event, and the Concessionaire will be entitled to Concessionaire Damages, if any, pursuant to Section 14.01.

Section 8.09 Final Acceptance

(a) The Concessionaire will achieve Final Acceptance of the Project on or before the Final Acceptance Deadline, subject to adjustment in accordance with this Agreement.

(b) The Concessionaire will provide the Department with written notification when it has determined that the following conditions to Final Acceptance of the Project have been satisfied:

(i) Substantial Completion has occurred;

(ii) other than the Permitted Encumbrances (not including clause (c) of the definition thereof), the Project is free and clear of all Liens, claims, security interests or encumbrances arising out of or in connection with the performance of the Work during the Construction Period;
(iii) all Punch List items have been completed and delivered to the reasonable satisfaction of the Department;

(iv) all Project Documentation, including as built drawings of the Project Assets, to be submitted on or before Final Acceptance have been submitted and approved (to the extent approval is required) by the Department;

(v) the Concessionaire has paid for all Design-Build Work and other Work required to achieve Final Acceptance by third parties that the Concessionaire is obligated to pay (other than disputed amounts and amounts that are not yet due and payable);

(vi) the Concessionaire has delivered all required certifications from the engineer of record and architect of record to all necessary Governmental Authorities and to the Department;

(vii) the Concessionaire has made all deliveries of Work Product to the Department that are required to be made pursuant to this Agreement; and

(viii) the Concessionaire has delivered to the Department a list of each Asset of the type described in the Performance Requirements Baseline Table.

(c) The parties will comply with the submittal and review procedures set forth in Section 10.05 in the determination of whether Final Acceptance has been achieved provided that the deemed approval provisions of Section 10.05(c) will not apply to the determination of whether Final Acceptance has been achieved. During the 21-Day period following delivery of the Concessionaire’s written notification, the Concessionaire and the Department will meet, confer and exchange information with the goal being the Department’s orderly, timely inspection of the Project Assets and the Department’s issuance of a Final Acceptance Certificate, and the Department will conduct an inspection of the Punch List items, a review of the final drawings and such other investigation as may be necessary to evaluate whether the conditions to Final Acceptance have been satisfied. The Department will provide the Concessionaire with a determination of whether or not Final Acceptance has been achieved (and if not, an explanation with reasonable specificity as to the reasons therefor) within such 21-Day period.

(d) If the Department has not notified the Concessionaire of such approval or disapproval within 21 Days after such Concessionaire notice (or 10 Days with respect to any resubmittal of the notice), and if the delay is not a result of a Concessionaire Party action or inaction, then such delay will constitute a Delay Event and a Compensation Event, and the Concessionaire will be entitled to Concessionaire Damages, if any, pursuant to Section 14.01.

Section 8.10 Liquidated Damages for Delayed Completion

(a) Liquidated Damages Related to Substantial Completion. If the Concessionaire does not achieve Substantial Completion by the Guaranteed Substantial Completion Date, the Department will be entitled to assess $14,000 as liquidated damages for each Day that Substantial Completion of the Project remains to be achieved beyond the Guaranteed Substantial
Completion Date. The Concessionaire will cause any related liquidated damages payable by the Design-Build Contractor under the Design-Build Contract to be paid to the Department; provided that the Concessionaire’s overall liability for liquidated damages relating to this Section 8.10 shall in no event exceed $5,110,000.

(b) Liquidated Damages Related to Final Acceptance. If the Concessionaire does not achieve Final Acceptance by the Final Acceptance Deadline, the Department will be entitled to assess $5,000 as liquidated damages for each Day that Final Acceptance of the Project remains to be achieved following the expiration of the Final Acceptance Deadline, and the Concessionaire will cause any related liquidated damages payable by the Design-Build Contractor under the Design-Build Contract.

(c) Additional Provisions. The parties acknowledge, recognize and agree on the following:

(i) that because of the unique nature of the Project, it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by the Department as a result of the Concessionaire’s failure to timely complete the Work;

(ii) that any sums assessed under this Section 8.10 and Section 8.14 are in the nature of liquidated damages, and not a penalty, and are fair and reasonable and such payment represents a reasonable estimate of fair compensation for the additional Oversight Services that may reasonably be anticipated from such failure;

(iii) that any sums assessed under this Section 8.10 and Section 8.14 will be in lieu of all liability of the Concessionaire and its Contractors for any and all Losses, whether direct, special or consequential, and of any nature whatsoever incurred by the Department, which are caused by the Concessionaire’s failure to timely complete the construction Work, including failure to achieve Substantial Completion and Final Acceptance by the applicable deadlines and its actions causing Non-Permitted Lane Closures as described in Section 8.14;

(iv) that any sums assessed under this Section 8.10 and Section 8.14 will be due and owing to the Department upon assessment of such damages, subject to the dispute resolution procedures of Article 21; and

(v) notwithstanding the above, liquidated damages are not intended to excuse Concessionaire or any of its Contractors from liability for any other breach of its obligations under the Project Agreements, or limit the Department’s recourse to other remedies hereunder such as termination pursuant to Article 19 and Article 20; provided, that no Concessionaire Default will occur solely as a result of a delay in achieving Substantial Completion by the Guaranteed Substantial Completion Date, except as set forth in Section 19.01(e).
(d) **Payment of Liquidated Damages.** The Concessionaire will pay all undisputed liquidated damages under this Section 8.10 monthly in arrears not later than 30 Days after the end of each calendar month, and in accordance with the requirements set forth in Section 5.06(b).

**Section 8.11  Warranties; Defective Design and Construction**

(a) **Warranties.**

   (i) The Concessionaire will require the Design-Build Contractor to warrant that (A) the Design-Build Work is complete and conforms to Good Industry Practice; and (B) the Design-Build Work, including all materials and equipment furnished as part of the Design-Build Work, is new unless otherwise specified in the Technical Requirements or elsewhere in this Agreement, of good quality, free of defects in materials and workmanship.

   (ii) The warranties in Section 8.11(a) are exclusive and are in lieu of all other warranties by contract. No implied or statutory warranties will apply. Subject to Section 8.11(a)(iii) below and to such limitations on coverage including aggregate caps specified in the Design-Build Contract, the foregoing warranties for Work relating to the Project Assets will be effective for a period of, with respect to the Design-Build Work, 60 months beginning on the date on which substantial completion of the Design-Build Work is achieved as such date is defined in the Design-Build Contract (the “Warranty Period”). Such warranties will survive termination of this Agreement for Work that was in place prior to termination.

   (iii) With respect to the warranty furnished by the Design-Build Contractor pursuant to Section 8.11(a)(i) and if and to the extent the Concessionaire obtains general or limited warranties from any Contractor in favor of the Concessionaire with respect to design, materials, workmanship, construction, equipment, tools, supplies, software or services, the Concessionaire will cause such warranties to be expressly extended to the Department; provided, that the foregoing requirement will not apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products (including software products), equipment or supplies where the warranty cannot be extended to the Department using commercially reasonable efforts. The Department will only have the right to exercise remedies under any such warranty so long as the Concessionaire or a Lender is not pursuing remedies thereunder. To the extent that any Contractor warranty would be voided by reason of the Concessionaire’s negligence or failure to properly incorporate material or equipment into the Work, the Concessionaire will be responsible for correcting such defect.

   (iv) Contractor warranties are in addition to all rights and remedies available pursuant to this Agreement or Law or in equity, including Claims against the Performance Security, and will not limit the Concessionaire’s liability or responsibility imposed by this Agreement or Law or in equity with respect to the Work, including liability for Non-Conforming Work, design defects, patent and latent construction defects, strict liability, breach, negligence, willful misconduct or fraud.
(b) **Non-Conforming Work.** In the event of the occurrence of a Defect in the design or construction Work, including in any materials and equipment furnished as part of the construction, and including any Non-Conforming Work, the Department will be entitled, in addition to any other remedies:

(i) to demand that the Concessionaire rectify, or require the Contractor to rectify, such Defect at its sole expense, it being understood that, in such event, the Concessionaire will be permitted to draw on the Performance Security provided by the Contractor liable for such Work if the Contractor fails to perform such Work, to the extent of the cost of any work performed by the Concessionaire;

(ii) to suspend any affected portion of the Work of design and construction, by delivery of a written order to the Concessionaire, which order the Department will lift after the Concessionaire fully cures or corrects such Defects;

(iii) to rectify such Defects itself and to obtain payment of its Allocable Costs from the Concessionaire or, where the Contractor providing such Performance Security is liable for such Work from a draw on any Performance Security furnished pursuant to this Agreement (and the Concessionaire agrees to make such drawing upon the request of the Department); provided, that (A) the Department will not rectify such Defects itself or seek payment from the Concessionaire or such Performance Security unless it has requested rectification of, and the Concessionaire and the Contractor have failed to promptly rectify the Defects and (B) the Concessionaire will be permitted to draw on the Performance Security provided by any Contractor liable for such Work to the extent of any amounts paid by the Concessionaire; or

(iv) to seek performance or payment pursuant to any applicable guaranty.

(c) The issuance of a suspension order pursuant to Section 8.11(b)(ii) will not affect the Concessionaire’s rights to cure or correct any Non-Conforming Work giving rise to the issuance of the suspension order.

**Section 8.12 Transportation Management Plan.**

(a) The Department will develop, fund and implement a transportation management plan for the Project (“Transportation Management Plan” or “TMP”), which will be undertaken in coordination with the Concessionaire’s Maintenance of Traffic Plan and Sequence of Construction Plan. The Department will provide the Concessionaire with a reasonable opportunity to comment on the TMP. The TMP will set forth the program for traffic management and related activities to ensure safety and mobility for the travelling public throughout the I-95 Corridor for the duration of the Construction Period. The Concessionaire’s Maintenance of Traffic Plan (as described further in the Technical Requirements) will be consistent with, and included as part of, the TMP for the Construction Period.

(b) In connection with the TMP, the Concessionaire, at its sole cost and expense, will (i) develop and implement the Concessionaire’s Maintenance of Traffic Plan, (ii) be responsible
for the Concessionaire’s share of public outreach for the TMP pursuant to the Technical Requirements; and (iii) be responsible for traffic and operational analysis for lane closures, roadway reconfigurations and detours.

**Section 8.13 Substantial Completion of Segments of the Project.** In the Department’s sole discretion, it may issue a Substantial Completion Certificate and an authorization to commence Service Commencement with respect to certain Segments of the Project to be identified by the Concessionaire and approved by the Department, prior to issuing a Substantial Completion Certificate and authorization to commence Service Commencement for the balance of the Project. In such case, solely for the purpose of processing such early acceptance, the Department and the Concessionaire will develop a set of requirements that must be satisfied and other conforming changes to this Agreement, so that such Segments of the Project may be accepted early by the Department, in its sole discretion, pursuant to this Section 8.13.

**Section 8.14 Lane Closure Damages.** In its performance of the Work during the Construction Period, the Concessionaire may temporarily close existing lanes on the Project Right of Way only in accordance with the Technical Requirements. Any such closure that exceeds the time period permitted therefor in the Technical Requirements is a “Non-Permitted Closure”. If a Non-Permitted Closure occurs, the Department will notify the Concessionaire thereof and of the associated Lane Closure Damages, in writing, within 48 hours. The Concessionaire will pay to the Department the liquidated damages set forth below (the “Lane Closure Damages”) at the time and in the manner set forth in the Technical Requirements. The Lane Closure Damages for any Non-Permitted Closure will not exceed $200,000 per incident.

<table>
<thead>
<tr>
<th>Liquidated Damages for Lane Closures</th>
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<tbody>
<tr>
<td>Elapsed Time (min)</td>
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<tr>
<td>1-5, or any portion thereof</td>
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<tr>
<td>Every additional minute or portion thereof after the initial five minutes stated above.</td>
</tr>
</tbody>
</table>

**Section 8.15 Failure to Achieve Substantial Completion by Long Stop Date; Substantial Completion Recovery Plan**

(a) The Concessionaire will achieve Substantial Completion of the Project by the Long Stop Date.

(b) The Long Stop Date will be extended one time if (i) the Concessionaire submits to the Department for the Department’s review and approval a written recovery plan (the “Substantial Completion Recovery Plan”) not later than 90 Days prior to the Long Stop Date; (ii)
the Substantial Completion Recovery Plan outlines the actions the Concessionaire proposes to take in order to cause Substantial Completion to occur as promptly as reasonably possible, which plan may include increasing work hours to the extent permitted under applicable Law and utilizing additional labor and equipment and other appropriate acceleration techniques to improve schedule progress and will set forth a proposed new Long Stop Date; (iii) such Substantial Completion Recovery Plan and new Long Stop Date is approved by the Department within 30 Days in its reasonable discretion, and (iv) the Concessionaire diligently implements the Substantial Completion Recovery Plan. In addition, the Department may, in its sole discretion, consent to a second Substantial Completion Recovery Plan upon such terms and conditions as it may establish in its sole discretion.

Section 8.16 Department Allowances and Commercial Commitments for Design-Build Work.

(a) The Parties acknowledge that the contract price for the Design-Build Work in the Design-Build Contract includes certain agreed quantities set forth in the Technical Requirements (the “Baseline Quantities”) and associated unit prices and markups for concrete sign foundations, electric service panel feeds, and undercut excavation (the “Allowance Items”) as set forth in the Technical Requirements. If the actual quantities of the Allowance Items in the Design-Build Work exceed the Baseline Quantities, the Design-Build Contractor will be entitled to payment by the Concessionaire of an amount equal to the agreed unit price and markup multiplied by the actual quantities which exceed the Baseline Quantities; provided however, that such payment by the Concessionaire to the Design-Build Contractor will not exceed $15,000,000. The Department will pay the Concessionaire for any such amount that the Concessionaire pays to the Design-Build Contractor; provided however, that the maximum such amount payable by the Department to the Concessionaire pursuant to this Section 8.16(a) will not exceed $15,000,000.

(b) The Concessionaire will perform landscaping work only if and to the extent directed or approved by the Department, and all such landscaping work performed by the Concessionaire will be treated as a Department Change, as more fully set forth in the Technical Requirements; provided however, that the maximum amount of landscaping Work to be performed by the Concessionaire will not exceed $2,000,000, unless otherwise directed by the Department.

(c) The Department will pay the Concessionaire for any amounts paid by the Concessionaire to the Design-Build Contractor for fuel price adjustments and asphalt price adjustments for paving operations as set forth in the Technical Requirements.

(d) The Department will pay for the acquisition of stream and wetland credits in accordance with the Technical Requirements. The Concessionaire will perform stream restoration construction activities in accordance with the Technical Requirements.
ARTICLE 9.

PROJECT MANAGEMENT; OPERATIONS AND MAINTENANCE

Section 9.01 Transition of Operations and Maintenance to Concessionaire

(a) Care, Custody and Control.

(i) Except as otherwise specifically provided for in a LNTP, after the Financial Close Date and prior to the Substantial Completion Date, the Concessionaire will (A) have care, custody and control of the Design Build Right of Way for the Project Assets and (B) be responsible for the security and protection of active construction areas on the Project Assets and the Project Right of Way and (1) all materials, equipment, supplies and any other property of any Concessionaire Party and (2) all materials, equipment, supplies and any other property of the Department being held in a secure location at or on the Project Assets or otherwise being used or procured in connection with the Work, whether or not on the Project Right of Way. Notwithstanding the foregoing, during the Construction Period, the Department will (x) except as otherwise provided herein, operate and maintain the existing HOV Lanes and access ramps at its own cost and expense to the extent they are not actively under construction as provided in Section 9.07 (the “HOV Assets”); (y) have care, custody and control of the HOV Assets; and (z) be responsible for the security and protection of the HOV Assets and all materials, equipment, supplies and any other property of the Department at or on the HOV Assets, in all cases except as otherwise provided in Section 9.02.

(ii) Through the coordination process described in Section 8.07, the Concessionaire and the Department will determine from time to time which portions of the existing HOV Lanes will be open for traffic or under construction.

(iii) On and after the Substantial Completion Date to the end of the Term, the Concessionaire will have care, custody and control of the Project Assets (other than the Department Shared Assets).

(b) Turnover Process. The Concessionaire will implement and comply with the Turnover Plan to ensure the timely and orderly transition of operations and maintenance of the Project from the Department to the Concessionaire. The parties will cooperate and coordinate with each other with respect to activities undertaken pursuant to the Turnover Plan attached as Exhibit V.

Section 9.02 Conditions Precedent to Service Commencement of the Project

(a) The Concessionaire will not initiate Service Commencement until the following conditions have been satisfied (or the Department, in its sole discretion, waives any such condition) and the Department has delivered notice to that effect to the Concessionaire (the “Service Commencement Notice to Proceed”):
(i) the Department has issued the Substantial Completion Certificate, or it has been determined pursuant to the dispute resolution procedures set forth herein that the Department should have issued such certificate;

(ii) the Department has approved the Operations and Maintenance Plan, the updated Performance Requirements Baseline Tables, all other Project Documentation and all other Project Development Plans required by the Technical Requirements to be submitted on or before the Service Commencement Date;

(iii) the Concessionaire has received and delivered to the Department copies of all Governmental Approvals necessary to operate the Project and has satisfied all conditions and requirements thereof which must be satisfied before the Project can be lawfully opened for regular public use, all such Governmental Approvals remain in full force and effect, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval;

(iv) all insurance policies required under Section 17.01 for the Operating Period have been obtained and will be in full force and effect, and the Concessionaire has delivered to the Department duplicate originals or copies thereof (or endorsements reasonably acceptable to the Department extending coverage to the Project), certified by the Concessionaire’s insurance broker to be true and correct copies of the originals;

(v) there exists no Concessionaire Default for which the Concessionaire has received notice from the Department, except as to any Concessionaire Default that has been cured or for which Service Commencement will effect its cure, and there exists no event or condition that, with notice or lapse of time, would constitute a Concessionaire Default;

(vi) all Operations and Maintenance Agreements and agreements relating to toll collection and violation enforcement on the HOT Lanes are in full force and effect;

(vii) the Concessionaire has implemented the Maintenance Management System in accordance with the Technical Requirements;

(viii) to the extent not previously completed pursuant to Section 8.08, the Concessionaire has completed the toll commissioning process described in the Technical Requirements, and the ETTM System is completed, has passed all demonstration and performance testing in accordance with the Construction Documentation and the Technical Requirements, including demonstration of interoperability with E-ZPass or any successor to E-ZPass then utilized on State Highways, and is ready for normal operation unless previously completed pursuant to Section 8.08;

(ix) the Concessionaire has deposited the Source Code Documentation with the Escrow Agent in accordance with Section 18.06;

(x) all Project Agreements are in full force and effect;
(xi) the Concessionaire has paid or caused to be paid to the Department all
amounts due and payable from the Concessionaire to the Department, including, but not
limited to, Lane Closure Damages, in connection with this Agreement, including any
applicable interest thereon (except such amounts subject to dispute in accordance with the
dispute resolution procedures);

(xii) the Concessionaire has provided to the Department the training required to
have been provided prior to Service Commencement by the Technical Requirements;

(xiii) the Concessionaire has submitted to the Department an Annual Budget for
the remainder of the Agreement Year in which the Substantial Completion Date occurs
(or, if the remainder of such year is shorter than 90 Days, an Annual Budget that
conforms with the requirements specified in Section 9.08, for the remainder of such
Agreement Year and for the following Agreement Year); and

(xiv) the Concessionaire has certified to the Department in writing that the
conditions set forth in this subsection (a) have been satisfied as of the date of such
certification.

(b) The parties will comply with the submittal and review procedures set forth in
Section 10.05 in the Department’s determination of whether the Concessionaire has satisfied the
conditions precedent for achieving Service Commencement.

(c) The Department’s issuance (or deemed issuance) of the Service Commencement
Notice to Proceed will not constitute a waiver by the Department of any then-existing breach of
this Agreement by the Concessionaire.

Section 9.03 Concessionaire Obligation to Manage and Operate

(a) At all times following the Service Commencement Date, the Concessionaire, at its
sole cost and expense (except as otherwise provided herein), will cause the Project to be
managed, maintained and operated in accordance with Law, all Governmental Approvals, the
terms, conditions and standards set forth in this Agreement, including the requirements set forth
in the Technical Requirements, and in accordance with Good Industry Practice. Without limiting
the foregoing, the Concessionaire agrees to be responsible for the following, at its sole cost and
expense at all times following the Service Commencement Date for the Project:

(i) the management and control of traffic on the Project Assets, including, but
not limited to, incident response services and temporary partial or full closures of the
Project Assets, subject to the Department’s rights to assume control as expressly provided
in this Agreement;

(ii) the maintenance and repair of the Project Assets and all systems and
components thereof, including the ETTM System, which the Concessionaire may
upgrade, modify, change and replace, as applicable, in accordance with this Agreement
and the requirements set forth in the Technical Requirements;
(iii) the operation of the Project Assets and the ETTM System, and otherwise carrying out the collection and enforcement of tolls and other incidental charges in accordance with Article 5 respecting the Project Assets;

(iv) the maintenance, compliance with and renewal of Governmental Approvals necessary and incidental to the foregoing activities;

(v) traffic management, and maintenance and repair responsibilities under Section 9.04(a) in accordance with the Technical Requirements; and

(vi) except as otherwise specifically provided herein (including the right of the Concessionaire to close all or a portion of the HOT Lanes in accordance with the provisions hereof), at all times during the Term, causing the Project Assets to be continuously open and operational for use by all members of the public travelling in Permitted Vehicles 24 hours a day, 365 Days a year.

(b) Snow and Ice Removal.

(i) Prior to the Service Commencement Date, the Department will, at its own cost, remove snow and ice from the HOV Lanes that are open to traffic.

(ii) Subject to Section 9.03(b)(iv), the Department will provide snow and ice removal services on the HOT Lanes at a comparable level of service to that it provides on the GP Lanes. The Concessionaire will provide access to the HOT Lanes to the Department or its contractors to provide snow and ice removal services. If the Concessionaire does not provide access to the HOT Lanes to the Department or its contractors, then the Department will not be required to provide snow and ice removal services on the applicable HOT Lanes during the pendency of such denial of access.

(iii) Other than as provided in Section 9.03(b)(iv), the Department will have no liability to the Concessionaire arising out of its snow and ice removal services. If the Department’s contractors for snow and ice removal damage the Project Assets, the Department will provide to the Concessionaire any amounts that the Department has received in respect of such damage from such contractor or its insurer. Subject to Section 9.03(b)(i) and Section 9.03(b)(ii), the Department will have full discretion to establish priorities for its contractors regarding timing and location of services, materials and equipment, without liability to the Concessionaire, other than as provided in clause (iv) below.

(iv) The Concessionaire may notify the Department if the Department fails at any time to provide snow and ice removal to the HOT Lanes at a level of service comparable to that it provides on the GP Lanes. Such notice will be given verbally, to be immediately followed up in writing, to the Department’s District Administrator and Assistant District Administrator for Maintenance or its designee (i.e. Duty Officer) for the Northern Virginia District and the Fredericksburg District for the applicable section of the HOT Lanes. If the Department fails to respond affirmatively within two hours of
the written notice from the Concessionaire or if the Department does not begin snow and ice removal services within four hours of such written notice, except if the Concessionaire does not provide access to the HOT Lanes to the Department, then the Concessionaire may arrange for other contractors to provide such service and the Department will pay the Concessionaire for such contractors’ reasonable documented cost of snow and ice removal services; provided that such contractors will not in any way hinder the removal of snow and ice from the GP Lanes.

(v) The Concessionaire may arrange for a contractor to provide snow and ice removal services to the HOT Lanes, at the Concessionaire’s sole cost and expense, even if the Department is providing such services at a level of service comparable to that it provides on the GP Lanes, with prior written notice to the Department; provided that any such contractor will not in any way hinder the removal of snow and ice from the GP Lanes. Such notice will be given verbally, to be immediately followed up in writing, to the Department’s District Administrator and Assistant District Administrator for Maintenance or its designee (i.e. Duty Officer) for the Northern Virginia District and the Fredericksburg District for the applicable section of the HOT Lanes.

(c) Drainage. The Concessionaire will be responsible, at its own cost and expense, for the maintenance, repair and replacement of the existing drainage system located within and outside of the Project Right of Way in accordance with the Technical Requirements, except to the extent such responsibility is allocated to the Department in accordance with the Technical Requirements.

Section 9.04 Procedures Relating to Maintenance Work

(a) General. The Concessionaire will perform all maintenance obligations with respect to the Project in accordance with this Agreement and the Technical Requirements.

(b) Life Cycle Maintenance Plan. No later than 90 Days before the beginning of each calendar year after the Service Commencement Date, the Concessionaire will prepare and deliver to the Department a full five-year period maintenance plan on a rolling basis that describes life cycle asset maintenance for the Project (each, a “Life Cycle Maintenance Plan”) in accordance with the Technical Requirements. The Life Cycle Maintenance Plan will include a description of all Major Maintenance to be undertaken during such five-year period, by component, item or discrete project (each, a “Task”), the estimated costs and timing relating to each Task, the underlying assumptions used to develop such plan, including assumptions arising from the re-evaluations of the physical condition of the Assets conducted pursuant to Section 9.04(d); and such other information as may be reasonably requested by the Department.

(c) Review and Approval of Life Cycle Maintenance Plan.

(i) The Department will review and approve the Life Cycle Maintenance Plan and components thereof, including, but not limited to, the proposed scope of work, timing and estimated costs for the Major Maintenance. The Department will deliver its comments, approval or disapproval to the Concessionaire within 45 Days after the
Concessionaire has delivered each proposed Life Cycle Maintenance Plan to the Department in accordance with Section 9.04(b).

(ii) The Concessionaire will reasonably consider any changes or additions proposed by the Department to the proposed Life Cycle Maintenance Plan and will modify the Life Cycle Maintenance Plan to reflect those changes and additions which are consistent with the standards and requirements of this Agreement.

(iii) In the event of any Dispute relating to a Life Cycle Maintenance Plan, the Department and the Concessionaire will endeavor in good faith to resolve any such Dispute within 60 Days after it is provided to the Department. Any Disputes raised by the Department with respect to the Life Cycle Maintenance Plan must be based on whether it and the underlying assumptions are reasonable, realistic and consistent with Good Industry Practice, the Technical Requirements and Law. If no agreement is reached within such 60-Day period as to any such matter, either party may submit the Dispute to the dispute resolution procedures set forth in Article 21. Until resolution of any Dispute relating to a Life Cycle Maintenance Plan, the treatment of the disputed Tasks in the most recently-approved Life Cycle Maintenance Plan will remain in effect and govern the requirements relating to such Tasks. If there is no approved Life Cycle Maintenance Plan then in effect, the Concessionaire will proceed as directed by the Department until resolution of such Dispute.

(d) Inspection and Implementation.

(i) After the Service Commencement Date, the Concessionaire will conduct inspections of the physical condition of the Project Assets pursuant to the Technical Requirements. Every five years after the Service Commencement Date, the Concessionaire will conduct an assessment of the physical condition of the Project Assets pursuant to the Technical Requirements, and will prepare a comparative analysis of such conditions to the conditions as previously reported (or, with respect to any Project Enhancements, their condition upon completion thereof), such analysis to take into account any changes in Federal Requirements and changes to safety standards. The condition of each Asset will be assessed using the Department’s Maintenance Rating Program in accordance with the Technical Requirements. If any Asset is determined by the Concessionaire or the Department to fall below the applicable level or rating specified in the Technical Requirements for such Asset, the Concessionaire will, within 90 Days of such assessment, develop and submit to the Department a plan to restore such Asset to a condition that will enable the Asset to meet all applicable Performance Requirements, and such plan will also include a budget, timeline and identification of the funding sources (if known at the time) that will be utilized to restore such Asset.

(ii) The Department will be responsible at its sole cost and expense for inspection of bridges and structures on the Project Right of Way in accordance with the Technical Requirements. The Concessionaire will cooperate with the Department in its conduct of inspections and will use reasonable efforts to minimize any disruption to the Department’s conduct of such inspections. The Department and the Concessionaire will
use reasonable efforts to minimize any disruption to or impairment of the Work, the Project and the Department’s inspection activities.

(iii) If the Concessionaire fails to complete any of the Tasks in accordance with this Agreement and the applicable Life Cycle Maintenance Plan, the Department may demand by notice in writing that such Tasks be completed by the Concessionaire. If the Concessionaire has failed to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers such notice, the Department may, at its option, but is not obligated to, either (A) carry out such Task or correct such defective work using Department personnel, materials and equipment or (B) procure the services for such Task or corrective work by one or more contractors. If the Concessionaire fails to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers notice pursuant to this Section 9.04(d)(iii) and the Department elects to pursue its rights pursuant to Section 9.04(d)(iii)(A) or (B), then the Concessionaire will pay the Department’s Allocable Costs it incurs to complete such Task or corrective work, and its third-party costs to procure such contract(s).

(iv) Notwithstanding anything to the contrary in Section 9.04(d)(iii), the Concessionaire may, by written notice delivered to the Department within 30 Days of receipt of the Department’s notice of demand described in Section 9.04(d)(iii), object to any such demand by the Department on the basis that the Concessionaire has completed the Task(s) specified in the Department’s demand in accordance with this Agreement and the applicable Life Cycle Maintenance Plan or that such Task(s) are not then required in accordance with this Agreement or the applicable Life Cycle Maintenance Plan, which notice will give details of the grounds for such objection. Upon the giving of any such notice, the parties will endeavor to reach agreement as to any matters referred to in the notice. If no agreement is reached as to any such matter within 30 Days after the giving of such notice, either party may refer the Dispute to the dispute resolution procedures set forth in Article 21. Notwithstanding the foregoing, the Concessionaire will perform the Task as directed by the Department and the Department will be entitled to exercise its remedies for the Concessionaire’s failure to comply with such directive in accordance with this Agreement. If it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then such directive and any additional Work required by the Department will be treated as a Department Change pursuant to Section 14.02.

Section 9.05 Major Maintenance Reserve Fund

The Concessionaire will fund the Major Maintenance Reserve Fund in such amounts and in accordance with the terms as may be required by the Lenders.

Section 9.06 Police and Enforcement Services

(a) The Department will coordinate with the Virginia State Police to provide policing services, and to provide emergency services (fire and rescue), including traffic patrol and traffic law enforcement services, to be provided on the Project at a level of service equivalent to that
provided on comparable State Highways from time to time. All such foregoing services will be provided without any charge to the Concessionaire or the Project. For the avoidance of doubt, such services will not include any enforcement of HOV compliance. In addition, if reasonably requested by the Concessionaire, the Department will assist the Concessionaire in obtaining enhanced levels of police services for the control of traffic for construction or maintenance activities or as otherwise needed (and in each case, at the Concessionaire’s sole cost and expense). Notwithstanding such assistance, the Concessionaire will be solely responsible for obtaining such enhanced services and the Department does not guarantee that such services can be obtained.

(b) The Concessionaire may, at its sole cost and expense, engage the Virginia State Police to provide toll enforcement and HOV enforcement services (including the identification and apprehension of toll violators), and the Department will assist the Concessionaire in obtaining such services if so requested by the Concessionaire. The Concessionaire will not engage or permit the engagement of private security services to provide traffic patrol or traffic law enforcement services on the Project; provided, that the foregoing does not preclude the Concessionaire from engaging private security firms or employing other appropriate security devices, vehicle occupancy detection equipment or other automated technology to protect, collect and enforce the payment of Toll Revenues and to identify toll and/or HOV violators, subject to Law, and to enforce any private rights and civil remedies available to it respecting toll and/or HOV violations.

(c) Notwithstanding the foregoing, the Concessionaire will not permit any private security firm to stop vehicles, apprehend road users, or engage in any other direct enforcement activity on the Project Right of Way.

(d) The Department will not have any responsibility or liability to the Concessionaire resulting from or otherwise relating to the failure of the Virginia State Police or any other public agencies to provide policing services contemplated by this Section 9.06 or any of the acts or omissions of the Virginia State Police or such agencies with respect to such services.

(e) The parties further understand and agree that, as the Project Assets will constitute part of the State Highway system, the Virginia State Police and other public agencies will have access to the Project Assets and jurisdiction to enforce the laws and regulations of the State as they apply to the Project Assets.

Section 9.07 Maintenance by the Department.

(a) Except as otherwise provided herein, the Department will maintain, repair and, subject to and in accordance with the Department’s normal course of operations and activities as in effect from time to time, cause to be open and operational, in a manner consistent with access to State Highways, so as to permit access to the HOT Lanes by Permitted Vehicles, the ramps, bridges and roadways directly connecting to the HOT Lanes over which the Department has sole control. The foregoing does not restrict the Department’s right to operate existing or new facilities, to modify existing facilities, to construct new facilities, including Project Enhancements, and, subject to Section 12.02(d)(i) through (iii), to perform planned and
emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project.

(b) Except as set forth in the Technical Requirements, the Department will maintain and repair the Department Shared Assets, subject to and in accordance with the Technical Requirements and the Department’s normal course of operations and activities as in effect from time to time. Except as set forth in the Technical Requirements, the cost for maintenance and repair of the Department Shared Assets will be paid by the Department.

(c) The Department will be responsible, at its own cost and expense, for the maintenance, repair and replacement of the existing drainage system located within and outside of the Project Right of Way in accordance with the Technical Requirements, except to the extent such responsibility is allocated to the Concessionaire in accordance with the Technical Requirements.

(d) Activities undertaken by the Department pursuant to this Section 9.07 will not constitute a Compensation Event, unless they meet the criteria as provided in this Agreement.

Section 9.08 Annual Budget

(a) For each Agreement Year and partial Agreement Year from and after the Service Commencement Date, the Concessionaire will file with the Department an annual budget for the Project for such full or partial Agreement Year at least 60 Days prior to the start thereof (an “Annual Budget”). Each Annual Budget will be in a form reasonably acceptable to the Department and show in reasonable detail in respect of such full or partial Agreement Year:

   (i) projected Gross Revenues;

   (ii) projected Operating Costs, including all amounts payable to the Department;

   (iii) projected maintenance expenses, including the costs of Major Maintenance activities to be performed pursuant to the Life Cycle Maintenance Plan;

   (iv) projected debt service and other amounts payable with respect to Concessionaire Debt, including deposits to reserve funds held for benefit of the Project Lenders;

   (v) projected Distributions; and

   (vi) for each Agreement Year after the Concessionaire has achieved the Initial IRR to the Agreement Year in which the Concessionaire achieves the Highest Revenue Share IRR, the date on which the Concessionaire expects to achieve the Highest Revenue Share IRR.
(b) The Concessionaire will provide such other information as the Department may reasonably require in connection with its review of the Annual Budget, including: (i) any amendments to operating budgets pursuant to the O&M Agreement; and (ii) any budgets related to the Shared Facilities Agreement.

Section 9.09 Signage.

(a) The Concessionaire will submit a Signage Plan to the Department for its review and approval pursuant to the Technical Requirements. The Concessionaire will limit its signage to the Project Right of Way and any other real property or real property rights as set forth in Section 8.05.

(b) The Concessionaire agrees that it shall, at its sole cost, install, operate and maintain on connecting State Highways such signs solely notifying motorists of the access to the HOT Lanes, the amount of tolls and fines for toll violations, the applicable High Occupancy Requirement, and other relevant information, in accordance with applicable Law and the Technical Requirements.

(c) The Department will remain responsible, at its cost, for general directional signs on State Highways informing the public of the direction and distance to the HOT Lanes and other State Highways. During the Term, the Department will also cooperate with, and use its commercially reasonable efforts to cause other public agencies or entities to cooperate with, the Concessionaire to install, at the Concessionaire’s cost, additional signs along State Highways notifying motorists of the access to the HOT Lanes and any other communications relating to the HOT Lanes as are reasonably requested by the Concessionaire, subject to any obligation to obtain any necessary authorizations of any other Governmental Authority and in accordance with applicable Law. In connection with any such request, the Concessionaire will submit the proposed layout, location, type, size, color and content of all such traffic signs or other signs.

ARTICLE 10.

CONCESSIONAIRE PROJECT AND QUALITY MANAGEMENT; DEPARTMENT OVERSIGHT AND OTHER SERVICES

Section 10.01 Project and Quality Management

The Concessionaire will provide oversight and management of the Project to control the scope, quality, cost, and on-time delivery of the Work. If the Concessionaire is required to rectify any Non-Conforming Work in accordance with Section 8.11(b), the parties will review the Quality Management System Plan to assess and determine whether changes, including increased management and oversight efforts by the Concessionaire, to such plan are necessary to prevent such further Non-Conforming Work.
Section 10.02 Right to Oversee Work

(a) The Department will have the right at all times during the Term to carry out Oversight Services with respect to all aspects of the design, permitting, financing, acquisition, construction, installation, equipping, maintenance, repair, preservation, modification, operation, management and administration of the Project. The Department’s Oversight Services will not impact its right to rely on the Concessionaire to perform its obligations pursuant to this Agreement.

(b) The Concessionaire will fully cooperate with the Department to facilitate its conduct of Oversight Services. In the course of performing Oversight Services, the Department will use reasonable efforts to minimize the effect and duration of any disruption to or impairment of the Work or the Project.

Section 10.03 Department Access and Inspection

The Department, the FHWA, and their respective authorized agents will have unrestricted access at all times to enter upon, inspect, sample, measure and physically test any part of the Project Assets or the Project Right of Way, as well as any materials, supplies, machinery and equipment to be incorporated into or used in construction, operation or maintenance of the Project. The Department will also have the right, upon reasonable advance written notice (except as provided in Section 18.07(b)) to the Concessionaire, to inspect financial or other records relating to the Project. Upon the Concessionaire’s request, the Department will provide the Concessionaire with the results of any such test or inspections subject to any protections from disclosure under applicable Law.

Section 10.04 Compensation for Oversight Services

(a) Except as otherwise expressly provided in this Agreement, including, without limitation, Section 10.04(b), Section 10.04(c), Section 10.05(h), Section 11.05(a) and Section 24.03, the Department will not be compensated for its Oversight Services, whether in respect of the design, inspection or permitting for the Project, any Project Enhancement or any Safety Compliance Orders.

(b) Notwithstanding Section 10.04(a), if at any time the Concessionaire has failed to perform any of its construction, operating or maintenance obligations in any material respect then, in addition to other remedies available pursuant to this Agreement and the other Project Agreements, the Department, with written notice to the Concessionaire given concurrently with the increase in the Department’s monitoring or as soon as practicable thereafter, is entitled to adequately and appropriately increase the level of its monitoring of the Project and the Concessionaire’s compliance with its construction, operation and maintenance obligations pursuant to this Agreement, until such time as the Concessionaire has demonstrated to the Department’s reasonable satisfaction that it will perform and is capable of performing its construction, operation and maintenance obligations pursuant to this Agreement. The Concessionaire will compensate the Department for all Allocable Costs incurred by the Department as a result of such increased level of monitoring from and after the date on which
such increased level of monitoring begins, provided, that if the increased monitoring is due to a delay in achieving Substantial Completion, Service Commencement or Final Acceptance, the Concessionaire will compensate the Department for such increased monitoring solely by payment of liquidated damages pursuant to Section 8.10. The Concessionaire’s total liability to the Department during the Construction Period in connection with any increased monitoring will not exceed $2,000,000 in the aggregate.

(c) If the Department increases its monitoring or oversight as permitted in this Agreement during the Operating Period, then the Department will give notice of such increased level of monitoring as provided in Section 10.04(b). Within 10 Days following the day on which increased monitoring activities begin, the Department will provide the Concessionaire with a budget for its increased oversight and/or monitoring activities which sets out its total proposed costs in reasonable detail. If there is a change in circumstances in the oversight activities or the events which precipitated them occurs following the submission of the Department’s initial budget, then the Department will provide a revised budget, which budget will detail any increased costs.

(d) The Concessionaire may submit a cure plan describing specific actions the Concessionaire will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject. Notwithstanding Section 10.04(c), if the Department accepts a cure plan, the Department shall not increase its monitoring or other Oversight Services unless the Concessionaire fails to diligently pursue such cure plan.

Section 10.05 Department Approvals

(a) This Section 10.05 sets forth procedures governing certain submittals or requests by the Concessionaire (or the Design-Build Contractor or the O&M Contractor) to the Department (including, but not limited to, plans, schedules, designs, Design Documentation and Construction Documentation) which require an approval, review, comment, consent, notification, determination, decision or other response (collectively, a “Response”) from the Department pursuant to this Agreement. All submittals or requests to the Department will be made in the form required by, and otherwise in conformity with, the requirements set forth in the Technical Requirements. Except as otherwise provided in this Agreement, the procedures set forth in this Section 10.05 will apply to any submittal or request by the Concessionaire relating to, or any required approval or disapproval by the Department of, the following: any proposed OSPS Improvement Plan pursuant to Section 5.08(b); the issuance of a Design Work Notice to Proceed pursuant to Section 8.03(a) or a Construction Notice to Proceed pursuant to Section 8.03(b); any submittal of Design Documentation and Construction Documentation relating to the Work pursuant to Section 8.04(a); the approval of the ROW Acquisition and Relocation Plan pursuant to Section 8.05(a); the determination of whether Substantial Completion has been achieved pursuant to Section 8.08(e); the determination of whether Final Acceptance has been achieved pursuant to Section 8.09(c); the determination of whether the conditions precedent for achieving Service Commencement have been achieved pursuant to Section 9.02(b); any Signage Plan pursuant to Section 9.09(a); data, reports and any proposed Remedial Action Plan pursuant to Section 16.01(b); insurance submittals pursuant to Section 17.02(e); and a Disbursement Request pursuant to the Public Funds Amount Payment Terms attached as Exhibit N.
(b) Except as otherwise set forth herein, any submittal, resubmittal or request to the Department will be deemed complete at 5:30 p.m. Eastern time on the seventh Day following its receipt by the Department unless, the Department notifies the Concessionaire in writing prior to 5:30 p.m. Eastern time on such seventh Day that such submittal, resubmittal or request is incomplete according to the standards set forth in the Technical Requirements and sets forth in reasonable detail the incomplete elements of the submittal, resubmittal or request.

(c) In any case in which a submittal or request is or has been deemed to be complete under Section 10.05(b), the Department will review and respond to such submittal or request as promptly as reasonably possible, and no later than 21 Days after the date on which the Concessionaire (or the Design-Build Contractor or the O&M Contractor) has delivered such submittal or request to the Department. The Department will respond within such 21-Day period by (i) approving, certifying or taking other appropriate action with respect to, the submittal or request, as applicable or (ii) disapproving such submittal or request and providing written notice to the Concessionaire specifying in reasonable detail the reasons for which it has disapproved the submittal or request. If the Department objects or disapproves any submittal or request in accordance with clause (ii) of the preceding sentence, the Concessionaire will resubmit the submittal or request as promptly as reasonably possible, and the Department will resume its review and respond to such submittal or request by approving or disapproving the submittal or request (provided that such submittal or request is complete or has been deemed to be complete under Section 10.05(b)) within 10 Days following its receipt of a resubmittal or request. The Department’s review of a resubmittal or request will be limited to the issue, condition or deficiency which gave rise to the Department’s disapproval and will not extend to other aspects for which a notice of disapproval was not previously provided to the Concessionaire unless the issue, condition or deficiency which gave rise to the Department’s disapproval reasonably relates to the Department’s disapproval for which notice was previously provided. The Concessionaire is in no way obligated to incorporate the Department’s comments unless necessary to comply with a specific requirement of this Agreement.

(d) The time periods specified in Section 10.05(c) will be extended for the duration of a Force Majeure Event that prevents the Department or the Concessionaire, as applicable, from performing under this Section 10.05.

(e) Unless otherwise provided in this Agreement, if the Department fails to respond to a complete submittal or request which has been timely submitted or resubmitted, as the case may be within the applicable time periods, as provided in this Section 10.05, the Department will be deemed to have approved, certified or taken other similar action with respect to, such submittal or request; provided that such deemed approval will not be deemed a waiver of the Department’s other rights or the Concessionaire’s other obligations pursuant to this Agreement, including compliance with the Technical Requirements, Governmental Approvals, Good Industry Practice and applicable Law. Notwithstanding the foregoing, the deemed approval provisions of this Section 10.05(e) will not apply to the issuance of a Design Work Notice to Proceed pursuant to Section 8.03(a) or a Construction Notice to Proceed pursuant to Section 8.03(b), the approval of the ROW Acquisition and Relocation Plan pursuant to Section 8.05(a), the determination of whether Substantial Completion has been achieved pursuant to
8.08(e); the determination of whether Final Acceptance has been achieved pursuant to Section 8.09(c); the submission of any data, reports and any proposed Remedial Action Plan pursuant to Section 16.01(b); or a Disbursement Request pursuant to the Public Funds Amount Payment Terms attached as Exhibit N.

(f) Unless otherwise agreed by the parties, the Concessionaire is entitled to resolve any disapproval by the Department of a resubmittal in accordance with the dispute resolution procedures set forth in Article 21. If the Department reasonably believes that all or a portion of a resubmittal fails to comply with this Agreement, the Department may, in accordance with this Agreement, direct the Concessionaire to perform the Work in accordance with the Department’s instructions. In such event, the Concessionaire will diligently proceed with the Work in accordance with such directive, and may (i) dispute the Department’s directive in accordance with this Agreement and (ii) if it chooses, proceed with the dispute resolution procedures set forth in Article 21. If it is finally determined in accordance with such dispute resolution procedures that the Concessionaire’s submittal or resubmittal complied with this Agreement, the Work required under the Department’s directive will be treated as a Department Change.

(g) In all cases where Responses are required to be provided hereunder, such Responses will not be withheld or delayed unreasonably and such determinations will be made reasonably except in cases where a different standard is specified. In cases where sole discretion is specified with respect to a Response by the Department, the Response will not be subject to the dispute resolution procedures set forth in Article 21. Any failure of the Department to respond to a matter which is determined in the Department’s sole discretion (by way of example, Deviations pursuant to Section 14.03) within 21 Days after delivery of the Concessionaire’s request to the Department will be deemed disapproval by the Department. The Department will provide within ten days after a request by the Concessionaire its rationale, in reasonable detail, for any disapproval or deemed disapproval of any matter where the Department has sole discretion to approve or disapprove.

(h) Subject to Section 10.04, if the Concessionaire must submit a submittal or request to the Department for review and Response more than twice due to the Concessionaire’s failure to comply with the requirements of this Agreement, the Concessionaire will pay the Department for the Department’s Allocable Costs incurred thereafter in reviewing any portions of such submittal or request. If the Concessionaire must submit a submittal or request more than twice due to the Department’s failure to comply with the requirements of this Agreement, the Department will pay the Concessionaire for the Concessionaire’s Allocable Costs incurred thereafter in preparing or submitting any portions of such submittal or request.

**Section 10.06 Limitations on the Concessionaire’s Right to Rely**

(a) The Concessionaire expressly acknowledges and agrees that the Department’s rights, if any, under the Project Agreements:

(i) to review, comment on, approve, disapprove and/or accept designs, plans, specifications, work plans, construction, equipment, installation, plans for maintenance,
traffic management, policing and/or Project management, books, records, reports or statements, or documents pertaining to Concessionaire Debt and Financing Assignments,

(ii) to review, comment on and approve or disapprove qualifications and performance of, and to communicate with, Contractors, and

(iii) to perform Oversight Services,

exist solely for the benefit and protection of the Department, do not create or impose upon the Department any standard or duty of care toward any Concessionaire Party, all of which are hereby disclaimed, may not be relied upon, nor may the Department’s exercise or failure to exercise any such rights be relied upon, by the Concessionaire in determining whether the Concessionaire has satisfied the standards and requirements set forth in this Agreement and may not be asserted, nor may the Department’s exercise or failure to exercise any such rights be asserted, against the Department by the Concessionaire as a defense, legal or equitable, to the Concessionaire’s obligation to fulfill such standards and requirements; provided, that the foregoing will not limit the Department’s liabilities or obligations pursuant to this Agreement.

(b) To the maximum extent permitted by Law, and subject to the provisions of this Agreement, the Concessionaire hereby releases and discharges the Department from any and all duty and obligation to cause permitting, Project Right of Way acquisition, Utility Relocation, construction, equipping, operations, maintenance, policing, renewal, replacement, traffic management or other management of or for the Project or the Project Right of Way, by the Department, to satisfy the standards and requirements set forth in the Project Agreements; provided, that the foregoing will not limit the Department’s liability or obligations under this Agreement. The Department will be entitled to remedies for Non-Conforming Work pursuant to Section 8.11(b).

(c) No rights of the Department described in Section 10.06(a), no exercise or failure to exercise such rights, no failure of the Department to meet any particular standard of care in the exercise of such rights, no issuance of permits or certificates of completion or acceptance and no Final Acceptance of the Project or any Project Enhancement will:

(i) relieve the Concessionaire from performance of the Work or of its responsibility for the selection and the competent performance of its Contractors;

(ii) relieve the Concessionaire of any of its obligations or liabilities under the Project Agreements;

(iii) be deemed or construed to waive any of the Department’s rights and remedies under the Project Agreements; or

(iv) be deemed or construed as any kind of representation or warranty, express or implied, by the Department.
(d) Notwithstanding Section 10.06(a), (b) and (c) above: (i) any Notices to Proceed and certificates or notices of Substantial Completion, Service Commencement and Final Acceptance will be binding on the Department and the Concessionaire will be entitled to rely thereon; provided however, that the delivery of such notices and certificates will not constitute a waiver by the Department of any breach of this Agreement by the Concessionaire or relieve the Concessionaire of any of its obligations hereunder; (ii) the Concessionaire will be entitled to rely on specific approved written Deviations and interpretative engineering decisions the Department gives pursuant to this Agreement in accordance with the Technical Requirements, the Design-Build Contract or any Development Contract, and any Law; (iii) the Department is not relieved from any liability arising out of a knowing, intentional material misrepresentation under any written statement the Department delivers; and (iv) the Department is not relieved from its obligations under this Agreement or any Development Contract.

Section 10.07 Suspension of the Work

(a) The Department will have the right and authority, without liability to the Concessionaire, to suspend any affected portion of the Work by written order to the Concessionaire to comply with any court order or judgment, to protect against a risk to the public health, safety or welfare (as more particularly set forth in Section 24.04(b)), including to workers, other personnel or the general public from unsafe or dangerous conditions, or upon the occurrence of any of the following by the Concessionaire:

(i) with respect to Non-Conforming Work, as provided in Section 8.11(b)(i);

(ii) failure to comply with any Law or Governmental Approval (including failure to handle, preserve and protect archeological, paleontological or cultural resources, or failure to handle Hazardous Substances, in accordance with applicable Laws and Governmental Approvals);

(iii) failure to provide proof of required insurance coverage or to provide or maintain the required Performance Security;

(iv) failure to carry out and comply with Directive Letters; and

(v) failure to satisfy any conditions to commencing performance of the applicable portion of the Work set forth in Article 8 or Section 9.01.

(b) The Department will lift the suspension order promptly after it is permitted by the terms of the court order or judgment, after the dangerous or unsafe condition is rectified, or after the Concessionaire fully cures and corrects the applicable breach or failure to perform.

(c) The Concessionaire will have the right to dispute the Department’s suspension order by written notice to the Department, which notice will provide supporting information for the Concessionaire’s position. Unless directed otherwise by the Department after receipt of such notice, the Concessionaire will carry out the Work required by the Department. If it is determined in accordance with the dispute resolution procedures in Article 21 that the
Concessionaire was in compliance with its obligations under this Agreement, then the suspension order and any additional Work required by the Department will be treated as a Department Change pursuant to Section 14.02.

(d) The issuance of a suspension order will not affect the Concessionaire’s rights to cure or correct any such incidents giving rise to the issuance of the suspension order in accordance with this Agreement.

ARTICLE 11.

NON-COMPLIANCE POINTS SYSTEM

Section 11.01 Non-Compliance Points System

(a) Exhibit W to this Agreement sets forth a table for the identification of certain Concessionaire breaches or failures to perform its obligations under this Agreement that may result in the assessment by the Department of Non-Compliance Points. The Non-Compliance Points system is used by the Department to measure the Concessionaire’s performance levels and the accumulation of Non-Compliance Points by the Concessionaire may trigger the remedies set forth or referenced in this Article 11. This Article 11 shall apply only during the Operating Period. The inclusion in Exhibit W of a breach or failure to perform shall not determine whether such breach or failure is material.

(b) The Department may exercise any of its remedies under this Article 11 without prejudice to any other rights or remedies it has under this Agreement.

(c) If the Department determines any breach or failure described in Exhibit W has occurred, the Department shall within five Days of its determination deliver to the Concessionaire written notice thereof describing the breach or failure in reasonable detail. Within five Days of receipt of the Department’s notice, the Concessionaire shall investigate the Department’s claim and provide a written report as to whether the breach or failure in performance has in fact occurred and describing any mitigating factors. Within 10 Days after receiving the Concessionaire’s report, the Department shall deliver to the Concessionaire a written determination setting forth the number of Non-Compliance Points, if any, the Department, in its sole discretion, has assessed to the Concessionaire.

Section 11.02 Assessment of Non-Compliance Points and Cure Periods

The Department may assess Non-Compliance Points as described in Section 11.03 and Section 11.04 subject to the following terms and conditions.

(a) The Non-Compliance Points system will apply commencing on the later of (i) the Service Commencement Date and (ii) the fifth anniversary of the “Service Commencement Date” as such term is defined in the Capital Beltway Comprehensive Agreement. In addition, there will be a phased introduction of the Non-Compliance Points system, and for the initial year that the Non-Compliance Points system is applicable, the thresholds for “Total Cumulative
Number of Uncured Points” specified on page 1 of Exhibit W will be increased by 50% for the first year, and over the period of the next five years such threshold will be reduced 10% per year such that the thresholds in Exhibit W apply.

(b) The Department will not assess points for the first instance of each breach or failure provided that the breach or failure is cured within the cure period stated in Exhibit W. However, the Department will provide notice to the Concessionaire that a breach or failure has occurred. Any subsequent instances of each breach or failure may be subject to the assessment of Non-Compliance Points.

c) Exhibit W sets forth the maximum number of Non-Compliance Points the Department may assess for each breach or failure. The Department may, in its sole discretion, assess fewer Non-Compliance Points for a particular breach or failure based on the merits of the individual breach or failure.

d) Where a single act or omission gives rise to more than one breach or failure as described in Exhibit W, the Department may assess Non-Compliance Points for only one breach or failure. In such circumstances, the Department may, in its sole discretion, assess Non-Compliance Points for the breach or failure with the highest maximum number of Non-Compliance Points shall apply.

e) For breaches or failures classified as category A in Exhibit W, Non-Compliance Points shall be assessed only at the end of the applicable cure period if the Concessionaire has failed to cure within that time. Additional Non-Compliance Points may be assessed again at the end of each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Non-Compliance Points equals or exceeds the level described in Section 11.05(c).

f) For breaches or failures classified as category B in Exhibit W, the Non-Compliance Points shall be assessed on the date of the written determination from the Department to the Concessionaire. Provided that the breach or failure is not then cured within the applicable cure period, Non-Compliance Points shall be assessed again at the end of the first and each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Non-Compliance Points equals or exceeds the level described in Section 11.05(c).

g) For breaches or failures identified as category C in Exhibit W (no applicable cure period), the Non-Compliance Points shall be assessed on the date of the written determination from the Department to the Concessionaire.

(h) Any cure period specified in Exhibit W shall be extended day-for-day for any Delay Event that prevents performance of Work to cure a breach or failure.

(i) At every 10 year anniversary of the Agreement Date, or upon significant revision of the Technical Requirements, either party, by written notice to the other party at least 90 Days prior to such anniversary reserves the right to request a review of the Non-Compliance Points
system. Upon receiving the notice, both parties must review the existing Non-Compliance Point system in place and agree in writing to any revisions required to the system.

Section 11.03 Notification of Cure

When the Concessionaire determines it has cured any breach or failure for which the Department has assessed Non-Compliance Points, the Concessionaire shall deliver written notice to the Department. The Concessionaire’s written notice shall identify the breach or failure at issue and describe what steps were undertaken to cure it. The Department or its designee shall then promptly verify the cure through inspection or other means and provide to the Department a written certification of cure. The Department retains the right to verify independently that the breach or failure in performance has in fact been cured.

Section 11.04 Accumulation of Non-Compliance Points

(a) The total of uncured Non-Compliance Points assessed by the Department shall be monitored by the Department or its designee on an ongoing basis for the duration of the Operating Period.

(b) The cumulative total of cured and uncured Non-Compliance Points assessed by the Department shall be monitored in rolling 365 Day cycles from the time the breach has been cured for those breaches classified in categories A and B, and from the time the breach has occurred for those breaches classified in category C. At the end of each 365 Day cycle, the Non-Compliance Points assessed for that specific breach will be subtracted for the cumulative total number of Non-Compliance Points the Concessionaire has been assessed.

Section 11.05 Impact of Non-Compliance Points

(a) Increased Monitoring. If the Concessionaire is assessed 135 or more Non-Compliance Points during any 365 Day cycle or maintains 30 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.05, the Department may increase the level of monitoring of the Project in accordance with Section 10.04. The Concessionaire shall compensate the Department for its Allocable Costs incurred as a result of such increased level of monitoring. The Concessionaire may submit a cure plan describing specific actions the Concessionaire will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject.

(b) The Remedial Plan.

(i) If the Concessionaire is assessed 200 or more Non-Compliance Points during any 365 Day cycle or maintains 45 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.04, the Department may require the Concessionaire to prepare and submit a remedial plan for the Department’s approval. The remedial plan shall be delivered to the Department within 45 Days of its request. The remedial plan shall set forth a schedule
and describe specific actions the Concessionaire will undertake to improve its performance as demonstrated by its incurring no additional Non-Compliance Points and by reducing the total number of uncured Non-Compliance Points it has accumulated to date. Such actions may include but are not limited to improvements to Concessionaire’s quality management practices, plans and procedures; changes in its organizational and management structures; increased monitoring and inspections; changes in key personnel; and the replacement of subcontractors.

(ii) If, after 180 Days following the implementation of the remedial plan, the Concessionaire can demonstrate that: (1) the remedial plan has reduced the number and frequency of Non-Compliance Points assessed as compared to the period prior to the implementation of the remedial plan; (2) the Concessionaire is complying in all material respects with the course of action described in the remedial plan; and (3) the Concessionaire has no uncured Non-Compliance Points, then the total number of Non-Compliance Points assessed over the course of the 180 Day period shall be reduced by 50%. If the rolling 365 Day cycle described in Section 11.04(b) ends at any time during the 180 Day period described herein, the total number of Non-Compliance Points the Concessionaire has cured during that 365 Day cycle shall carry over to the next 365 Day cycle. However, if the total number of Non-Compliance Points assessed over the course of the 180 Day period is reduced by 50% as described above, the total number of previously cured Non-Compliance Points that were carried over also shall be subtracted from the Concessionaire’s cumulative total number of assessed Non-Compliance Points.

(c) Default. If the Concessionaire: (1) fails to deliver to the Department the remedial plan within 45 Days of the Department’s request; or (2) fails to comply with the course of action set forth in the remedial plan and incurs a total of 245 Non-Compliance Points during any 365 Day cycle or maintains 68 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.04(a), the Department may notify the Concessionaire in writing that such failure is a breach of a material obligation hereunder, in which event such failure shall become a Concessionaire Default under Section 19.01(b) unless cured following such notice within the time period specified in Section 19.01(b).

Section 11.06 Disputes Regarding the Assessment of Non-Compliance Points

(a) The Concessionaire may object to the assessment of Non-Compliance Points or the amount of Non-Compliance Points assessed by delivering to the Department written notice of its objection within 10 Days of receipt of the Department’s written determination assessing the Non-Compliance Points at issue. Such notice shall set forth with specificity the grounds for the Concessionaire’s objection.

(b) The Department will reasonably consider the Concessionaire’s objections and Representatives of the Department and the Concessionaire will meet to discuss the matter within 30 Days after the Concessionaire has provided its written objection. If, at the conclusion of this 30 Day period, the Concessionaire still objects to the Department’s decision, it may pursue dispute resolution under Article 21.
(c) If for any reason the Concessionaire fails to deliver its written notice of objection within the time period specified in Section 11.06(a), the Concessionaire shall have waived its right to challenge the Department’s assessment of Non-Compliance Points.

ARTICLE 12.

PROJECT ENHANCEMENTS AND SAFETY COMPLIANCE ORDERS

Section 12.01 Project Enhancements by the Concessionaire

The Concessionaire will have the right, at its sole cost and expense, at any time after the Service Commencement Date, to design, develop, construct, operate and maintain Concessionaire Project Enhancements within the Project Right of Way, including any fundamental change in the dimensions, character, quality, location or position of all or any part of the Project; provided, that the Concessionaire will not undertake any such Project Enhancements unless all aspects thereof are approved in writing by the Department in its sole discretion, and the Concessionaire has entered into a Development Contract with the Department with respect to such Concessionaire Project Enhancement.

Section 12.02 Project Enhancements by the Department

(a) The Department will have the right from time to time after the Service Commencement Date, at its sole cost and expense, to design, develop, construct, operate and maintain Department Project Enhancements. The Department will have the right to design, develop, construct, operate and maintain Department Project Enhancements through one or more of the following mechanisms, as the Department selects from time to time in its sole discretion:

(i) use by the Department of its own personnel, materials and equipment;

(ii) contracting with third parties through requests for proposals, competitive bids, negotiations or any other lawful procurement process; and

(iii) authorizing and directing the Concessionaire, at the Department’s sole cost and expense, to undertake the Department Project Enhancements, through contracting for necessary traffic and revenue studies and all necessary planning, design, engineering, permitting, financial, right-of-way acquisition services, Utility Relocation, construction, installation, project management, operation, maintenance, repair and other work and services;

provided, that the Department will give the Concessionaire at least 60 Days’ written notice prior to initiating any procurement process referred to in clause (ii) above, during which time the Concessionaire will have the right, but not the obligation, to agree in writing to undertake the Department Project Enhancement on such terms and conditions as the Department and the Concessionaire will mutually agree upon; provided further, that if the Department and the Concessionaire fail to agree upon such terms and conditions within such 60 Day period, the Department will be entitled to proceed with any of the mechanisms set forth in clauses (i), (ii)
and (iii) of this Section 12.02(a) and will have no further liability or obligation to the Concessionaire except as otherwise expressly provided in this Agreement.

(b) If the Department authorizes and directs the Concessionaire to undertake a Department Project Enhancement pursuant to Section 12.02(a) (iii), then, in cooperation with the Department, as applicable, and subject to (i) the review and written approval by the Department in its sole discretion and (ii) without limiting the Concessionaire’s right to claim additional Concessionaire Damages, the Department making available to the Concessionaire sufficient funds, through monthly progress payments for work performed and costs incurred (plus an amount not to exceed 10% of such costs to pay the Concessionaire for reasonable and documented costs actually incurred to administer the work), including without limitation the costs of obtaining any Governmental Approvals necessitated by such Department Project Enhancement, in order to perform the work required to design, construct, operate and maintain such Department Project Enhancement, the Concessionaire will implement such Project Enhancement in accordance with the terms and provisions of this Agreement, and the Project Enhancement will be deemed a part of the Project and will become subject to all the terms and provisions of this Agreement as of the date the Concessionaire is required to assume such responsibility pursuant to this Section 12.02(b).

(c) The Department will have the right to enter upon the Project and the relevant rights of way for any purpose relating to Department Project Enhancements under this Section 12.02 to the extent reasonably necessary.

(d) The Department will have the right at any time (and without liability to the Concessionaire for any damages it may suffer, except as otherwise expressly provided in this Agreement) to perform planned and emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project; provided that

(i) the Department shall use reasonable commercial efforts to keep the Concessionaire informed of planned maintenance, renewal and replacement and repair activities which can reasonably be foreseen to impact activities on the Project;

(ii) the Department shall provide to the Concessionaire copies of and other information concerning the Department’s then current maintenance, renewal and replacement and repair program, upon the Concessionaire’s reasonable request; and

(iii) to the extent it relates to Department Project Enhancements, the provisions of Section 12.02 shall govern the Department’s liability to the Concessionaire therefor.

Section 12.03 Safety Compliance Orders

(a) The Department may, but is not obligated to, issue Safety Compliance Orders to the Concessionaire at any time after the Substantial Completion Date; provided, that no Safety Compliance Order may in any event order or direct the Concessionaire to do any act in violation of any Law. Compliance with a Safety Compliance Order by the Concessionaire will not be
deemed a default by the Concessionaire under the provisions of this Agreement or any other VDOT Project Agreement.

(b) The Department will use good faith efforts to inform the Concessionaire at the earliest practicable time of any circumstance or information relating to the Project which in the Department’s reasonable judgment is likely to result in a Safety Compliance Order. Except in the case of an Emergency, the Department will consult with the Concessionaire, prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts and the availability of Concessionaire resources to fund the Safety Compliance Work. The Department may, in its discretion, monitor and inspect the Project Assets at any time and from time to time for the purposes of determining whether any circumstances exist that warrant issuance of a Safety Compliance Order and giving the Department and the Concessionaire reports and recommendations related to such matters.

(c) If the Department issues a Safety Compliance Order, the Concessionaire will proceed, at its sole cost and expense, with the necessary environmental, design and construction Work to carry out the Safety Compliance Order as follows:

(i) if the Safety Compliance Order is of the type described in clause (a) of the definition of that term, the Concessionaire will proceed expeditiously; and

(ii) if the Safety Compliance Order is of the type described in clause (b) of the definition of that term, the Concessionaire will carry it out in accordance with the procedures adopted by the Department for carrying out similar work on similar portions of the State Highways.

(d) The Concessionaire will have the right to dispute a Safety Compliance Order by providing written notice to the Department within 21 Days of the issuance of the Safety Compliance Order setting forth the Concessionaire’s Claim that no condition exists to justify the disputed Safety Compliance Order and the Concessionaire’s estimate of impact costs, Gross Revenues and the construction schedule, if applicable. The Concessionaire will nevertheless implement the Safety Compliance Order, but if it is finally determined in accordance with the dispute resolution procedures in Article 21 that conditions warranting the Safety Compliance Order did not exist, then the Safety Compliance Order will be treated as a Department Change pursuant to Section 14.02.

Section 12.04 Development of Other Facilities

(a) Except for the right of the Concessionaire to receive compensation set forth in Section 12.02, Section 12.04(d) (with respect to disruptions to the construction of the Project) Section 12.05 and Section 12.06(e) (with respect to disruptions to the construction of the Project), the State Parties will have the unlimited right, each in its sole discretion, at any time and without liability, to finance, develop, approve, construct, expand, improve, modify, upgrade, add capacity to, reconstruct, rehabilitate, restore, renew and replace any existing and new transportation or other facilities other than the Project (including, without limitation, free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, HOT/HOV lanes,
light rail, heavy rail, high-speed rail, freight rail and bus lanes) and exercise all of its authority to advise and recommend on transportation planning, development and funding, and to otherwise improve the GP Lanes and other roadways and structures within or adjacent to the I-95 Corridor (collectively, the “Department Projects”) outside the HOT Lanes, and whether nearby or otherwise located as to affect the Project, its operation and maintenance (including the costs and expenses thereof), its vehicular traffic and/or its revenues, provided, that:

(i) the Department will use diligent efforts to keep the Concessionaire informed of planned maintenance, renewal and replacement and repair activities of the Department Projects, which can reasonably be foreseen to impact the Work or traffic on the HOT Lanes; and

(ii) the Department will provide to the Concessionaire copies of and other information concerning the Department’s then current maintenance, renewal and replacement and repair program of the Department Projects, upon the Concessionaire’s reasonable request.

(b) The Department Projects include those facilities (i) owned or operated by the State Parties, including those owned or operated by a private entity pursuant to a contract with a State Party; (ii) owned or operated by a joint powers authority or similar entity to which a State Party is a member; (iii) owned or operated by any other Governmental Authority pursuant to a contract with a State Party, including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities and (iv) owned or operated by any other Governmental Authority (including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities) with respect to which a State Party has contributed funds, in-kind contributions or other financial or administrative support. The foregoing rights include the ability to institute, increase or decrease tolls or other fees and charges on such facilities or modify, change or institute new or different operation and maintenance procedures.

(c) The State Parties will have the right, without liability, to make discretionary and non-discretionary distributions of Federal and other funds for any transportation projects, programs and planning, and to exercise all of its authority to advise and recommend on transportation planning, development and funding on any project of its choosing.

(d) In no event will the taking of any action described in this Section 12.04 by a State Party (i) constitute a default by the Department pursuant to this Agreement or (ii) entitle the Concessionaire to Concessionaire Damages or other relief, except to the extent provided in (A) Section 12.02 with respect to any such existing and new transportation or other facilities that constitute Department Project Enhancements and (B) Section 12.05 with respect to Alternative Facilities; provided however, that if the construction activities associated with a Department Project directly cause a material disruption to the construction of the Project, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement; provided further however, that the Concessionaire will not be entitled to Concessionaire Damages or other relief if such material disruption is caused by a Concessionaire Party.
Section 12.05 Alternative Facilities.

(a) Additional Lanes.

(i) If the Department determines that Additional Lanes are in the State’s best interests, the Department will consult with the Concessionaire as to an appropriate strategy to implement such Additional Lanes. Prior to undertaking construction of Additional Lanes, the Department will give the Concessionaire the first right to submit a proposal to construct such Additional Lanes as new HOT Lanes and HOV Lanes at the Concessionaire’s sole cost as a Concessionaire Project Enhancement, so long as the Concessionaire demonstrates that (A) it has or can obtain sufficient funding (whether debt, equity, other sources of funds or combination thereof) for such Concessionaire Project Enhancement, and (B) it has or can obtain (with appropriate assistance from the Department) all required Governmental Approvals for such Concessionaire Project Enhancement.

(ii) The Concessionaire’s proposal to construct Additional Lanes as new HOT Lanes pursuant to a Concessionaire Project Enhancement will contain the information specified by the Department in writing and delivered to the Concessionaire. The Concessionaire’s failure to submit such a proposal within 120 Days of its receipt of the Department’s specifications as to the contents of the Concessionaire’s proposal will constitute a waiver of the Concessionaire’s right to submit a proposal pursuant to this Section 12.05. If a valid proposal is submitted by the Concessionaire, the Department will evaluate the Concessionaire’s proposal in accordance with the Department’s specifications within 90 Days of its submission. If the Concessionaire determines not to pursue the construction of such Additional Lanes as a Concessionaire Project Enhancement or the Department does not approve such Concessionaire Project Enhancement after review in accordance with the Department’s specifications, the Department may add Additional Lanes as a Department Project; and except as provided in clause (iv), such Additional Lanes will constitute a Compensation Event.

(iii) The Department will coordinate the activities described in Section 12.05(a) with the Concessionaire so as to minimize to the extent reasonably feasible the disruption to the Concessionaire’s construction, operation and maintenance of the Project and the generation of Toll Revenues.

(iv) Without limiting the applicability of clause (ii) above, the construction of Additional Lanes by or on behalf of the Department will not constitute a Compensation Event if the Highest Revenue Share IRR has been reached as of the date on which Commencement of Use of the Additional Lanes begins.

(b) Route One Improvements. The Route One Improvements will be treated as a Compensation Event unless the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Route One Improvements.
(c) **Occoquan Bridge Improvements.** The Occoquan Bridge Improvements will be treated as a Compensation Event unless the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Occoquan Bridge Improvements.

(d) **Southern HOT Lanes.** The Southern HOT Lanes will be treated as a Compensation Event unless (i) the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Southern HOT Lanes or (ii) the Concessionaire develops and constructs the Southern HOT Lanes as a Concessionaire Project Enhancement.

(e) **Procedures.**

(i) This **Section 12.05(e)** sets forth the Concessionaire’s sole and exclusive rights and remedies with respect to Alternative Facilities, and supersedes any provisions of this Agreement to the contrary; **provided** however, that if the construction activities associated with an Alternative Facility directly cause a material disruption to the construction of the Project Assets, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement. Such rights and remedies are subject to **Section 12.05(e)(iii).**

(ii) The Concessionaire Damages owing from the Department to the Concessionaire on account of an Alternative Facility will be equal to the Concessionaire Damages, if any, attributable to the Alternative Facility, but only to the extent that any such amount of any such reduction has not been previously recognized under **Section 14.04.** The foregoing Concessionaire Damages will be determined in the same manner, and subject to the same conditions and limitations, as for a Compensation Event under **Section 14.01.**

(iii) The Concessionaire acknowledges that each of CTB and the Department has a paramount public interest and duty to develop and operate whatever Department Projects it deems to be in the best interests of the State, and that the compensation to which the Concessionaire is entitled on account of Alternative Facilities is a fair and equitable remedy. Accordingly, the Concessionaire will not have, and irrevocably waives and relinquishes, any and all rights to institute, seek or obtain any injunctive relief or pursue any action, order or decree to restrain, preclude, prohibit or interfere with CTB’s or the Department’s rights to plan, finance, develop, operate, maintain, toll or not toll, repair, improve, modify, upgrade, reconstruct, rehabilitate, restore, renew or replace Alternative Facilities; **provided,** that the foregoing will not preclude the Concessionaire from enforcing its right to submit proposals for Additional Lanes and the Northern HOT Lanes pursuant to **Section 12.05(a) and Section 12.06(a),** respectively, its rights to compensation under this **Section 12.05,** or claiming any relief in respect of Compensation Events or Delay Events, if appropriate. The filing of any such action by the Concessionaire seeking to restrain, preclude, prohibit or interfere with CTB’s or the Department’s rights will automatically entitle CTB or the Department, as applicable, to recover all costs and expenses, including attorneys fees, of defending such action and any appeals.
Section 12.06 Northern HOT Lanes

(a) Concessionaire Project Enhancement - Concessionaire's Sole Cost.

(i) If the Department determines to develop the Northern HOT Lanes or if the Concessionaire proposes to develop, construct, operate and maintain Northern HOT Lanes, the Department and the Concessionaire will consult as to an appropriate strategy to implement the Northern HOT Lanes. The Concessionaire will have the first right to submit a proposal to the Department to develop, construct, operate and maintain the Northern HOT Lanes at the Concessionaire’s sole cost as a Concessionaire Project Enhancement, so long as the Concessionaire demonstrates that (i) it has or can obtain sufficient funding (whether debt, equity, or combination thereof) for the development, construction, operation and maintenance of the Northern HOT Lanes, (ii) it has or can obtain (with appropriate assistance from the Department) all required Governmental Approvals for the development, construction, operation and maintenance of the Northern HOT Lanes and (iii) neither the Department nor any other agency of instrumentality of the State will be required to make a contribution of public funds or provide any other sort of financial support or credit in connection with the development, construction, operation and maintenance of the Northern HOT Lanes, other than customary approvals and non-financial support from an issuer of bonds that will be used to finance the Northern HOT Lanes.

(ii) The Concessionaire’s proposal to develop, construct, operate and maintain the Northern HOT Lanes as a Concessionaire Project Enhancement will contain the information specified by the Department in writing and delivered to the Concessionaire. The Concessionaire’s failure to submit such a proposal within 120 Days of its receipt of the Department’s specifications of the contents of the Concessionaire’s proposal will constitute a waiver of the Concessionaire’s first right to submit a proposal pursuant to this Section 12.06. If the Concessionaire submits a valid proposal, the Department will evaluate the Concessionaire’s proposal in accordance with the Department’s specifications within 90 Days of its submission.

(b) Concessionaire Project Enhancement - Department Contribution. If the Concessionaire or the Department determine that the Department (or any other agency or instrumentality of the State) would be required to make a contribution of public funds or provide any other sort of financial support or credit in connection with the development and construction of the Northern HOT Lanes, the Concessionaire shall have the first right to submit a proposal to operate and maintain the Northern HOT Lanes as a Concessionaire Project Enhancement. In such event, the Concessionaire and the Department shall cooperate in the solicitation of proposals to develop and construct the Northern HOT Lanes through competitive processes in accordance with Law. The acceptance of any proposal to develop, construct, operate and maintain the Northern HOT Lanes shall be at the Department’s sole discretion.

(c) Department Project. If the Concessionaire determines not to pursue the development, construction, operation and maintenance of the Northern HOT Lanes as a Concessionaire Project Enhancement or the Department does not approve such Concessionaire
Project Enhancement after review in accordance with the Department’s specifications, the Department may develop, construct, operate and maintain the Northern HOT Lanes as a Department Project.

(d) The development, construction, operation and maintenance of the Northern HOT Lanes will not be a Delay Event or a Compensation Event, and the Concessionaire acknowledges and agrees that the Department may, in its sole discretion, develop additional general purpose lanes or HOV lanes in the area between the intersection of Eads Street and Interstate 395 and the current northern terminus of the I-95 Corridor, which is approximately one mile north of Route 648 (Edsall Road); provided however, that if the construction activities associated with the Northern HOT Lanes directly cause a material disruption to the construction of the Project, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement; provided further however, that the Concessionaire will not be entitled to Concessionaire Damages or other relief if such material disruption is caused by a Concessionaire Party.

ARTICLE 13.

DELAY EVENTS

Section 13.01 Delay Event Notice and Determination

(a) If the Concessionaire is affected by a Delay Event, it will give written notice to the Department within 30 Days following the date on which the Concessionaire first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Delay Event, (provided, that in the case of the same Delay Event being a continuing cause of delay, only one notice will be necessary) (a “Delay Event Notice”). Such Delay Event Notice will include (i) a detailed description of the Delay Event, (ii) details of the circumstances from which the Delay Event arises and (iii) an estimate of the duration of the delay in the performance of obligations pursuant to this Agreement attributable to such Delay Event and information in support thereof, if known at that time. The Concessionaire will also provide such further information relating to the Delay Event as the Department may reasonably require. The Concessionaire will bear the burden of proving the occurrence of a Delay Event and the resulting impacts.

(b) If for any reason the Concessionaire fails to deliver a Delay Event Notice within such 30-Day period, the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or right to time extensions or any other relief with respect to such Delay Event pursuant to this Agreement or any Project Agreement.

(c) Upon the occurrence of a Delay Event, the Concessionaire will promptly undertake efforts to mitigate the effects of such Delay Event, including all steps that would generally be taken in accordance with Good Industry Practice. The Concessionaire will promptly deliver to the Department an explanation of the measures being undertaken to mitigate the delay and other consequences of the Delay Event. The Concessionaire will notify the
Department within 30 Days following the date on which it first became aware (or should have
become aware, using all reasonable due diligence) that such a Delay Event has ceased.

(d) Notwithstanding the occurrence of a Delay Event, the Concessionaire will
continue its performance and observance pursuant to this Agreement of all of its obligations and
covenants to be performed to the extent that it is reasonably able to do so and will use its
reasonable efforts to minimize the effect and duration of the Delay Event. Without limiting the
foregoing, the occurrence of a Delay Event will not excuse the Concessionaire from timely
payment of monetary obligations pursuant to this Agreement, from compliance with Law, or
from compliance with the Technical Requirements, except temporary inability to comply with
the Technical Requirements as a direct result of the Delay Event.

(e) Subject to the Concessionaire giving the notice required in Section 13.01(a), a
Delay Event will excuse the Concessionaire from whatever performance is prevented or delayed
by the Delay Event referred to in such notice to the extent set forth in Section 13.02 and Section
13.03.

Section 13.02 Delay Events During the Construction Period

A Delay Event occurring during the Construction Period will excuse the Concessionaire
from performance of its obligations to perform the Work pursuant to this Agreement but only to
the extent that such obligations are directly affected by such Delay Event. In addition, during the
Construction Period, extensions of milestones and/or activities identified on the Baseline
Schedule for Delay Events affecting the Work will be made based on Time Impact Analysis,
using the then current Baseline Schedule and taking into account impacts of the Delay Events on
Critical Path items, in accordance with the Technical Requirements, and will extend the
Guaranteed Substantial Completion Date, the Final Acceptance Deadline and the Long Stop
Date. For avoidance of doubt, the Long Stop Date may be extended in accordance with this
Agreement by reason of a Delay Event that occurs during the period after the Guaranteed
Substantial Completion Date. If the Department and the Concessionaire cannot agree upon the
extension, then either party will be entitled to refer the matter to the dispute resolution
procedures in Article 21.

Section 13.03 Delay Events After Service Commencement

A Delay Event occurring after Service Commencement will only excuse the
Concessionaire from performance of its obligations to perform O&M Work pursuant to this
Agreement directly affected by such Delay Event.
ARTICLE 14.

COMPENSATION EVENTS; DEPARTMENT CHANGES; DEVIATIONS; NET COST SAVINGS

Section 14.01 Compensation Events

(a) Compensation Event Notice.

(i) If the Concessionaire is affected by a Compensation Event, it will give written notice to the Department within 30 Days following the date on which the Concessionaire first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Compensation Event (a “Compensation Event Notice”); provided, that, in the case of a Department Project Enhancement, a Compensation Event Notice must be given within 30 days following the Commencement of Use of such Department Project Enhancement. The Compensation Event Notice will set forth (A) the Compensation Event and its date of occurrence in reasonable detail, (B) the amount claimed as Concessionaire Damages and (C) details of the calculation thereof including a written analysis and calculation of the estimated Net Cost Impact, if any, and estimated Net Revenue Impact, if known at that time; provided that, if the amount of Concessionaire Damages and details of the calculation thereof are not available within the 30-Day notice period required herein, the Concessionaire may submit an estimate of the amount, or if known, the actual amount claimed as Concessionaire Damages and details of the calculation thereof no later than 60 Days from submission of the Compensation Event Notice; provided however, the Concessionaire may update the amount of claimed Concessionaire Damages and details thereof every 30 Days.

(ii) If, for any reason, the Concessionaire fails to deliver such written Compensation Event Notice within the foregoing time period, the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or right to Concessionaire Damages or other adverse effects on Gross Revenues or on costs, expenses and liabilities attributable to such Compensation Event.

(iii) After the Concessionaire submits a Compensation Event Notice, the Department may, but is not required to, obtain, at its sole cost, (A) a comprehensive report as to the Concessionaire’s estimate of the Net Cost Impact attributable to the Compensation Event and (B) from a traffic and revenue consultant a traffic and revenue study, prepared in accordance with Good Industry Practice, analyzing and calculating the estimated Net Revenue Impact attributable to the Compensation Event. Within 90 Days after receiving a Compensation Event Notice and the supporting documentation required by Section 14.01(a)(i), the Department will provide to the Concessionaire a copy of such reports as it has elected to obtain. If the Department disagrees with the entitlement to or amount of Concessionaire Damages claimed by the Concessionaire, the Concessionaire and Department will commence good faith negotiations to resolve the Dispute within 120 Days after the delivery of the Compensation Event Notice. If the Dispute cannot be
resolved within such 120 Days, either party may submit the Dispute for resolution pursuant to Article 21.

(b) Concessionaire Damages Determination.

(i) Concessionaire Damages with respect to any Compensation Event will be calculated based on the sum of (A) any adverse Net Cost Impact and (B) any adverse Net Revenue Impact for each year that there is an impact attributable to such Compensation Event; provided, that, subject to Section 14.01(c), any Net Cost Savings and positive Net Revenue Impact attributable to such Compensation Event will be used to decrease the amount of Concessionaire Damages. The calculation of Concessionaire Damages will be based on the difference in the projected cost and revenue related to the Project immediately prior to the occurrence of the Compensation Event and the projected cost and revenue related to the Project after taking into account the impact of the Compensation Event.

(ii) Following the calculations pursuant to Section 14.01(b)(i), the Concessionaire will incorporate such calculations into the proposed Base Case Financial Model Update and will provide such proposed Base Case Financial Model Update to the Department pursuant to Article 6.

(iii) The Concessionaire Damages will be net of all applicable insurance proceeds payable to the Concessionaire or its Contractors associated with the Compensation Event (or that would have been payable to the Concessionaire or its Contractors but for the failure by the Concessionaire or its Contractors to comply with the insurance requirements set forth in Section 14.01(b)(v) and Article 17), except as any payment of such insurance proceeds is affected by the bankruptcy or insolvency of the provider of such insurance, and will include all costs of asserting a Claim for such insurance proceeds and any increased insurance premium resulting from any such Claim; provided, that any increased insurance premium resulting from such Claim is certified in writing by the insurance provider of the Concessionaire or its Contractor, as applicable, prior to payment by the Department.

(iv) The Concessionaire will conduct all discussions and negotiations with the Department to determine any Concessionaire Damages and will share with the Department all data, documents and information pertaining thereto, on an Open Book Basis. As part of such negotiations, the parties will continue to refine and exchange, on an Open Book Basis, plans, drawings, configurations and other information related to the Compensation Event, traffic and revenue data, information, analyses and studies and financial modeling and quantifications of projected Net Cost Impacts, Net Revenue Impacts or Net Cost Savings, if any.

(v) The Concessionaire will take all steps reasonably necessary to mitigate the amount of the Concessionaire Damages attributable to, and other consequences of, any Compensation Event, including all steps that would generally be taken in accordance
with Good Industry Practice, including filing a timely claim for insurance and pursuing such claims.

(vi) If the Concessionaire and the Department are unable to agree upon the amount of the Concessionaire Damages within 120 Days after the delivery of the Compensation Event Notice, then either party, by written notice to the other party, may terminate the negotiations and request the Dispute be resolved in accordance with Article 21; provided, that the Department will proceed to make payment to the Concessionaire of the undisputed portion of the Concessionaire Damages in accordance with Section 14.01(b) without regard to the dispute resolution procedures.

(vii) The Concessionaire will not be entitled to Concessionaire Damages which are de minimis.

c) Compensation Event Payment. Following a determination of the Concessionaire Damages pursuant to Section 14.01(b), the Department will compensate the Concessionaire for such Concessionaire Damages in such manner as agreed upon by the parties in writing or as may be determined through the dispute resolution procedures set forth in Article 21; provided, that:

(i) in the case of any lump sum payment of the Concessionaire Damages or any other payment schedule that differs from the projected timing of the Concessionaire Damages, the net present value of the Concessionaire Damages will be determined using the then appropriate risk adjusted discount rate(s), as agreed between the Department and the Concessionaire;

(ii) in the case of any payment method chosen other than an up-front lump sum payment or a payment that is based on the projected timing and amounts of the Concessionaire Damages, the payment method will yield an amount that will be equal to the present value of a lump sum payment, using appropriate risk adjusted discount rate(s) as agreed by the parties;

(iii) the amount and timing of payment of Concessionaire Damages related to a Compensation Event will take into account the ability of the Concessionaire, first, to obtain funding in relation to such Concessionaire Damages in accordance with Section 14.01(d) and, second, to have funds available in such time and in such amounts as are required to make current payments to third parties in respect of any portion of Net Cost Impact related to such Compensation Event; and

(iv) any Net Cost Savings or positive Net Revenue Impact attributable to such Compensation Event not included in the determination of Concessionaire Damages under the provisions of this Section 14.01 will be included in the Permit Fee calculated pursuant to the Permit Fee calculation, as agreed between the Department and the Concessionaire.

d) Concessionaire Funding of Concessionaire Damages. If requested by the Department, the Concessionaire will use commercially reasonable efforts to obtain funding for a portion or the full amount of Concessionaire Damages; provided, however, that the
Concessionaire will not be obligated to obtain such funding if the Concessionaire, in its reasonable discretion, determines that obtaining such funding will diminish the Project Value, or to the extent such funding, combined with any payments from the Department, will not make funds available in such time and in such amounts as are required to make current payments to third parties as they are due or will become due in respect of any portion of Net Cost Impact included as part of such Concessionaire Damages. If the Concessionaire is able to obtain funding for all or part of the Concessionaire Damages, the Concessionaire will submit a funding proposal for the Department’s review and approval. Such funding proposal will identify the terms and conditions required to secure funding for such Concessionaire Damages, including any proposed payments by the Department. The Department will reject or accept the funding proposal within 30 Days of receipt of the funding proposal. If the funding proposal is accepted by the Department, the Department will issue a Change Order to implement the funding proposal and, to the extent such funding proposal secures financing for less than 100% of the Concessionaire Damages, the Change Order will provide funding for the remainder thereof on terms and conditions mutually agreed by the parties.

(e) **Sole Remedy and Release of Claims.**

   (i) Without limiting the Concessionaire’s rights with respect to non-monetary relief for Delay Events, the Concessionaire Damages as determined according to this Section 14.01 will represent the sole right to compensation and damages for the adverse effects of a Compensation Event.

   (ii) As a condition precedent to the Department’s obligation to compensate any portion of the Concessionaire Damages, following a determination of the Concessionaire Damages, the Concessionaire will execute a full, unconditional, irrevocable release, in form reasonably acceptable to the Department, of any Claims, Losses or other rights to compensation or other monetary relief associated with such Compensation Event, except for (A) the Claim and right to the subject Concessionaire Damages, (B) the Concessionaire’s right to non-monetary relief for a Delay Event and (C) the right to terminate this Agreement in accordance with Article 20 and to receive any applicable termination compensation.

(f) **Additional Provisions for Certain Compensation Events.**

   (i) For the Compensation Event described in clause (k) of the definition thereof, the Concessionaire will be entitled to recover the Net Cost Impact for such Compensation Event; *provided*, however, that:

   (A) in no event will the Concessionaire be entitled to submit a Claim if the Net Cost Impact of such Compensation Event does not equal or exceed $10 million per occurrence ("Claim Threshold");

   (B) if such Compensation Event meets the Claim Threshold, the Department will be solely responsible for the Net Cost Impact in excess of $10 million for such Compensation Event; *provided*, however, that the Concessionaire will be solely
responsible for the Net Cost Impact up to $10 million per occurrence for the first two Compensation Events that meet the Claim Threshold; and

(C) the Department will be responsible for the Net Cost Impact for such Compensation Events after the first two such Compensation Events occur that meet the Claim Threshold.

For the avoidance of doubt, the Concessionaire will be solely responsible for such Compensation Events with a Net Cost Impact under $10 million per occurrence.

(ii) For the Compensation Event described in clause (i) of the definition thereof, the Concessionaire will be entitled to recover the Net Cost Impact for such Compensation Event, provided, however, that:

(A) the Concessionaire will be solely responsible for the Net Cost Impact up to $5 million in the aggregate for such Compensation Event;

(B) the Department will be solely responsible for the Net Cost Impact in excess of $5 million but less than or equal to $10 million for such Compensation Event; and

(C) the parties will share evenly the Net Cost Impact in excess of $10 million for such Compensation Event

The provisions of this Section 14.01(f)(ii) apply to each event and not in the aggregate.

Section 14.02 Department Changes

(a) Department’s Right to Issue Change Orders. The Department may, at any time and from time to time during the Term, authorize and/or require changes in the Work pursuant to a Change Order or in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work); provided, that the Department has no right to require any change that:

(i) is not in compliance with Law;

(ii) would contravene an existing Governmental Approval and such contravention cannot be corrected by the issuance of a further or revised Governmental Approval;

(iii) would cause an insured risk to become uninsurable; or

(iv) would give rise to a material and adverse health or safety issue.
(b) **Request for Change Proposal.**

(i) If the Department desires to initiate a Department Change, then the Department will issue a Request for Change Proposal. The Request for Change Proposal will set forth the nature, extent and details of the proposed Department Change.

(ii) Within 21 Days following Concessionaire’s receipt of the Request for Change Proposal, the Concessionaire will provide the Department with a preliminary written response, and within a reasonable time thereafter (not to exceed 30 Days or such other timeframe agreed upon between the Concessionaire and the Department), with a definitive written response (a “Change Proposal”), as to whether, in the Concessionaire’s opinion, the Department Change constitutes a Compensation Event, and if so, (A) a detailed assessment of the Net Revenue Impacts and Net Cost Impacts, to the extent known at that time, (B) the effect of the proposed Department Change on the Concessionaire’s performance of its obligations pursuant to this Agreement, to the extent known at the time, (C) the proposed Base Case Financial Model Update and (D) a TIA if applicable.

(iii) Within 30 Days following the delivery of the Change Proposal, the Concessionaire and the Department will exercise good faith efforts to negotiate a mutually acceptable Change Order.

(iv) The Department will pay the Concessionaire’s Allocable Costs for preparing a Change Proposal and conducting preliminary work to respond to a Request for Change Proposal at the Department’s request. Upon payment of such Allocable Costs, the Department will own all Work Product included in the Change Proposal.

(c) **Concessionaire Performance of Department Change.** The Concessionaire will perform the work required to implement the Department Change in a timely manner; provided, that:

(i) a Change Order setting forth, among other things, the adjusted scope of the Work and adjustments to the Baseline Schedule and the Technical Requirements, if applicable, will have been mutually agreed upon between the Department and the Concessionaire and issued by the Department;

(ii) the Department and the Concessionaire (if applicable) will have identified sufficient funds that may be made available to the Concessionaire to perform the work required to implement the Department Change; and

(iii) all necessary Governmental Approvals to commence the Work required to implement the Department Change have been obtained.
(d) **Disputed Work.**

(i) If the Department and the Concessionaire agree that the Work in question constitutes a Department Change and are unable to reach an agreement on a Change Order, the Department may deliver to the Concessionaire a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question, notwithstanding such disagreement. Such Directive Letter will include any changes to the Technical Requirements, if applicable, necessary to proceed with the Work covered by the Directive Letter.

(ii) If the parties disagree whether the Work in question constitutes a Department Change, the Department will have the right to issue a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question, and the Concessionaire will proceed with such work. Such Directive Letter will include any changes to the Technical Requirements necessary to proceed with the Work covered by the Directive Letter.

(iii) Upon receipt of a Directive Letter under (i) or (ii) above, the Concessionaire will implement and perform the Work in question as directed by the Department and the Department will make payments to the Concessionaire for such Work performed pursuant to Section 14.02(e).

(iv) To the extent there are any Disputes related to any Directive Letter issued under Section 14.02(d), such Disputes will be subject to the dispute resolution procedures set forth in Article 21.

(e) **Payments for Directive Letter Work.** If the Department issues a Directive Letter to the Concessionaire pursuant to Section 14.02(d), the Department will make payments to the Concessionaire on a monthly basis for the Work in question for the reasonable Allocable Costs of the Work in question, subject to subsequent adjustment through the dispute resolution procedures set forth in Article 21.

(f) **Technical Requirements Revisions.** Notwithstanding anything to the contrary contained in this Agreement, during the Construction Period, a change in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work) required or authorized by the Department will constitute a Department Change.

### Section 14.03 Concessionaire Requests for Deviations

(a) The Concessionaire may request the Department to approve, in the Department’s sole discretion, Deviations by submitting to the Department a written change request in a form approved by the Department. At a minimum, the following information will be submitted with each such change request:

(i) a statement that the request is submitted pursuant to this Section 14.03(a):
(ii) a statement concerning the basis for the request, benefits to the Department or the Project and an itemization of the contract items and requirements affected by the request;

(iii) a detailed estimate of the time and/or cost savings and impacts on Gross Revenues;

(iv) proposed specifications and recommendations as to the manner in which the requested changes are to be accomplished; and

(v) the time by which the request must be approved so as to obtain the maximum cost-effectiveness.

(b) The Department may consider and approve or disapprove, in its sole discretion, any such request, and the Concessionaire will bear the burden of persuading the Department that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice and achieves the Department’s applicable safety standards and criteria. No Deviation will exist or be effective unless and until approval thereof is expressly provided in writing by the Department. Approval of a submission containing a Deviation will not constitute approval of the Deviation unless and until the Department expressly and specifically approves the Deviation in writing pursuant to the terms of this Section 14.03(b). The Department’s decision will not be subject to the dispute resolution procedures of Article 21. If not previously communicated, the Department will provide within 10 Days after a request by the Concessionaire its rationale, in reasonable detail, for any disapproval of a Deviation proposed by the Concessionaire.

(c) Unless otherwise agreed, the Concessionaire will be solely responsible for payment of any increased costs, for any losses of Gross Revenues, for all Allocable Costs and for any schedule delays or other impacts resulting from the implementation of a Deviation requested by the Concessionaire that has been approved by the Department.

Section 14.04 Net Cost Savings or Positive Net Revenue Impact

(a) Whenever it believes a Net Cost Saving or positive Net Revenue Impact exists or will arise from a Compensation Event, a Deviation, or a Department waiver of Non-Conforming Work, the Department at its election may, and the Concessionaire will, deliver to the other party written notice thereof. The notice will set forth (i) the Compensation Event and its date of occurrence in reasonable detail, the proposed or approved Deviation, or the Non-Conforming Work, as the case may be, (ii) a preliminary estimate, if then known, of the amount of the Net Cost Saving or positive Net Revenue Impact and (iii) a brief, preliminary written analysis and calculation thereof. Such notice will be brought within 30 Days after a claim for Concessionaire Damages or, if no claim is brought by the Concessionaire for Concessionaire Damages, within 30 Days after the occurrence of the Compensation Event or, in the case of a Project Enhancement, within 30 Days after the Commencement of Use of the Project Enhancement.
(b) If the Concessionaire gives such a notice to the Department, the parties will follow the terms and procedures set forth in Section 14.01 as if they applied to the determination of the Net Cost Saving or positive Net Revenue Impact.

(c) Following a determination of the Net Cost Saving or positive Net Revenue Impact by mutual agreement or the dispute resolution procedures set forth in Article 21, the Department will decide on the percentage share of each that it desires as compensation, in any event not to exceed 50% of the applicable Net Cost Savings and/or positive Net Revenue Impact. The Concessionaire will compensate the Department in an amount equal to the selected percentage in the manner provided for in Section 14.01(c); provided that when Concessionaire Damages and Net Cost Saving or positive Net Revenue Impact are payable in the same time period, such amounts shall be netted to the extent possible. The parties will select one or any combination of the following methods of compensation:

(i) through monthly payments of the selected percentage of the Net Cost Saving or positive Net Revenue Impact in accordance with a written payment schedule determined by mutual agreement or through the dispute resolution procedures set forth in Article 21;

(ii) by a lump sum payment of the selected percentage, payable as determined by mutual agreement or through the dispute resolution procedures set forth in Article 21; or

(iii) in such other manner as agreed upon by the parties in writing.

ARTICLE 15.

INDEMNIFICATION

Section 15.01 Indemnities of the Concessionaire

In addition to the Concessionaire’s indemnity obligations as set forth elsewhere in this Agreement, the Concessionaire will indemnify, defend, and hold harmless a State Indemnitee from and against any Losses actually suffered or incurred by such State Indemnitee (except to the extent such Losses are solely caused by the misconduct, negligence or other culpable act, error or omission of a State Indemnitee), due to Third-Party Claims that are based upon:

(a) any actual or alleged failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement or a Project Agreement or, any actual or alleged breach by the Concessionaire of its representations or warranties set forth herein or therein;

(b) any actual or alleged misconduct, negligence or other culpable act, error or omission of a Concessionaire Party in connection with the Project;
(c) any actual or alleged patent or copyright infringement or other actual or alleged improper appropriation or use by a Concessionaire Party of trade secrets, patents, proprietary information, know-how, trade marked or service marked materials, equipment, devices or processes, copyright rights or inventions in connection with the Project;

(d) any actual or alleged inverse condemnation, trespass, nuisance or similar taking of or harm to real property committed or caused by a Concessionaire Party in connection with the Project arising from any actual or alleged (i) failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement; (ii) breach by Concessionaire of its representations or warranties set forth in this Agreement or (iii) misconduct, negligence or other culpable act, error or omission of a Concessionaire Party; provided, however, that the Concessionaire will not be required to indemnify, defend or hold harmless a State Indemnitee from and against any Losses actually suffered or incurred by such State Indemnitee due to Third-Party Claims that are based upon any actual inverse condemnation arising from the establishment of the Project Right of Way as identified in the NEPA Documents and any other real property or real property rights outside the Project Right of Way acquired pursuant to Section 8.05(b);

(e) any actual or alleged violation of any Federal or state securities or similar law by any Concessionaire Party, or the Concessionaire’s failure to comply with any requirement necessary to preserve the tax exempt status of interest paid on the PABs;

(f) any actual or alleged Tax attributable to any Transfer of the Concessionaire’s Interest or any part thereof; or

(g) any actual or alleged claim for brokerage commissions, fees or other compensation by any Person who acted on behalf of the Concessionaire, its Affiliates or their respective Representatives in connection with this Agreement or a Project Agreement, any Transfer of the Concessionaire’s Interest or any part thereof.

Section 15.02 Defense and Indemnification Procedures

(a) In the event that any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against the Department, it will as promptly as practicable notify the Concessionaire in writing of such Claim, and such notice will include a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim; provided, that any failure to give such prompt notice will not constitute a waiver of any rights of the Department, except to the extent that the rights of the Concessionaire are actually and materially prejudiced thereby. If any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against a State Indemnitee other than the Department, a failure by such State Indemnitee to give the Concessionaire prompt notice in writing of such Claim together with a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim, will constitute a waiver of any rights of such State Indemnitee to indemnification to the extent, and only to the extent, that the rights of the Concessionaire are actually and materially prejudiced thereby.
(b) The Concessionaire will be entitled and obligated to appoint counsel of its choice at the expense of the Concessionaire to represent a State Indemnitee in any action for which indemnification is sought (in which case the Concessionaire will not thereafter be responsible for the fees and expenses of any separate counsel retained by that State Indemnitee except as set forth below); provided, that such counsel will be satisfactory to such State Indemnitee. Notwithstanding the Concessionaire’s appointment of counsel to represent a State Indemnitee in any action, such State Indemnitee will have the right to employ separate counsel, and the Concessionaire will bear the reasonable fees, costs and expenses of such separate counsel, if:

(i) the use of counsel chosen by the Concessionaire to represent the State Indemnitee would present such counsel with a conflict of interest;

(ii) the actual or potential defendants in, or targets of, any such action include both the State Indemnitee and the Concessionaire and the State Indemnitee will have reasonably concluded that there may be legal defenses available to it and/or other State Indemnitees which are different from or additional to those available to the Concessionaire;

(iii) the Concessionaire will not have employed counsel to represent the State Indemnitee within a reasonable time after notice of the institution of such action; or

(iv) the Concessionaire authorizes the State Indemnitee to employ separate counsel at the Concessionaire’s expense.

(c) The Concessionaire will not be liable for any settlement or compromise by an affected State Indemnitee of a Third Party Claim except with the Concessionaire’s prior written consent, which consent will not be unreasonably withheld or delayed, or except where the settlement or compromise is approved by the court after the Concessionaire receives reasonable notice and the opportunity to be heard and such court approval has become final and non-appealable.

ARTICLE 16.

HAZARDOUS SUBSTANCES

Section 16.01 General Obligations

(a) The Concessionaire will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and/or disposal of any Hazardous Substances the presence of which constitutes a Hazardous Environmental Condition that are discovered on, in or under the Project Right of Way on which the Work is performed, after the earlier to occur of (i) the issuance of an LNTP (but limited to the portion of the Project Right of Way on which the LNTP Work is performed pursuant to such LNTP), (ii) issuance of a Construction Notice to Proceed, or (iii) the Service Commencement of the Project in accordance with this Agreement.
(b) After the earlier to occur of (i) the issuance of an LNTP (but limited to the portion of the Project Right of Way on which the LNTP Work is performed pursuant to such LNTP), (ii) the issuance of the Construction Notice to Proceed, or (iii) the Service Commencement of the Project, if the Concessionaire encounters any Hazardous Environmental Condition that must be managed, treated, handled, stored, monitored, removed, transported or disposed of (collectively, “Remedial Actions”), then the Concessionaire will promptly notify the Department. In the case of Hazardous Environmental Conditions that are attributable to Known Pre-Existing Hazardous Substances, the Concessionaire will thereafter proceed with such Remedial Actions in accordance with the Concessionaire’s Environmental Management Plan. In the case of all other Hazardous Environmental Conditions and to the extent not covered by the Environmental Management Plan, the Concessionaire will develop a Remedial Action Plan setting out the scope of the Remedial Actions that the Concessionaire proposes to take in relation to the relevant Hazardous Environmental Condition, such actions to include, but not be limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Substances and submitting copies of such data and reports to the Department for its review and approval, (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Substances (iii) preparing and obtaining Governmental Approvals for remedial action plans, including Department approval, (iv) carrying out the Remedial Action Plan, including, as necessary, disposal of the Hazardous Substances and (v) timely informing the Department of all such actions.

(c) Before any Remedial Actions are taken that would inhibit the Department’s ability to ascertain the nature and extent of the Hazardous Environmental Condition, the Concessionaire will afford the Department the opportunity to inspect areas and locations that require Remedial Actions; provided, that in the case of a sudden release of any Hazardous Substances, the Concessionaire may take all reasonable actions necessary to stabilize and contain the release without prior notice or inspection, but will promptly notify the Department of the sudden release and its location.

(d) The Concessionaire will obtain all Governmental Approvals relating to Remedial Actions. The Concessionaire will be solely responsible for compliance with such Governmental Approvals and applicable Environmental Laws concerning or relating to Hazardous Substances. In carrying out Remedial Actions that are compensable by the Department pursuant to this Agreement, the Concessionaire will not take any steps or actions which impair the Department’s potential Claims for indemnity and contribution, statutory or otherwise.

(e) Unless directed otherwise by the Department, the Concessionaire will seek to recover costs from any available reimbursement program or from any third party responsible for generating or otherwise creating or contributing to conditions that lead to the need for Remedial Action. Without limiting the preceding sentence, the Concessionaire will seek pre-approval and pursue reimbursement from the Virginia Petroleum Storage Tank Fund (“VPSTF”) for qualifying expenses incurred during the course of investigation, containment, management, mitigation or remediation activities on petroleum storage tank releases. The parties will
cooperate with and notify each other with respect to activities undertaken pursuant to this Section 16.01(e).

(f) Except as provided in Section 16.02, the Concessionaire will bear all costs and expenses of preparing and complying with any Remedial Action Plan, of complying with Law and obtaining and complying with Governmental Approvals pertaining to Hazardous Substances, and otherwise of carrying out Remedial Actions.

Section 16.02 Pre-Existing Hazardous Substances

(a) The Department will pay, to the extent permitted by Law, the Concessionaire for the Concessionaire’s Allocable Costs for Remedial Actions with respect to any Unknown Pre-Existing Hazardous Substances and Third-Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition. To the extent the Concessionaire recovers costs from any available reimbursement program or third parties with respect to Unknown Pre-Existing Hazardous Substances or Third-Party Hazardous Substances, the Concessionaire will pay such costs to the Department, less the Allocable Costs incurred by the Concessionaire in seeking recovery in accordance with Section 16.01(e). The Concessionaire will furnish to the Department documentation supporting the amount recovered from any reimbursement program or third parties and the Allocable Costs incurred by the Concessionaire in pursuing such recovery.

(b) The Department will assume, to the extent permitted by Law, responsibility for third party claims against the Concessionaire or any Concessionaire Party for personal injury, damages or harm to property or business due to any Pre-Existing Hazardous Substances and Third-Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition, and all related penalties, fines and administrative or civil sanctions arising out of or related to such Pre-Existing Hazardous Substances and Third-Party Hazardous Substances; except to the extent such claims are due to the negligence, recklessness, or willful misconduct of a Concessionaire Party.

(c) At all times during the Term, the Concessionaire will provide cost estimates with respect to such Remedial Actions which may be paid by the Department, for the Department’s review and approval prior to proceeding with any such Remedial Actions, provided, that in the case of a sudden release of any Hazardous Substances, the Concessionaire may take all reasonable actions necessary to stabilize and contain the release without prior submission of such cost estimates. If the Department has not responded to a request for such approval pursuant to this Section 16.02(c) within 21 Days after the Department’s acknowledgement of receipt (or in the case of an emergency a reasonably appropriate shorter period), the request will be deemed to be approved, except to the extent matters deviate from applicable Technical Requirements, or Law.

Section 16.03 Concessionaire Indemnifications Regarding Hazardous Substances

(a) The Concessionaire will indemnify, protect, defend and hold harmless and release each State Indemnitee from and against any and all Third Party Claims, including attorney’s fees,
expert witness fees and court costs suffered or incurred by such State Indemnitee, to the extent caused by:

(i) Hazardous Substances introduced to or brought onto the Project Right of Way by a Concessionaire Party;

(ii) failure of any Concessionaire Party to comply with any requirement of this Agreement or any other Project Agreement relating to Hazardous Substances (including any failure to perform any Remedial Action required in accordance with Section 16.01) or to otherwise comply with applicable Environmental Laws and Governmental Approvals; or

(iii) the exacerbation, release, spreading, migration, or toxicity of Hazardous Substances due to the negligence, recklessness, or willful misconduct of a Concessionaire Party.

(b) The Concessionaire will defend such Third-Party Claims in accordance with Section 15.02.

(c) The Concessionaire’s obligations under this Section 16.03 will not apply to Third-Party Claims to the extent caused by the negligence, recklessness, or willful misconduct of any State Indemnitee.

Section 16.04 Generator Status

(a) The Department will be deemed the generator of Pre-Existing Hazardous Substances and Third-Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition, within the Project Right of Way. The Department agrees to be identified as the generator of such Pre-Existing Hazardous Substances in waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Authority.

(b) The Concessionaire will be deemed the generator of Hazardous Substances introduced to the Project Right of Way by a Concessionaire Party, the presence of which constitutes a Hazardous Environmental Condition within the Project Right of Way. The Concessionaire agrees to be identified, or cause the applicable Concessionaire Party to be identified, as the generator of such Hazardous Substances in waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Authority.

ARTICLE 17.

INSURANCE; PERFORMANCE SECURITY

Section 17.01 Insurance Coverage Required

(a) Required Insurance for the Construction Period. The Concessionaire will provide and maintain at its own expense, or cause the Design-Build Contractor to provide and maintain,
for the Construction Period the insurance coverages specified in Part 1 of the Insurance Requirements attached as Exhibit Y.

(b) **Required Insurance for Operating Period.** The Concessionaire will provide and maintain at its own expense, or cause the O&M Contractor to provide and maintain, for the Operating Period and for any time period following the Term’s expiration if the Concessionaire is required to return and perform any additional work, the insurance coverages specified in Part 2 of the Insurance Requirements and the Technical Requirements.

(c) **Railroad Protective Liability Insurance.** The Concessionaire will provide and maintain at its own expense, or cause to be provided and maintained, during the Term, railroad protective liability insurance as specified in the Insurance Requirements and the Technical Requirements or as may be required by any railroad in connection with Work across, under or adjacent to the railroad’s tracks or railroad right-of-way.

**Section 17.02 General Requirements Applicable to Insurance**

The insurances which the Concessionaire is required to maintain or cause to be maintained under Section 17.01:

(a) will delete any design-build or similar exclusions that could compromise coverages because of the Concessionaire’s use of the design-build delivery method;

(b) except for professional liability insurance, worker’s compensation insurance and employer’s liability insurance, the Department will be named as an additional insured on a primary, non-contributory basis;

(c) will not limit the Concessionaire’s liabilities and obligations pursuant to this Agreement, including the Concessionaire’s indemnification obligations;

(d) will be maintained with insurers that at the time coverage commences are authorized to do business in the State and have a current policyholder’s management and financial size category rating of not less than “A-: VIII” according to A.M. Best’s Financial Strength Rating and Financial Size Category, except as otherwise approved by the Department;

(e) will be on terms specified herein or otherwise approved by the Department (such approval not to be unreasonably withheld);

(f) will contain coverage terms and conditions that reflect the industry standard that the commercial market will provide and support as of the date of such insurance procurement and any subsequent renewals;

(g) without inferring a right of cancellation that would not exist in the absence of these endorsements, will contain a term which requires the insurer to give not less than 30 Days’ prior notice to the Department whenever the insurer gives the Concessionaire a notice of cancellation or any other notice with respect to the policy (except in the case of any non-
premium payment, not less than ten Days’ prior notice, which the insurer will be obligated to give to the Department simultaneously with providing such notice to the Concessionaire);

(h) other than for workers compensation insurance, employer’s liability insurance, automobile liability insurance, property and business interruption insurance, professional liability insurance and contractor pollution liability insurance, will be effected on a severability of interest basis for the purposes of which the insurer accepts the term “insured” as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall policy limit not being increased as a result);

(i) other than for professional liability insurance, worker’s compensation insurance, employer’s liability insurance and property and business interruption insurance, will include cross-liability clauses allowing one insured to bring a claim against another insured party;

(j) will be endorsed so that the insurer agrees to waive all rights of subrogation or action that it may have or acquire against all or any of the Persons comprising the insured;

(k) other than for workers compensation insurance, employer’s liability insurance, automobile liability insurance, professional liability insurance and contractor pollution liability insurance, will contain a provision under which the insurer agrees that the failure of one insured to observe and fulfill the terms of the policy will not prejudice the coverage of the other insureds;

(l) other than for workers compensation insurance, employer’s liability insurance, commercial general liability insurance, excess liability insurance, contractor pollution liability insurance and automobile liability insurance, have each policy endorsed to contain a standard mortgagee clause to the effect that the Department and the other insureds will not be prejudiced by an unintended and/or inadvertent error, omission or misdescription of the risk interest in property insured under the policies, incorrect declaration of values, failure to advise insurers of any change of risk interest or property insured or failure to comply with a statutory requirement;

(m) will not include defense costs within the limits of coverage or permit erosion of coverage limits by defense costs, except that defense costs may be included within the limits of coverage of professional and contractor pollution liability policies; and

(n) will provide that the coverage thereof is primary and noncontributory coverage with respect to all named or additional insureds, except for coverage that by its nature cannot be written as primary.

Section 17.03 Proof of Coverage

The Concessionaire will deliver to the Department true and correct copies of policies, material forms, endorsements and premium indications of each insurance policy certified by the Concessionaire’s insurance broker (or as appropriate the Design-Build Contractor’s, the Lead Engineering Contractor’s or the O&M Contractor’s broker) to be true and correct copies of such policies, forms, endorsements and premium indications, as a condition to receiving the applicable notices to proceed set forth in this Agreement, and annually thereafter no later than
ten Days prior to policy renewal or replacement. The Concessionaire will also deliver to the Department duplicate originals or copies of each Project-specific insurance policy and endorsements for the Project coverage of each other insurance policy certified by the Concessionaire’s insurance broker (or as appropriate the Design-Build Contractor’s, the Lead Engineering Contractor’s or the O&M Contractor’s broker) to be true and correct copies of the originals no later than 60 Days after receiving the applicable notices to proceed set forth in this Agreement and annually thereafter no later than 60 Days after policy renewal or replacement, and also whenever reasonably requested by the Department.

**Section 17.04 Adjustments in Coverage Amounts**

(a) All insurance coverage limits stipulated in Section 17.01(b), as well as deductibles and self-insured retentions, will be reviewed every three years and adjusted as appropriate, in line with such amounts that would be insured by a prudent business similar to, and undertaking similar activities to, the Concessionaire; provided, that no such review or adjustments will be required with respect to insurance coverage required for the Design-Build Work.

(b) In determining increases in limits and adjustments to deductibles or self-insured retentions, the parties will take into account (A) Claims and Loss experience for the Project, provided, that premium increases due to adverse Claims experience will not be a basis for justifying increased deductibles or self-insured retentions; (B) the condition of the Project, (C) the safety compliance and performance record for the Project; (D) then-prevailing Good Industry Practice for insuring comparable transportation projects; and (E) the provisions regarding unavailability of increased coverage set forth in Section 17.05.

(c) In connection with such review, the Concessionaire will deliver to the Department evidence that such insurance is in effect, together with the Concessionaire’s certification that such insurance is in line with amounts that would be insured by such a prudent business.

(d) Any Dispute regarding increases in limits or adjustments to deductibles or self-insured retentions will be resolved according to the dispute resolution procedures under Article 21.

**Section 17.05 Unavailability of Insurance**

(a) If any insurance required to be maintained pursuant to this Article 17 (including the limits, deductibles or any other terms under policies for such insurance) ceases to be available on a commercially reasonable basis, the Concessionaire will provide written notice to the Department accompanied by a letter from the Concessionaire’s insurance advisor stating that such insurance is unavailable anywhere in the global market on a commercially reasonable basis. Such notice will be given not later than 30 Days prior to the scheduled date for renewal of any such policy. Except to the extent attributable to the Concessionaire, or any Concessionaire Party upon receipt of such notice by the Department, the Concessionaire and the Department will immediately enter into good faith negotiations regarding the matters set forth in Section 17.05(c) and (d) below.
(b) The Concessionaire will not be excused from satisfying the insurance requirements of this Article 17 merely because premiums for such insurance are higher than anticipated. To establish that the required coverages (or required terms of such coverages, including insurance policy limits) are not available on commercially reasonable terms, the Concessionaire will bear the burden of proving either that (i) the same is not available at all in the global insurance and reinsurance markets or (ii) the premiums for the same have so materially increased over those previously paid for the same coverage that a reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are not justified by the risk protection afforded. For the purpose of clause (ii), the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry.

(c) In the event that the Concessionaire and the Department cannot reach a resolution acceptable to both parties within ten Days, the Concessionaire and the Department will make arrangements for the formation of an insurance panel consisting of the Concessionaire’s insurance advisor (or broker), the Department or its insurance advisor (or broker) and an independent insurance expert from a nationally recognized insurance brokerage firm, chosen by the Concessionaire and reasonably acceptable to the Department. Such independent expert will conduct a separate review of the relevant insurance requirements of this Article 17 and the Technical Requirements and the market for such insurance at the time, giving due consideration to the representations of both insurance advisors, and upon conclusion of such review will issue a written report stating whether such insurance is available or unavailable on a commercially reasonable basis.

(d) If the insurance expert concludes that such insurance is not available on a commercially reasonable basis, the insurance expert will provide a written recommendation (which will include the amount and type of insurance which is available upon a commercially reasonable basis) not less than 15 Days before the date for renewal of such insurance. The Concessionaire will, prior to the expiration of the insurance then in effect, obtain the insurance required by this Article 17 as adjusted in accordance with such recommendation.

(e) The Department makes no representation that the limits of liability specified for any insurance policy to be carried pursuant to this Agreement are adequate to protect the Concessionaire against its undertakings pursuant to this Agreement, to the Department, or any third party. No such limits of liability will preclude the Department from taking any actions as are available to it under the Project Agreements or Law.

Section 17.06 Failure to Obtain Insurance Coverage

(a) If in any instance the Concessionaire has not performed its obligations respecting insurance coverage set forth in this Agreement (as may be adjusted in accordance with Section 17.05) or is unable to enforce and collect any such insurance for failure to assert Claims in accordance with the terms of the insurance policies, then for purposes of determining the Concessionaire’s liability and the limits thereon or determining reductions in compensation due from the Department to the Concessionaire on account of available insurance, the Concessionaire will be treated as if it has elected to self-insure up to the full amount of insurance coverage which
would have been available had the Concessionaire performed such obligations and not committed such failure.

(b) Nothing in this Section 17.06 or elsewhere in this Article 17 will be construed to treat the Concessionaire as electing to self-insure where the Concessionaire is unable to collect due to the bankruptcy or insolvency of any insurer which at the time the insurance policy is written meets the rating qualifications approved by the Department.

Section 17.07 Restoration; Insurance Proceeds

(a) If all or any part of any of the Project Assets will be destroyed or damaged during the Term in whole or in part by fire or other casualty of any kind or nature (including any casualty for which insurance was not obtained or obtainable), ordinary or extraordinary, foreseen or unforeseen, the Concessionaire will:

(i) give the Department notice thereof promptly after the Concessionaire receives actual notice of such casualty

(ii) except (A) in the case of destruction or damage caused by a Compensation Event (in which case the provisions of Section 14.01 will apply) or (B) as otherwise provided in Section 20.03, at its sole cost and expense (whether or not insurance proceeds, if any, are equal to the estimated cost of repairs, alterations, restorations, replacement and rebuilding (the “Casualty Cost”)), proceed diligently to restore the Project to its pre-casualty condition;

(iii) deposit all insurance proceeds received by the Concessionaire in connection with any restoration with a Depositary (such insurance proceeds, together with any interest earned thereon, the “Restoration Funds”); provided, that the procedures of this Section 17.07(a)(iii) will only apply to casualty events for which the cost of restoration exceeds $5,000,000, adjusted annually by the percentage increase in CPI.

(b) Subject to Section 17.07(a)(ii), if the Concessionaire (i) fails or neglects to commence the diligent restoration of the Project or the portion thereof so damaged or destroyed, (ii) having so commenced such restoration, fails to diligently complete the same in accordance with the terms of this Agreement or (iii) prior to the completion of any such restoration, this Agreement expires or terminates in accordance with this Agreement, the Department may, but will not be required to, complete such restoration at the Concessionaire’s expense and will be entitled to be paid out of the Restoration Funds for the relevant restoration costs incurred by the Department. Subject to Section 17.07(a)(ii), in any case where this Agreement will expire or be terminated prior to the completion of the restoration, the Concessionaire will (A) account to the Department for all amounts spent in connection with any restoration which was undertaken, (B) immediately pay over or cause the Depositary to pay over to the Department the remainder, if any, of the Restoration Funds received by the Concessionaire prior to such termination or cancellation and (C) pay over or cause the Depositary to pay over to the Department, within five Business Days after receipt thereof, any Restoration Funds received by the Concessionaire or the
Depositary subsequent to such termination or cancellation. The Concessionaire’s obligations under this Section 17.07(b) will survive the expiration or termination of this Agreement.

(c) Subject to the satisfaction by the Concessionaire of all of the terms and conditions of this Section 17.07, the Concessionaire will cause the Depositary, with prior written notice to the Department, to pay to the Concessionaire from time to time, any Restoration Funds, but not more than the amount actually collected by the Depositary upon the loss, together with any interest earned thereon, to be utilized by the Concessionaire solely for the restoration, such payments to be made as follows:

(i) prior to commencing any restoration, the Concessionaire will furnish to the Department for its approval the estimated cost, estimated schedule and detailed plan for the completion of the restoration, each prepared by an architect or engineer;

(ii) the Restoration Funds will be paid to the Concessionaire in installments as the restoration progresses, subject to Section 17.07(c)(iii), based upon requisitions to be submitted by the Concessionaire to the Depositary, with a copy to the Department, in compliance with Section 17.07(d), showing the cost of labor and materials purchased for incorporation in the restoration, or incorporated therein since the previous requisition, or the amounts payable or paid to the Contractor, as the case may be, and due and payable or paid by the Concessionaire; provided, that if any Lien caused by a Concessionaire Party is filed against the Project or any part thereof in connection with the restoration (other than a Permitted Encumbrances (but not including clause (c) of the definition thereof)), the Concessionaire will not be entitled to receive any further installment until such Lien is satisfied or discharged (by bonding or otherwise); provided further, that notwithstanding the foregoing, but subject to the provisions of Section 17.07(c)(iii), the existence of any such Lien will not preclude the Concessionaire from receiving any installment of Restoration Funds so long as such Lien will be discharged with funds from such installment and at the time the Concessionaire receives such installment the Concessionaire delivers to the Department and the Depositary a release of such Lien executed by the holder of such Lien and in recordable form;

(iii) the amount of each installment to be paid to the Concessionaire will be the aggregate amount of Casualty Costs theretofore incurred by the Concessionaire minus the aggregate amount of Restoration Funds theretofore paid to the Concessionaire in connection therewith; provided, that all disbursements to the Concessionaire will be made based upon an architect’s or engineer’s certificate for payment in accordance with industry standards, and disbursements may be made for advance deposits for materials and Contractors to the extent that such disbursements are customary in the industry and that the unapplied portion of the funds held by the Depositary, together with other funds available to the Concessionaire for such Restoration, as certified by the Concessionaire, are sufficient to complete the restoration; and

(iv) except as provided in Section 17.07(b), upon completion of and payment for the restoration by the Concessionaire, subject to the rights of any Collateral Agent, the Depositary will pay the balance of the Restoration Funds, if any, to the Concessionaire;
provided, that if the insurance proceeds are insufficient to pay for the restoration (or if there will be no insurance proceeds), the Concessionaire will nevertheless be required to make the restoration and provide the deficiency in funds necessary to complete the restoration as provided in Section 17.07(a)(iii).

(d) The following will be conditions precedent to each payment made to the Concessionaire as provided in Section 17.07(c):

(i) the Concessionaire will have furnished the Department with estimates of costs and schedule and a detailed plan for the completion of the restoration, as provided for in Section 17.07(c)(i);

(ii) the Concessionaire will have furnished the Department a certificate stating that the materials and other items which are the subject of the requisition have been delivered to the Project (except with respect to requisitions for advance deposits permitted under Section 17.07(c)(iii)), free and clear of all Liens (other than Permitted Encumbrances), and no unsatisfied or unbonded mechanic’s or other Liens have been claimed, except for any Lien that will be discharged, by bonding or otherwise, with funds to be received pursuant to such requisition (provided, that a release of such Lien is delivered to the Depositary in accordance with Section 17.07(c)(ii));

(iii) the restoration will be carried out under the supervision of the relevant architect or engineer, who is licensed in the State and has met all of the requirements of the Virginia Department of Professional and Occupational Regulation applicable to an architect or engineer and who may be a licensed employee of the Concessionaire or a Contractor, and there will be submitted to the Depositary and the Department the certificate of such architect or engineer stating that:

(A) the sum then requested to be withdrawn either has been paid by the Concessionaire or is due and payable to Contractors, engineers, architects or other Persons (whose names and addresses will be stated), who have rendered or furnished services or materials for the work and giving a brief description of such services and materials and the principal subdivisions or categories thereof and the several amounts so paid or due to each of such Persons in respect thereof, and stating in reasonable detail the progress of the work up to the date of such certificate;

(B) no part of such expenditures has been made the basis, in any previous requisition (whether paid or pending), for the withdrawal of Restoration Funds or has been made out of the Restoration Funds received by the Concessionaire;

(C) the sum then requested does not exceed the value of the services and materials described in the certificate;

(D) other than amounts for disbursements for advance deposits for materials and Contractors, the work relating to such requisition has been performed in accordance with this Agreement;
(E) the balance of the Restoration Funds held by the Depositary or available from other sources will be sufficient upon completion of the restoration to pay for the same in full, and stating in reasonable detail an estimate of the cost of such completion; and

(F) in the case of the final payment to the Concessionaire, the restoration has been completed in accordance with this Agreement.

(e) If the Concessionaire obtains Performance Bonds or performance Letters of Credit related to a restoration (which the Concessionaire may or may not obtain in its discretion), the Concessionaire will name the Department and the Concessionaire and the Collateral Agent, as their interests may appear, as additional obligees or transferee beneficiaries (as applicable), and will deliver copies of any such bonds or letters of credit to the Department promptly upon obtaining them. The Department will only have the right to exercise remedies under any such bonds or letters of credit so long as the Concessionaire or a Lender is not pursuing remedies thereunder.

(f) The requirements of this Section 17.07 are for the benefit only of the Department, and no Contractor or other Person will have or acquire any claim against the Department as a result of any failure of the Department actually to undertake or complete any restoration as provided in this Section 17.07 or to obtain the evidence, certifications and other documentation provided for herein.

(g) Restoration Funds deposited with a Depositary will be invested and reinvested in direct obligations of and obligations fully guaranteed by, the United States of America or any agency or instrumentality of the United States of America, the obligations of which are backed by the full faith and credit of the United States of America, or in other “permitted investments” under the Project Financing Agreements, and all interest earned on such investments will be added to the Restoration Funds.

(h) The Department acknowledges and agrees that any Restoration Funds not applied to a restoration as provided in this Section 17.07 will be subject to the Lien or Liens of any Collateral Agent.

Section 17.08 Performance Security

(a) Performance Security – Equity Funding Guaranties. The Concessionaire will cause each Equity Member to provide an equity funding guaranty from each of the Fluor Guarantor and the Transurban Guarantor (each, an “Equity Funding Guaranty”) which guarantees the funding of capital contributions of the Equity Members in accordance with the terms of the Equity Funding Agreements. Subject to the provisions of the Direct Agreement, the Project Financing Agreements will include a provision granting the Department the right to direct the Collateral Agent to draw upon the applicable Equity Funding Guaranty with respect to any amounts that the relevant Equity Member has failed to fund when due and payable (whether at the scheduled date or upon acceleration upon an event of default under the Project Financing
Agreements), and that the proceeds of such draw will be deposited in a project account as designated by the Collateral Agent in accordance with the Project Financing Agreements.

(b) Performance Security – Design-Build Letter of Credit.

(i) The Concessionaire will require the Design-Build Contractor to furnish a Letter of Credit (the “Design-Build Letter of Credit”) in an amount not less than seven and one-half percent (7.5%) of the price of the Design-Build Contract. The Design-Build Letter of Credit will provide that it may be transferred by the Concessionaire to the Department, as beneficiary, with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the Design-Build Contract.

(ii) Upon the Concessionaire’s receipt from the Department of the Substantial Completion Certificate, the Design-Build Letter of Credit may be reduced to an amount not less than three percent (3%) of the price of the Design-Build Contract. If the Punch List has not been completed within 60 Days after the Final Acceptance Deadline, the Concessionaire agrees to draw on the Design-Build Letter of Credit at the written direction of the Department and to use the proceeds of such drawing to provide for the prompt completion of the items on the Punch List.

(c) Performance Security - Design-Build Work Guarantee. Concurrently with Financial Close or, if earlier, the commencement of Work under the Design-Build Contract, the Concessionaire will cause to be delivered to the Department, an executed copy of a guaranty agreement of the Fluor Guarantor, in substantially the form set forth in Exhibit F (the “Design-Build Work Guarantee”), in which the Fluor Guarantor guarantees the performance of the Design-Build Contractor’s obligations under the Design-Build Contract. In addition to and notwithstanding the Design-Build Work Guarantee required to be delivered pursuant to the preceding sentence, the Concessionaire will ensure that the Design-Build Contract will include customary provisions limiting the Design-Build Contractor’s liability to not less than 40% of the aggregate dollar value of the Work to be performed thereunder.

(d) Additional Requirements

(i) Unless otherwise specified in this Agreement, a draw on any Performance Security will not be conditioned on prior resort to any other security of, or provided for the benefit of, any Concessionaire Party. If the Department receives proceeds of a draw on any Performance Security in excess of the relevant obligation, the Department will promptly refund the excess to the Concessionaire (or to its designee) after all relevant obligations are satisfied in full.

(ii) The Concessionaire will obtain and furnish all Performance Security and replacements thereof at its sole cost and expense, and will pay all charges imposed in connection with the Department’s presentment of sight drafts and drawing against any Performance Security or replacements thereof.
(iii) In the event the Department makes a permitted assignment of its rights and interests under this Agreement, the Concessionaire will cooperate so that concurrently with the effectiveness of such assignment, either replacement Performance Security for, or appropriate amendments to, the outstanding Performance Security will be delivered to the assignee naming the assignee as replacement beneficiary, at no cost to the Concessionaire.

(iv) The obligations of the Concessionaire during the Term to reimburse the issuer for draws under any Performance Security may be secured by a Financing Assignment if it encumbers the entire Concessionaire’s Interest.

(e) Applicability to Project Enhancements and Major Maintenance. The Concessionaire will require its contractors to furnish the Major Maintenance Performance Security with respect to Project Enhancements and Major Maintenance during the Term if and to the extent required by the Project Financing Agreements or, if there are no Project Financing Agreements, as may be reasonably required by the Department. The Major Maintenance Performance Security will name the Department a permitted assignee or transferee beneficiary (as applicable), with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the O&M Contract.

ARTICLE 18.

OWNERSHIP AND ACCESS TO RECORDS

Section 18.01 Maintenance of Records

The Concessionaire will maintain or cause to be maintained proper books, records and accounts in which complete and correct entries will be made of its transactions in accordance with GAAP or any other generally accepted accounting standards which are acceptable to the Department. Such books and records will be maintained at a location situated within the contiguous United States of America as designated by the Concessionaire by delivery of notice of such location to the Department. Further, the Concessionaire will maintain or cause to be maintained such books, records and accounts in accordance with applicable Law, including Laws applicable to the Project as a result of the costs of the Project being financed in part with State funds, federal-aid funds and State bond proceeds.

Section 18.02 Public Records

(a) The Concessionaire acknowledges that any Work Product the Department owns and any document of which the Department obtains a copy that relates to the Project may be considered public records under the Virginia Public Records Act, Sections 42.1-76 through 42.1-91 of the Code of Virginia or official records under the Virginia Freedom of Information Act, Sections 2.2-3700 through 2.2-3714 of the Code of Virginia, and as such may be subject to public disclosure. In the event of a request for disclosure of any such information, the Department will comply with Law. The Department recognizes that certain Work Product the Department owns, and certain documents of which the Department obtains a copy that relate to
the Project, including Escrow Documents obtained under Section 18.05, may contain information exempt from disclosure under Section 2.2-3705.6(11) of the Code of Virginia, may constitute trade secrets as defined in the Uniform Trade Secrets Act, Sections 59.1-336 through 59.1-343 of the Code of Virginia, and may include confidential information which is otherwise subject to protection from misappropriation or disclosure, and the Department will keep such information confidential unless disclosure is required by Law. Should such records become the subject of a request for public disclosure, the Department will promptly notify the Concessionaire of such request and the date by which the Department anticipates responding and will consider the objections received from the Concessionaire in advance of such date.

(b) If the Concessionaire believes that any Work Product or any document subject to transmittal to or review by the Department under the terms of this Agreement or a Project Agreement contains proprietary or confidential information or trade secrets that are exempt or protected from disclosure pursuant to Law, the Concessionaire will use its reasonable efforts to identify such information prior to such transmittal or review and the Concessionaire and the Department will confer on appropriate means of ensuring compliance with such Law prior to transmittal or review. Upon the written request of either party, the Concessionaire and the Department will mutually develop a protocol for the transmittal, review and disclosure of Work Product or other documents produced or obtained by the Concessionaire so as to avoid violations of any Law and to protect, consistent with the requirements of Law, appropriate information from disclosure.

Section 18.03 Ownership of Work Product

(a) All Work Product (including records thereof in software form), including reports, studies, data, information, logs, records and similar terms, which is prepared or procured by or on behalf of the Department or its other contractors, whether before or after the Agreement Date, will be and remain the exclusive property of the Department; provided, that the Department will make available to the Concessionaire, without charge, and without representation or warranty of any kind, any documents in the possession of the Department relating to the planning, design, engineering and permitting of the Project and any Project Enhancement that the Concessionaire elects to or is directed to carry out.

(b) Prior to the expiration or earlier termination of this Agreement, all Work Product prepared by or on behalf of the Concessionaire will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of this Agreement for any reason, including termination by the Concessionaire for a Department Default, (i) the Concessionaire will promptly turn over to the Department a copy of all Work Product the Concessionaire owns and (ii) subject to Section 18.04, all such Work Product will be considered the sole and exclusive property of the Department (other than Proprietary Work Product, with respect to which the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license in connection with the Project), without compensation due the Concessionaire or any other party. The Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any Proprietary Work Product, subject to Section 18.02. The Concessionaire will continue to
have a full and complete right to use any and all duplicates or other originals of such Proprietary Work Product in any manner it chooses.

Section 18.04 Ownership of Proprietary Intellectual Property

(a) All Proprietary Intellectual Property of the Concessionaire will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of, or any assignment by the Concessionaire of its rights under, this Agreement for any reason whatsoever, the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire solely in connection with the Project. The Department will not at any time sell any such Proprietary Intellectual Property or use or allow any party to use any such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project (except as permitted on other State Highways in accordance with Section 18.04(b)). Subject to Section 18.02, the Department will not disclose any Proprietary Intellectual Property of the Concessionaire (other than to its concessionaires, Contractors, employees, attorneys and agents in connection with the development and operation of the Project who agree to be bound by any confidentiality obligations of the Department relating thereto), and the Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such Proprietary Intellectual Property.

(b) The Department will have the right to purchase from the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire on any other tolled State Highway owned and operated by the Department or other State agency on commercially reasonable terms. The Concessionaire will continue to have the full and complete right to use, sell or license to other Persons any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

(c) With respect to any Proprietary Intellectual Property owned by a Person other than the Concessionaire or the Department, the Concessionaire will obtain from such owner, concurrently with execution of any Contract or purchase order with such owner, both for the Concessionaire and the Department, nonexclusive, nontransferable, irrevocable, fully paid up (other than with respect to ongoing maintenance and support fees) licenses to use such Proprietary Intellectual Property solely in connection with the Project, of at least identical scope, purpose, duration and applicability as the licenses granted by Section 18.04(a); provided, that the foregoing requirement will not apply to standard, pre-specified manufacturer licenses of mass-marketed products (including software products) or equipment where the license cannot be extended to the Department using commercially reasonable efforts or to other licenses of products or equipment where the products or equipment are not reasonably necessary for the operation or maintenance of the Project. The Concessionaire will use commercially reasonable efforts to obtain from such owner a right in favor of the Department to purchase from such owner a nonexclusive, nontransferable, irrevocable, fully paid up license to use such owner’s Proprietary Intellectual Property on any other tolled State Highway owned and operated by the Department or other State agency on commercially reasonable terms. The limitations on sale
and disclosure by the Department set forth in Section 18.04(a) will also apply to the Department’s licenses in such Proprietary Intellectual Property.

(d) The Concessionaire Marks may appear on some of the Project Assets, including supplies, materials, stationery and similar consumable items at the Project on the last Day of the Term. The parties agree that the Concessionaire will remain the owner or licensee, as applicable, of the Concessionaire Marks at the end of the Term, and the Concessionaire may remove, at its expense, the Concessionaire Marks prior to the end of the Term. If the Concessionaire fails to do so, the Department will be entitled to remove the Concessionaire Marks and, in such case, the Department will be entitled to payment of its Allocable Costs in so doing from the Concessionaire. The Department acknowledges and agrees that it will have no right, title, interest or license in the Concessionaire Marks.

(e) On or before the Agreement Date, the Department will grant to the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use any Proprietary Intellectual Property of the Department that has been developed for the Project, solely in connection with the development, construction, operation, maintenance and other incidental activities of the Project. The Concessionaire will not at any time sell such Proprietary Intellectual Property or use or allow any party to use such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project. On or before the Agreement Date, the Department will also assign in favor of the Concessionaire the Department’s rights with respect to any license by the Department’s software suppliers (to the extent permitted by, and subject to the terms of, such license) for the use of any Proprietary Intellectual Property for the Project, together with an assignment of the Department’s rights under any escrow for the Source Code and Source Code Documentation relating to such Proprietary Intellectual Property, which assignments will be reasonably satisfactory to the Concessionaire. The Concessionaire will not disclose any such Proprietary Intellectual Property (other than to its Contractors, employees, attorneys, agents and Affiliates in connection with the Project who agree to be bound by any confidentiality obligations of the Concessionaire relating thereto), and the Concessionaire will enter into a confidentiality agreement reasonably requested by the Department with respect to any such Proprietary Intellectual Property. The Department will continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

Section 18.05 Escrow Documents

(a) General. Prior to the Agreement Date, the Concessionaire, the Department and the Escrow Agent will have executed and delivered the Escrow Agreement to implement the provisions of this Section 18.05. The Concessionaire will submit to the Department for its review and approval the following materials (collectively, the “Escrow Documents”): one copy of all documentary information generated with respect to (i) the expected costs of the Work (which uses the estimating methodology actually used by the Design-Build Contractor) available to the Concessionaire under the Design-Build Contract (the “Construction Escrow Documents”) and (ii) the components of, and formulae for, the Initial Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model, including, without limitation, forecast revenue and expected non-financial costs of the Project during the Term included in the Initial
Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model (the “Financing Escrow Documents”). The Concessionaire will deliver the Construction Escrow Documents to the Department within 14 Days following the Agreement Date and will deliver the Financing Escrow Documents not later than the Agreement Date.

(b) Format and Contents.

(i) The Concessionaire may submit Escrow Documents in their usual cost estimating format; provided, that all information is clearly presented and ascertainable and submitted in accordance with the requirements of this Section 18.05. It is not the intention of this Section 18.05 to cause the Concessionaire extra work, but to ensure that the Escrow Documents will be adequate to enable complete understanding and proper interpretation for their intended use.

(ii) The Escrow Documents will be submitted in English and clearly itemize the estimated costs of performing each item of the Project, including financing, administrative and related costs. Cost items will be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review.

(iii) The Construction Escrow Documents will include, to the extent obtained, procured or in the possession of the Concessionaire: estimates for costs of the design professionals and consultants itemized by discipline both for development of the design, all quantity take-offs, crew size and shifts, equipment, calculations of rates of production and progress, copies of quotes from Contractors and suppliers, and memoranda, narratives, drawings and sketches showing site or work area layouts and equipment, add/deduct sheets, geotechnical reviews and consultant reports, all other information used by the Concessionaire to arrive at the estimated prices for the Project, and all information and formulae used by the Concessionaire in developing the Initial Base Case Financial Model. Estimated costs will be broken down into estimate categories for items such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials and subcontract costs as appropriate. Plant and equipment, indirect costs, bond rates and calculations, insurance costs and financing should be detailed. The Concessionaire’s allocation of indirect costs, contingencies, and mark-up will be identified.

(iv) The Construction Escrow Documents will identify all costs. If detailed costs are not available to the Concessionaire, estimated unit costs are acceptable without a detailed cost estimate, provided, that labor, equipment, materials and subcontracts, as applicable, are specified, and provided further, that indirect costs, contingencies, and mark-up, as applicable, are allocated.

(c) Submittal.

(i) The Concessionaire will submit the Escrow Documents in sealed containers, the Construction Escrow Documents in one and the Financing Escrow Documents in another, to the Department, which containers have been clearly marked on
the outside with the Concessionaire’s name, reference to the Project, and the words “I-95 HOV/HOT Lanes Project Construction Escrow Documents” or “I-95 HOV/HOT Lanes Project Financing Escrow Documents” as applicable.

(ii) On or before the Agreement Date, representatives of the Department, assisted by members of the Concessionaire’s staff who are knowledgeable in how the Escrow Documents were prepared, will have examined, organized and inventoried the Escrow Documents. This examination was to ensure that the Escrow Documents are legible and complete. It did not include review of, and does not constitute approval of proposed construction methods, estimating assumptions, or interpretations of any Project Agreements, including the Design-Build Contract. Such examination will not alter any condition or term of any Project Agreement.

(iii) Timely submission of complete Escrow Documents as of the Agreement Date is an essential element of the Concessionaire’s responsibility and a prerequisite to the execution and delivery of this Agreement by the Department.

(iv) To the extent the Concessionaire plans to contract out any part of the Work as of the Agreement Date, the Concessionaire will cause each Contractor whose total Contract price exceeds 5% of the Project costs as set forth in the Design-Build Contract to provide separate similar documentation to be included with those of the Concessionaire. Such documents will be opened and examined in the same manner and at the same time as the examination described above for the Concessionaire to the extent that they are relevant to the issue at hand.

(d) **Updating of the Escrow Documents.** Upon each update of the Initial Base Case Financial Model, Adjusted Financial Model and Base Case Financial Model Update in accordance with this Agreement (other than any such update that does not change the Financial Formulas or forecast assumptions), such update will be submitted by the Concessionaire to the Escrow Agent promptly and in any event within seven Days after an update has not been disputed or any such dispute has been resolved for inclusion as part of the Financing Escrow Documents. For the avoidance of doubt, previous undisputed versions of the Escrow Documents will remain in escrow with the Escrow Agent.

(e) **Storage.** The Escrow Documents will be stored at the following address:

SunTrust Bank  
919 East Main Street, Floor 7  
Richmond, Virginia 23219  
Attention: Corporate Agency Services  
Telephone: 804-782-5400  
Facsimile: 804-782-785

The Concessionaire will bear the cost for storing the Escrow Documents.
(f) Examination.

(i) Subject to the terms of the Escrow Agreement, the Escrow Documents may be examined by the Department and the Concessionaire at any time deemed necessary by the Department or the Concessionaire and the Department may delegate review of the Escrow Documents to members of its staff or to Consultants; provided, that, unless a Consultant is bound by a confidentiality agreement or other obligations to keep the Escrow Documents confidential, each such Consultant will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such examination. No other person will have access to the Escrow Documents. The Department will provide advance notice of any such examination to the Design-Build Contractor, and the Design-Build Contractor will have the right to be present during an examination of the Construction Escrow Documents; provided, however, that such right will not in any way limit the Department’s right to review the Construction Escrow Documents if the Design-Build Contractor does not attend such examination. Notwithstanding the foregoing, the Escrow Documents and information contained therein may be used:

(A) to assist in the negotiation of Concessionaire Damages, Net Cost Savings and Change Orders;

(B) in the resolution of any claim or dispute before any entity selected to resolve disputes; and

(C) in any dispute resolution procedure commenced hereunder.

(ii) Access to the documents will take place in the presence of duly designated representatives of both the Department and the Concessionaire, except that, if the Concessionaire refuses to be present or to cooperate in any other way in the review of the documents, the Department may upon notice to the Concessionaire, review such documents without the Concessionaire being present.

(g) Ownership. The Escrow Documents are, and will always remain, the property of the Concessionaire, subject to joint review by the Department and the Concessionaire, as provided herein. The Department stipulates and expressly acknowledges that the Escrow Documents constitute trade secrets. This acknowledgement is based on the Department’s express understanding that the information contained in the Escrow Documents is not known outside the Concessionaire’s business, is known only to a limited extent and only by a limited number of employees of the Concessionaire, is safeguarded while in the Concessionaire’s possession, is extremely valuable to the Concessionaire and could be extremely valuable to the Concessionaire’s competitors by virtue of its reflecting Concessionaire’s contemplated techniques of design and construction. The Department further acknowledges that the Concessionaire expended substantial sums of money in developing the information included in the Escrow Documents and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. The Department further acknowledges that the Escrow Documents and the information contained therein are made available to the Department
only because such action is an express prerequisite to the execution and delivery of this Agreement. The Department further acknowledges that the Escrow Documents include a compilation of the information used in the Concessionaire’s business, intended to give the Concessionaire an opportunity to obtain an advantage over competitors who do not know of or use the contents of the documentation.

(h) Final Disposition and Return of Escrow Documents. The Construction Escrow Documents will be returned to the Concessionaire upon the earlier to occur of (i) completion of the Design-Build Work, including tender of final payment and resolution of all claims or disputes arising under the Design-Build Contract or (ii) termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement. The remaining Escrow Documents will be returned upon termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement.

Section 18.06 Source Code Escrow

(a) The Department and the Concessionaire acknowledge that the Concessionaire and/or the Concessionaire’s Software suppliers may not wish to disclose directly to the Department at the time of installation the Source Code and Source Code Documentation which is Proprietary Intellectual Property of the Concessionaire and/or the Concessionaire’s software suppliers, as public disclosure could deprive the Concessionaire and/or the Concessionaire’s software suppliers of commercial value, but that the Department must be ensured access to such Source Code and Source Code Documentation in either of the following circumstances:

(i) in the case of Source Code and Source Code Documentation that is a Contractor’s Proprietary Intellectual Property, if this Agreement is terminated for Concessionaire Default or upon assignment by Concessionaire of its rights pursuant to this Agreement, the Department assumes the contract or subcontract with such Software supplier, and either (A) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Software supplier occurs or (B) the Software supplier fails or ceases to provide services as necessary to permit continued use of the software by the Department as contemplated by this Agreement; or

(ii) in the case of Source Code and Source Code Documentation that is the Concessionaire’s Proprietary Intellectual Property, (A) this Agreement is terminated for Concessionaire Default, (B) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Concessionaire occurs or (C) the Concessionaire fails or ceases to provide services as necessary to permit continued use of the software by the Department as contemplated by this Agreement.

(b) By no later than the Service Commencement Date, the Department and the Concessionaire will establish one or more escrows (the “Source Code Escrows”) with the Escrow Agent on terms and conditions reasonably acceptable to the Department and to the Concessionaire into which such Source Code and Source Code Documentation will be escrowed, including all relevant commentary, explanations and other documentation, as well as instructions
to compile such Source Code and Source Code Documentation and all modifications, additions or substitutions made to such Source Code and Source Code Documentation.

(c) The escrow provided for herein will survive any termination of this Agreement regardless of the reason.

(d) The Concessionaire will pay the reasonable costs and expenses of the Escrow Agent related to the Source Code Escrows.

Section 18.07 Inspection and Audit Rights

(a) Subject to Section 18.07(c), the Concessionaire will make available to the Department and the FHWA (including their employees, contractors, consultants, agents or designees), and allow each of them access to, such books, records and documents as they may reasonably request in connection with the Project for any purpose related to the Project, this Agreement, including but not limited to monitoring compliance with the terms and conditions of this Agreement. The Department will provide the Concessionaire 48 hours prior written notice prior to exercising its rights to access and audit the Concessionaire’s books, records and documents pursuant to this Section 18.07(a) and Section 18.07(b); provided, however, that the Department may exercise such rights unannounced and without prior notice during a Concessionaire Default or where there is good faith suspicion of fraud.

(b) Subject to Section 18.07(c), the Department and the State, at the Department’s own expense, will have the right to carry out an audit of information relating to (i) the design, construction, operation, maintenance and repair of the Project or (ii) other information required to be maintained or delivered by the Concessionaire pursuant to this Agreement or any other Project Agreement. Such audit may extend, without limitation, to calculations undertaken, and financial or business reports provided, by or on behalf of the Concessionaire pursuant to this Agreement. The Department or its employees, agents, auditors, attorneys and consultants, at the Department’s own expense may examine, copy, take extracts from and audit all the books and records of the Concessionaire related to the Project, including all subcontracts entered into under Section 24.02. In addition, the Department or its agents, auditors, attorneys and consultants, at the Department’s own expense may conduct a re-audit and observe the business operations of the Concessionaire to confirm the accuracy of books and records. In addition, at FHWA’s request, the Concessionaire will make all its records relating to the Project available to the FHWA for inspection and audit.

(c) The Concessionaire reserves the right to assert exemptions from Persons other than the Department from disclosure for information that would be exempt under Law from discovery or introduction into evidence in legal actions. Unless otherwise required by Law or this Agreement, the Concessionaire may make available copies of books, records and documents containing trade secrets or confidential proprietary information with such information redacted.

(d) In addition, the Concessionaire, at its expense, will cause a reputable independent auditor to annually audit its books and records relating to the Project, according to GAAP or any other generally accepted accounting standards, which are acceptable to the Department. The
Concessionaire will cause the independent auditor to deliver the audit report to the FHWA and the Department promptly after it is completed, but in any event within 120 Days of the end of each of the Concessionaire’s fiscal years.

(e) Nothing contained in this Agreement will in any way limit the constitutional and statutory powers, duties and rights of elected State officials, including the independent rights of the State Auditor of Public Accounts, in carrying out his or her legal authority.

(f) No audit rights will extend to the make-up of any lump sum amount or unit price or rate under the Design-Build Contract once such amount, price or rate has been agreed.

(g) The Concessionaire will cooperate with the Department, the FHWA and the other persons mentioned in this Section 18.07 in the exercise of their rights hereunder. At the request of the Department, the Concessionaire will furnish or cause to be furnished to the Department such information relating to the operation, maintenance and repair of the Project as the Department may reasonably request for any purpose related to the Project or this Agreement and as will be in the possession and control of the Concessionaire, any Concessionaire Party, or any of their Representatives. Subject to Section 18.02, the Department will keep confidential any information obtained from the Concessionaire, any Concessionaire Party or their Representatives that (i) constitutes trade secrets or commercial or financial information (A) where the trade secrets or commercial or financial information are proprietary, privileged or confidential or (B) where disclosure of the trade secrets or commercial or financial information may cause competitive harm and (ii) is designated as such by the Concessionaire, a Concessionaire Party or their Representatives in writing to the Department, and the Department has determined that such information qualifies for exemption from disclosure under Law.

ARTICLE 19.

DEFAULTS AND REMEDIES

Section 19.01 Concessionaire Defaults

The occurrence of any one or more of the following events during the Term will constitute a “Concessionaire Default” pursuant to this Agreement:

(a) any representation or warranty made by the Concessionaire herein or in any other Project Agreement to which the Concessionaire and the Department are parties is false or misleading in any respect on the date made and a material adverse effect upon the Project or the Department’s rights or obligations under the Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof, with cure regarded as complete only when the adverse effects are remedied;

(b) the Concessionaire fails to comply with, perform or observe any other material obligation, covenant, agreement, term or condition in this Agreement or any Project Agreement to which the Department and the Concessionaire are parties (provided, that a debarment pursuant
to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a Concessionaire Default, which failure materially and adversely affects the Department’s rights or obligations under this Agreement or any other VDOT Project Agreement, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; provided, that the maximum cure period may be extended one time for any such failure to a final date if (i) at least 30 Days prior to the end of the maximum 180-Day cure period, the Concessionaire delivers a written work plan to the Department outlining the actions by which the Concessionaire will cure such failure and setting forth a final date by which the Concessionaire will cure such failure and (ii) the Department approves such work plan within 30 Days in its reasonable discretion; provided, that in all cases and regardless of the duration of the cure period, (A) the Concessionaire is proceeding with all due diligence to cure or cause to be cured such failure, (B) the failure is capable of being cured within a reasonable period of time, and (C) such failure is in fact cured within such period of time; provided further, that this Section 19.01(b) will not apply to events covered by other provisions of this Section 19.01; and provided, further, that any failure to comply with, perform or observe any obligation that is covered by the Non-Compliance Points system will constitute a Concessionaire Default only as provided in Section 11.05(c);

(c) the Concessionaire fails to pay to the Department when due any undisputed amount in excess of $100,000, adjusted annually by the percentage increase in CPI, payable to the Department pursuant to this Agreement or any other VDOT Project Agreement or to deposit funds to any reserve account in the amount and within the time period required by this Agreement, and such failure, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof;

(d) other than a Permitted Closure, the Concessionaire closes all or part of the HOT Lanes to traffic, at any time following Service Commencement, other than in accordance with the terms of this Agreement, and such closure continues without cure for a period of ten Days following the date the Department delivers to the Concessionaire written notice thereof;

(e) (i) the Concessionaire fails to achieve Substantial Completion of the Project by the Long Stop Date, as such date may be extended pursuant to this Agreement or (ii) in the case where a new Long Stop Date has been established pursuant to Section 8.15 hereof, the Concessionaire fails to diligently implement the Substantial Completion Recovery Plan;

(f) the Concessionaire fails to maintain, or to cause to be maintained, in effect the insurance, guarantees, letters of credit or other performance security as and when required pursuant to this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same and such failure continues without cure for a period of ten Business Days following the date the Department delivers to the Concessionaire written notice thereof;
(g) this Agreement or all or any portion of the Concessionaire’s Interest is
Transferred, or there occurs a Change in Control, in contravention of Section 25.01;

(h) after exhaustion of all rights of appeal, (i) there occurs any suspension or
debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes
into effect an agreement for voluntary exclusion, of the Concessionaire, any affiliate of the
Concessionaire (as “affiliate” is defined in 29 CFR 98.905 or successor regulation of similar
import), or Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor
whose work is not completed, from bidding, proposing or contracting with any Federal or State
department or agency or (ii) the Concessionaire, Fluor, Lane Construction Corporation,
Transurban or the Design-Build Contractor who have ongoing Work, or any of their respective
officers, directors, or Administering Employees have been convicted of, or plead guilty or nolo
contendere to, a violation of Law for fraud, conspiracy, collusion, bribery, perjury, or material
misrepresentation, as a result in whole or in part of activities relating to any project in the State,
and such failure continues without cure for a period of 90 Days following the date the
Department delivers to the Concessionaire written notice thereof (giving particulars of the failure
in reasonable detail); provided, that a debarment pursuant to the provisions set forth in Section
24.03(b) (relating to SWaM participation) will not constitute a Concessionaire Default. If the
offending Person is an officer, director or Administering Employee, cure will be regarded as
complete when the Concessionaire proves that such Person has been removed from any position
or ability to manage, direct or control the decisions of the Concessionaire, Fluor, Lane
Construction Corporation, Transurban or the Design-Build Contractor (as applicable) or to
perform Work; and if the Person debarred or suspended or subject to an agreement for voluntary
exclusion is an affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905 or
successor regulation of similar import), Fluor, Lane Construction Corporation, Transurban or the
Design-Build Contractor, cure will be regarded as complete when the Concessionaire replaces
such Person in accordance with this Agreement;

(i) the Concessionaire or any Concessionaire Financial Party (i) admits, in writing,
that it is unable to pay its debts as they become due, (ii) makes an assignment for the benefit of
its creditors, (iii) files a voluntary petition under Title 11 of the U.S. Code, or files any other
petition or answer seeking, consenting to or acquiescing in any reorganization, liquidation,
dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar
Law, or (iv) seeks or consents to or acquiesces in the appointment of any trustee, receiver,
custodian, assignee, sequestrator, liquidator or other similar official of such Concessionaire or
Concessionaire Financial Party, or of all or any substantial part of its properties or of the Project
or any interest therein;

(j) within 90 Days after the commencement of any proceeding against the
Concessionaire or any Concessionaire Financial Party seeking any reorganization, liquidation,
dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar
Law, such proceeding has not been dismissed, or, within 90 Days after the appointment, without
the consent or acquiescence of such Concessionaire or Concessionaire Financial Party, of any
trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of such
Concessionaire or Concessionaire Financial Party or of all or any substantial part of its properties
or of the Project or any interest therein, such appointment has not been vacated or stayed on
appeal or otherwise, or, within 90 Days after the expiration of any such stay, such appointment
has not been vacated;

(k) a levy under execution or attachment has been made against all or any part of the
Project or any interest therein (including the Concessionaire’s Interest) as a result of any Lien
(other than a Lien relating to permitted Concessionaire Debt) created, incurred, assumed or
suffered to exist by the Concessionaire or any Person claiming through it, and such execution or
attachment has not been vacated, removed or stayed by court order, bonding or otherwise within
a period of 60 Days, unless such levy resulted from actions or omissions of the Department or its
Representatives; and

(l) after the sixth full month following the Service Commencement Date, the
Concessionaire (i) fails to deliver an OSPS Improvement Plan meeting the requirements set forth
in Section 5.08(b) at the time specified in Section 5.08(b) and such failure continues without cure
for a period of 30 Days following the date on which the Department delivers to the
Concessionaire notice of such failure, or (ii) fails to use commercially reasonable efforts to
comply with any of the provisions set forth in an OSPS Improvement Plan submitted pursuant to
Section 5.08(b), and such failure to use commercially reasonable efforts continues without cure
for a period of 30 Days following the date on which the Department delivers notice of such
failure to the Concessionaire.

Section 19.02 Department Remedies upon Concessionaire Defa
ult

Upon the occurrence of a Concessionaire Default, the Department may, subject to the
provisions of the Direct Agreement, do any or all of the following as the Department, in its sole
discretion, will determine:

(a) the Department may terminate this Agreement and any other Project Agreements
to which the Department and the Concessionaire are both parties, to the extent provided in
Section 20.05;

(b) if the Concessionaire Default is by reason of the failure to pay any undisputed
monies to a third party, the Department may (but will have no obligation to) make payment on
behalf of the Concessionaire of such monies, and any amount so paid by the Department will be
payable by the Concessionaire to the Department within five Days after demand, including
accrued interest at the Bank Rate from the date such payment is made by the Department to the
repayment date; provided, that (i) the Department will not incur any liability to the
Concessionaire for any act or omission of the Department or any other Person in the course of
remedying or attempting to remedy any Concessionaire Default and (ii) the Department’s cure of
any Concessionaire Default will not waive or affect the Department’s rights against the
Concessionaire by reason of the Concessionaire Default;

(c) the Department may cure the Concessionaire Default (but this will not obligate
the Department to cure or attempt to cure a Concessionaire Default or, after having commenced
to cure or attempted to cure a Concessionaire Default, to continue to do so), and all costs and
expenses reasonably incurred by the Department in curing or attempting to cure the Concessionaire Default, including the Department’s Allocable Costs, will be payable by the Concessionaire to the Department within five Days of demand, including accrued interest at the Bank Rate from the date such costs or expenses were incurred to the repayment date; provided, that (i) the Department will not incur any liability to the Concessionaire, and the Concessionaire hereby irrevocably waives and releases any liability of the Department to the Concessionaire, for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default and (ii) the Department’s cure of any Concessionaire Default will not waive or affect the Department’s rights against the Concessionaire by reason of the Concessionaire Default;

(d) except as provided in Section 19.02(e) below, the Department will not incur any liability to the Concessionaire for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default, and the Department’s cure of any Concessionaire Default will not affect the Department’s rights against the Concessionaire by reason of the Concessionaire Default.

(e) without notice and without awaiting lapse of the period to cure, in the event of a Concessionaire Default under Section 19.01(d) (closure of all or any part of the Project or any lane in violation of this Agreement), or any failure to perform a Safety Compliance Order and the Concessionaire Default or failure to perform the Safety Compliance Order results in or prolongs an Emergency or danger to persons or property, the Department may enter and take control of the Project or applicable portion thereof to the extent the Department finds it necessary to rectify the closure, Emergency or danger, and may suspend construction Work and/or close or cause to be closed the portion of the Project affected by the Emergency or danger, until such time as such breach or failure is cured, or the Department terminates this Agreement. In the event of such action by the Department, the Department may, subject to Law, distrain against any of the materials and equipment purchased exclusively for the Project that are situated on the Project and the Concessionaire waives any statutory protections and exemptions in connection therewith. Further, the Concessionaire will pay to the Department on demand the Department’s Allocable Costs in connection with the exercise of the Department’s rights pursuant to this Section 19.02(e). So long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a breach or failure, such action will not be deemed unlawful or a breach of this Agreement, will not expose the Department to any liability to the Concessionaire and will not entitle the Concessionaire to any other remedy, it being acknowledged that the Department has a high priority, paramount public interest in providing and maintaining continuous public access to the Project Assets and in protecting public and worker safety. The foregoing will not, however, protect the Department from the Concessionaire’s lawful Claims for recovery for third party bodily injury or property damage arising out of any such Department action, if and to the extent (i) (A) the Department was mistaken in believing such a breach or failure occurred, or (B) such injury or property damage was caused by the Department’s gross negligence, recklessness or willful misconduct, and (ii) the third party liability is not insured and not required to be insured pursuant to this Agreement. Immediately following rectification of such breach or failure, as determined by the Department,
acting reasonably, the Department will relinquish control and possession of the Project or applicable portion thereof back to the Concessionaire; and

(f) the Department may exercise any of its other rights and remedies provided for hereunder or the other Project Agreements or at law or in equity, except where a specific remedy is expressly provided for herein.

Section 19.03 Financial Close Liquidated Damages

No liquidated damages will be assessed for failure to achieve Financial Close by the Financial Close Deadline.

Section 19.04 Department Default

The occurrence of any one or more of the following events during the Term will constitute a “Department Default” pursuant to this Agreement:

(a) any representation or warranty made by the Department herein or in any other Project Agreement to which the Department and the Concessionaire are parties is false or misleading in any respect on the date made and a material adverse effect upon the Project or the Concessionaire’s rights or obligations under such Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Concessionaire delivers to the Department written notice thereof, with cure regarded as complete only when the adverse effects are remedied;

(b) the Department fails to comply with, perform or observe any material obligation, covenant, agreement, term or condition in this Agreement or any other Project Agreement to which it is a party, which failure materially adversely affects the Concessionaire’s Interest, and such failure continues without cure for a period of 90 Days following the date the Concessionaire delivers to the Department written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; provided, that in the latter case, (i) the Department is proceeding with all due diligence to cure or cause to be cured such failure, (ii) the failure is capable of being cured within a reasonable period of time and (iii) such failure is in fact cured within such period of time; or

(c) subject to Section 25.19, the Department fails to pay to the Concessionaire when due any undisputed amount in excess of $100,000, adjusted annually by the percentage increase in CPI, payable to the Concessionaire pursuant to this Agreement, and such failure continues without cure for a period of 90 Days following the date on which the Concessionaire delivers to the Department written notice thereof.

Section 19.05 Concessionaire Remedies upon Department Default

(a) Upon the occurrence of a Department Default pursuant to this Agreement, the Concessionaire may by notice to the Department declare the Department to be in default and
may, subject to the provisions of Section 19.05(b), do any or all of the following as the Concessionaire, in its discretion, will determine:

(i) the Concessionaire may terminate this Agreement and any Project Agreements to which the Concessionaire and the Department are both parties, to the extent provided in Section 20.04; and

(ii) the Concessionaire may exercise any of its other rights and remedies provided for under this Agreement or at Law, subject to any limitations thereon set forth in this Agreement, including Section 25.09 and Section 25.19.

(b) If the Department’s failure constitutes a Delay Event or Compensation Event, the Concessionaire’s sole recourse will be to seek remedies pursuant to Article 13 and Article 14.

ARTICLE 20.

TERMINATION; HANDBACK

Section 20.01 Termination Upon Expiration of Term

Unless earlier terminated in accordance with the terms of this Article 20, all the rights and obligations of the parties hereunder will cease and terminate, without notice or demand, on the last Day of the Term. Not later than 180 Days preceding the end of the Term, the Concessionaire and the Department will develop a plan (the “Transition Plan”) to assure the orderly transition of the Project to the Department or its designee (which Transition Plan is in addition to the adjustments and changes to the Life Cycle Maintenance Plan under Section 20.02). The parties will then diligently implement the Transition Plan in accordance with the Technical Requirements.

Section 20.02 Handback Obligations and Reserve

(a) Upon the end of the Term, the Concessionaire shall hand-back the Project to the Department, at no charge to the Department, with asset condition having a remaining life of the greater of: (i) five years; or (ii) life within its normal lifecycle (collectively referred to as the “Handback Requirements”). In addition, if requested by the Department, the Concessionaire will dismantle the HOT Lanes toll system as required to convert the HOT Lanes back to HOV Lanes; provided that the Department shall notify the Concessionaire at least one year prior to the end of the Term if the HOT Lanes are to be converted back to HOV Lanes. Any such dismantling of the HOT Lanes toll system shall be at Concessionaire’s sole cost and expense.

(b) Beginning 20 years prior to the expiration of the Term and every five years thereafter, the Concessionaire and the Department will jointly conduct inspections of the Project Assets, for the purposes of jointly (i) determining and verifying the condition of all Project Assets and their residual lives, and (ii) determining, revising and updating the Life Cycle Maintenance Plan to reflect the Handback Requirements.
(c) Beginning five years prior to the expiration of the Term, the Concessionaire and the Department will jointly conduct annual inspections of the Project Assets to ensure that the Handback Requirements will be met.

(d) The Concessionaire shall diligently perform and complete all work contained in the Life Cycle Maintenance Plan prior to reversion of the Project back to the Department, based on the required adjustments and changes to the Life Cycle Maintenance Plan resulting from the inspections and analysis under Section 20.02(b) and (c). The Concessionaire shall complete all such work prior to the end of the Term.

(e) Starting five years prior to the expiration of the Term, the Concessionaire shall post to the Department a ten-year irrevocable Letter of Credit or a Performance Bond for a period of five years after expiration of the Term in an amount equal to 50% of the nominal lifecycle cost expended in the previous five years of the Term pursuant to the most recent Life Cycle Maintenance Plan approved by the Department. This Letter of Credit or Performance Bond may be drawn upon by the Department only in the event that subsequent to termination or expiration of the Term, the Project Assets are found to fail to address the Handback Requirements and in the amount required to address such failures up to the full amount of the Letter of Credit or Performance Bond.

(f) The Department will determine whether the Project Assets meet the Handback Requirements based on routine inspections up to five years after termination or expiration of the Term (“Handback Period”). If the Concessionaire disagrees with the Department’s determination of the condition of the Project Assets during the Handback Period, the Concessionaire may, at its own expense, retain an engineer to inspect the facility and review the findings of the Department. Resolution of any disagreement will be subject to the dispute resolution procedures set forth in Article 21.

Section 20.03 Termination for a Significant Force Majeure Event

(a) If a Significant Force Majeure Event occurs, then

(i) the Concessionaire may elect to terminate this Agreement unless the Department elects, within 14 Days following receipt of the Concessionaire’s written notice of election to terminate, to treat the Significant Force Majeure Event as a Compensation Event; and

(ii) the Department may elect to terminate this Agreement unless the Concessionaire elects, within 60 Days following the Significant Force Majeure Event, to restore any resulting damage or destruction at the Concessionaire’s sole cost and expense and furnishes a restoration plan acceptable to the Department with respect to such damage or destruction;

provided, that a party will exercise its right to terminate this Agreement pursuant to this Section 20.03(a) by delivering to the other party written notice of its election to terminate this Agreement (“Significant Force Majeure Termination Notice”).
(b) If the Concessionaire has elected to restore the Project in accordance with Section 20.03(a)(ii), it will promptly carry out the restoration of the Project in accordance with the terms of this Agreement and the restoration plan approved by the Department.

(c) If this Agreement is terminated pursuant to Section 20.03(a), the Department will pay to the Concessionaire the Significant Force Majeure Termination Amount.

Section 20.04 Termination for Failure to Achieve Financial Close; Termination Based on Excess Interest Rate Fluctuation

(a) Failure to Achieve Financial Close by Financial Close Deadline. If the Concessionaire fails to achieve Financial Close by the Financial Close Deadline, either party may, at its sole discretion, elect to terminate this Agreement and any other Project Agreement to which it is a party. If a party elects to terminate pursuant to this Section 20.04(a), such party will provide written notice of termination to the other party, and such termination will be effective immediately upon delivery of such notice. In the event of such termination, the Department will pay the Concessionaire the Non-Financial Close Termination Amount.

(b) Liability Upon Termination. In the event of any termination under this Section 20.04, the Department will have no liability to the Concessionaire under this Agreement or any other Project Agreement other than the Non-Financial Close Termination Amount, and the Concessionaire will not be entitled to any Concessionaire Damages.

Section 20.05 Termination for Concessionaire Default

(a) Subject to the provisions of the Direct Agreement, at any time after the occurrence and during the continuance of a Concessionaire Default, the Department is entitled to terminate this Agreement and any other Project Agreement to which the Department and the Concessionaire are both parties.

(b) If the Department elects to terminate pursuant to this Section 20.05, the Department will deliver to the Concessionaire and the Collateral Agent written notice of its election to terminate, which termination will take effect not less than 60 Days after the delivery of such notice.

(c) In the event of termination pursuant to this Section 20.05, the Department will pay to the Concessionaire in accordance with Section 25.19, the Concessionaire Default Termination Amount.

(d) A termination by the Department for Concessionaire Default or any other termination of this Agreement by the Department which is later determined by the court of proper jurisdiction to be wrongful or in violation of this Agreement will be deemed to have been a termination for Department Default pursuant to Section 20.06 for the sole purpose of calculating the compensation owed to the Concessionaire by the Department.
Section 20.06 Termination for Department Default

(a) Subject to the provisions of this Section 20.06, the Concessionaire is entitled to terminate this Agreement and any other Project Agreement to which the Concessionaire and the Department are both parties in the event of a Department Default.

(b) If the Concessionaire elects to terminate pursuant to this Section 20.06, the Concessionaire will deliver to the Department a written notice of intent to terminate this Agreement. Upon receipt of such notice of intent to terminate, the Department will be entitled to cure such Department Default by providing the Concessionaire with a written work plan within the 90-Day period after the Department receives the written notice of intent to terminate. The work plan will outline the actions by which the Department will ensure future compliance with the obligation, covenant, agreement, term or condition in this Agreement that the Department failed to perform or observe. The work plan will be subject to the Concessionaire’s written approval (which approval will not be unreasonably withheld, delayed or conditioned).

(c) If (i) the Department fails to provide the Concessionaire with the work plan required pursuant to Section 20.06(b) or (ii) the Department fails to comply in any material respect with the work plan approved by the Concessionaire pursuant to Section 20.06(b) and in the case of this clause (ii), such failure continues without cure for 60 Days following the date the Concessionaire delivers to the Department written notice thereof, the Concessionaire may terminate this Agreement by delivering to the Department written notice of its election to terminate, which termination will take effect not less than 30 Days after the delivery of such notice.

(d) In the event of a termination pursuant to this Section 20.06, the Department will pay to the Concessionaire the Department Default Termination Amount.

Section 20.07 Other Termination

(a) If this Agreement is terminated by the Department or the State prior to the end of the Term, other than pursuant to Sections 19.02, 20.03, 20.04, 20.05 or 20.06, or is canceled, rescinded or voided during the Term, subject to Section 25.19, the Department will pay to the Concessionaire the Other Termination Amount. A termination as contemplated by this Section 20.07 shall not be effective unless and until Project Value has been determined pursuant to Section 20.11.

(b) Each of the Department and Concessionaire hereby acknowledges and agrees that it may only terminate this Agreement in accordance with the express terms hereof.

Section 20.08 Concessionaire Actions Upon Termination

(a) On delivery of notice of termination of this Agreement or the Concessionaire’s rights hereunder for any reason prior to the expiration of the Term, the provisions of this Section 20.08 will apply. The Concessionaire will timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due
to the Concessionaire or the Department on account of termination. In connection with the expiration of the Term, certain provisions of this Section 20.08, as specified, will apply.

(b) The Concessionaire will conduct all discussions and negotiations to determine the amount of any termination compensation, and will share with the Department all data, documents and information pertaining thereto, on an Open Book Basis.

(c) Except as otherwise specified in this Agreement, within 30 Days after receipt of a notice of termination, or, if applicable, not later than 120 Days before expiration of the Term, the Concessionaire will meet and confer with the Department for the purpose of developing an interim transition plan for the orderly transition of Work, demobilization and transfer to the Department of control of the Project and Project Right of Way. The parties will use diligent efforts to complete preparation of the interim transition plan within 15 Days after the date the Concessionaire receives the notice of termination or, if applicable, not later than 15 Days before expiration of the Term. The parties will use diligent efforts to complete a final transition plan within 30 Days after such date. The transition plan will be in form and substance acceptable to the Department in its good faith discretion and will include and be consistent with the other provisions and procedures set forth in this Section 20.08, all of which procedures the Concessionaire will promptly follow, regardless of any delay in preparation or acceptance of the transition plan.

(d) Upon receipt of a notice of termination, or, if applicable, before expiration of the Term, the Concessionaire will take all action that may be necessary, or that the Department may reasonably direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, parts, supplies and other property. For the avoidance of doubt, during the period from its receipt of a notice of termination until the expiration of the Term, the Concessionaire will continue to perform its obligations and be entitled to receive Toll Revenues pursuant to this Agreement.

(e) The Concessionaire will deliver to the Department on the date of expiration of the Term or on the effective date of any earlier termination:

(i) all tangible personal property, reports, books, and records necessary or useful for the Project, and, to the extent provided in Article 18, Work Product and Intellectual Property used or owned by the Concessionaire or any Contractor relating to the Project or the Work; excluding, however, all personal property, machinery, equipment and tools owned or leased by any Contractor and not incorporated or intended to be incorporated into the Project;

(ii) possession and control of the Project and Project Assets (other than the Department Shared Assets), free and clear of any and all Liens created, incurred or suffered by the Concessionaire, any Concessionaire Party or any Affiliate or anyone claiming under any of them; provided, that release of the Liens of the Lenders will be subject to payment of termination compensation owing by the Department;
(iii) all other intangible personal property used or owned by the Concessionaire and relating to or derived from the Project and the Work; and

(iv) a notice of termination of this Agreement and the Concessionaire’s Interest, in the form reasonably required by the Department, executed and acknowledged by the Concessionaire.

(f) If, as of the date on which the notice of termination is delivered, the Concessionaire has not completed construction of all or part of the Project, the Department may, subject to the provisions of the Direct Agreement, elect, by written notice to the Concessionaire and the Design-Build Contractor delivered within 90 Days after the date on which the notice of termination is delivered, to continue in effect the Design-Build Contract or to require the termination of such agreement. If the Department does not deliver written notice of election within such time period, the Department will be deemed to elect to require termination of the Design-Build Contract. If the Department elects to continue the Design-Build Contract in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire’s right, title and interest in and to the Design-Build Contract, and the Department will assume in writing the Concessionaire’s obligations thereunder that arise from and after the end of the Term. If the Department elects (or is deemed to elect) to require termination of the Design-Build Contract, then the Concessionaire will:

(i) unless the Department has granted Replacement Agreements to a Lender or its Substituted Concessionaire, take such steps as are necessary to terminate the Design-Build Contract, including notifying the Design-Build Contractor that the Design-Build Contract is being terminated and that the Design-Build Contractor is to immediately stop work and stop and cancel orders for materials, services or facilities unless otherwise authorized in writing by the Department;

(ii) immediately and safely demobilize and secure construction, staging, lay down and storage areas for the Project Assets and Utility Relocations included in the construction Work in a manner satisfactory to the Department, and remove all debris and waste materials except as otherwise approved by the Department in writing;

(iii) take such other actions as are necessary or appropriate to mitigate further cost;

(iv) subject to the prior written approval of the Department, settle all outstanding liabilities and all Claims arising out of the Design-Build Contract;

(v) cause the Design-Build Contractor to execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Design-Build Contractor’s right, title and interest in and to (A) all third party agreements and permits, except Contracts for performance of the Design-Build Work; provided, that the Department assumes in writing all of the Design-Build Contractor’s obligations thereunder that arise after the effective date of termination
and (B) all assignable warranties and Claims held by the Design-Build Contractor against other Contractors and other third parties in connection with the Project or the Work; provided that the Design-Build Contractor will be entitled to retain its rights and remedies with respect to Work performed prior to the effective date of termination; and

(vi) carry out such other directions as the Department may give for suspension or termination of Work performed under the Design-Build Contract.

(g) If, as of the date notice of termination is delivered, the Concessionaire has entered into any other Contract for the design, construction, permitting, installation and equipping of the Project, the Department will elect, by written notice to the Concessionaire, to continue in effect such Contract or to require its termination. If the Department elects to continue the Contract in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire’s right, title and interest in and to the Contract, and the Department will assume in writing the Concessionaire’s obligations thereunder that arise from and after the effective date of termination. If the Department elects to require termination of the Contract, then the Concessionaire will take actions comparable to those set forth in Section 20.08(f) with respect to the Contract.

(h) If, as of the date notice of termination is delivered, the Concessionaire has entered into any operations or maintenance Contract, the Department will elect, by written notice to the Concessionaire, to continue it in effect or require its termination; provided, that if a Lender is entitled to Replacement Agreements following termination, the Department will not elect to terminate any such Contract until the Lender’s right to Replacement Agreements expires without exercise. If the Department elects to continue any such Contract in effect, then on or about the effective date of termination (or promptly after any later election to terminate) the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire’s right, title and interest in and to the Contract, and the Department will assume in writing the Concessionaire’s obligations thereunder that arise from and after the effective date of termination.

Section 20.09 Liability After Termination; Consequences of Termination

(a) If this Agreement is terminated by reason of a Concessionaire Default or a Department Default or any other Project Agreement is terminated for default thereunder, such termination will not excuse the defaulting party from any liability arising out of such default as provided in the Project Agreements. If any outstanding Claim of the Concessionaire against the Department that is independent of the event of termination and determination of the termination compensation is resolved prior to payment of the termination compensation (if any), the parties will adjust the termination compensation by the amount of the unpaid award, if any, on the Claim. Notwithstanding the foregoing, any termination of this Agreement will automatically extinguish any Claim of the Concessionaire to payment of Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination; provided, however, that (i) Claims for
any such Net Cost Impacts that cannot reasonably be avoided by the Concessionaire will not be extinguished, and (ii) the foregoing will not limit any Claim of the Concessionaire for interest on unpaid amounts owing or to become owing by the Department as provided herein.

(b) If this Agreement is terminated by any reason other than a Concessionaire Default or a Department Default or any other Project Agreement is terminated other than a termination for default, no party will have any further obligation or liability except for performance of their respective obligations which are either expressly stated in this Agreement or any other Project Agreement to survive termination or by their sense and context are intended to survive termination.

(c) The Department will, as of the effective date of termination of this Agreement or the Concessionaire’s rights hereunder, whether due to expiration or earlier termination of the Term, assume full responsibility for the Project or, if Substantial Completion has not been achieved or other Work has otherwise not been completed as of such date, be permitted to assume full responsibility for such outstanding Work, and as of such date, the Concessionaire will have no liability or responsibility for such Work, as the case may be, occurring after such date; provided, that the Department and the Concessionaire will remain fully responsible for all of their respective obligations or liabilities pursuant to this Agreement or any other Project Agreement arising before the effective date of termination and those obligations pursuant to this Agreement or other Project Agreements which survive termination.

(d) Each of the Concessionaire and the Department will be liable for all costs, expenses and other amounts for which it is liable or responsible hereunder incurred up to the effective date of termination of this Agreement or the Concessionaire’s rights hereunder, whether due to expiration or earlier termination of the Term, and the Concessionaire will not be liable for any costs, expenses and amounts incurred in connection with the Project or the Work on and after such date, except to the extent such costs, expenses and amounts are properly included in the measure of any damages due to the Department arising from a default by the Concessionaire pursuant to this Agreement. The amount of any termination compensation is subject to reduction and offset for such damages.

(e) Regardless of the Department’s prior actual or constructive knowledge thereof, no contract or agreement to which the Concessionaire is a party (unless the Department is also a party thereto) as of the effective date of termination will bind the Department, unless the Department elects to assume such contract or agreement in writing. Except in the case of the Department’s express written assumption, no such contract or agreement will entitle the contracting party to continue performance of work or services respecting the Project following the effective date of termination, or to any Claim, legal or equitable, against the Department.

(f) As of the effective date of termination of this Agreement, whether due to expiration or earlier termination of the Term, the Permit and all of the Concessionaire’s Interest will automatically terminate and expire, and all Liens created, permitted or suffered by the Concessionaire will be automatically extinguished, provided however, that the foregoing will not prohibit the Concessionaire from assigning its right to receive termination payments to the Lenders.
Section 20.10 Exclusive Termination Remedies

(a) Each of the Department and the Concessionaire hereby acknowledges and agrees that it may only terminate this Agreement in accordance with the express terms hereof.

(b) Article 19 and this Article 20 set forth the entire and exclusive provisions and rights of the Department and the Concessionaire regarding termination of this Agreement, and any and all other rights at law or in equity to terminate or to payment of compensation upon termination are hereby waived to the maximum extent permitted by Law. The parties hereto agree that, upon any termination of this Agreement, the payments provided herein will constitute the Concessionaire’s sole compensation (and the Concessionaire shall have no further liability to the Department except as otherwise provided herein) pursuant to this Agreement and in the event the Department or any designee or licensee of the Department imposes tolls for travel on the Project after termination of this Agreement, neither the Concessionaire nor any beneficiary or Lender as a result of a Financing Assignment will be entitled to any further compensation in respect thereof. In furtherance of the foregoing, the parties hereto agree that the provisions of Section 56-568B of the Code of Virginia will not apply to the Project after the termination of this Agreement.

Section 20.11 Determination of Project Value

(a) In the event the Department owes the Concessionaire an amount calculated by reference to the Project Value, Project Value will be determined according to the following procedures:

(i) within 30 Days after a party requests the appointment of an appraiser, the Department and the Concessionaire will confer in good faith to mutually appoint an independent third-party appraiser to determine the Project Value by written appraisal. This appraiser must be nationally recognized and experienced in appraising similar assets;

(ii) if the parties are unable to agree upon such a single appraiser within such 30-Day period, then within ten Days thereafter the Department and the Concessionaire will each appoint an independent third-party appraiser and both such appraisers will be instructed jointly to select, within 15 Days after they are appointed, a third independent third-party appraiser who is nationally recognized and experienced in appraising similar assets to make the appraisal referred to above;

(iii) if the appraisers appointed by the parties are unable to appoint an independent third-party appraiser under Section 20.11(a)(ii) within 60 Days after a party has requested the appointment of an appraiser under Section 20.11(a)(i), then either party may petition the Circuit Court for the City of Richmond to appoint an independent third-party appraiser having such reputation and experience;
(iv) each party will pay the costs of its own appraiser. The Department and the Concessionaire will pay in equal shares the reasonable costs and expenses of the third independent appraiser;

(v) each party will diligently cooperate with the appraiser, including promptly providing the appraiser with data and information regarding the Project, Project Right of Way, asset condition, historical cost and revenue data, and other information the appraiser may request that is in the possession of or reasonably available to the party. Each party will provide the appraiser with access to the party’s books and records regarding the Project on an Open Book Basis; and

(vi) once appointed, the independent third-party appraiser will conduct an appraisal of the Project Value and deliver to both parties a draft appraisal report and draft valuation. The appraisal will determine Project Value as of the effective date of termination of the Agreement, based on the then condition of the Project (but without regard to any damage or loss resulting from a Department Default). The appraiser will appraise Project Value by taking into account the terms and conditions of this Agreement, projected cash flows and projected costs of the Project for the remainder of the projected Term had this Agreement not been terminated, as determined by the appraiser. For the avoidance of doubt, the calculation of Project Value is the sum of the fair market value of the projected Distributions for the remainder of the Term without taking into consideration any terminations pursuant to Article 20 and the fair market value of any Concessionaire Debt outstanding as of the date of the calculation, and will include Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination. In conducting the appraisal, and before issuing a draft appraisal report, the independent appraiser will afford reasonable and comparable opportunity to each party to provide the appraiser with information, data, analysis and reasons supporting each party’s view on the Project Value. The parties will have 15 Days after receipt of the draft appraisal report to comment thereon. After the opportunity to comment has expired, the independent third-party appraiser will consider and evaluate all comments, prepare a final appraisal report stating the Project Value, and deliver the final appraisal report to both parties.

(b) If either party disagrees with the Project Value, either party may invoke the dispute resolution procedures set forth in Article 21, by delivery of notice to the other party within 60 Days following receipt of the appraiser’s report. Failure to invoke the dispute resolution procedures within such time period will conclusively constitute acceptance of the Project Value.
ARTICLE 21.

DISPUTE RESOLUTION

Section 21.01 General

(a) The parties will attempt to resolve any Disputes arising out of this Agreement at the Project level through good faith negotiations between designated representatives. The Department, the Concessionaire, the Design-Build Contractor, all subcontractors and the FHWA are firmly committed to the following principles:

(i) trust and open communications are encouraged and expected by all participants;

(ii) all of the participants move quickly to address and resolve issues at the lowest possible level by approaching problems from the perspectives and needs of all of the participants involved;

(iii) all of the participants have identified common goals and respect each other’s individual goals and values; and

(iv) all of the participants create an atmosphere conducive to cooperation and teamwork in finding better solutions to potential problems and issues at hand.

(b) If the Dispute cannot be resolved at the Project level in accordance with Section 21.01(a) above, then either party will have the right to submit the Dispute to the Steering Committee for resolution. The Steering Committee will convene a meeting within ten Days of notification by either party of any unresolved Dispute. After the meeting has convened, the Steering Committee will have seven Days to resolve the Dispute.

(c) If the Steering Committee has not resolved the Dispute pursuant to Section 21.01(a)(i), then either party may request non-binding mediation of the Dispute or any other form of alternative dispute resolution process that is mutually acceptable to both parties. If the Dispute has not been resolved within 60 Days after the initiation of mediation proceedings or, if both parties do not agree to mediation, the other form of alternative dispute resolution process, either party will have the right to proceed in accordance with Section 21.02. The first face-to-face meeting between the mediator and both parties will be deemed to be the initiation of mediation.

(d) Any of the time periods specified in this Section 21.01 may be extended by mutual agreement of the parties.

Section 21.02 Litigation; Venue

(a) All litigation between the parties arising out of or pertaining to this Agreement or its breach will be filed, heard and decided in the Circuit Court for the City of Richmond, Virginia, Division I, which will have exclusive jurisdiction and venue.
(b) As permitted by Section 56-569 of the Code of Virginia, the parties agree that any requirement that the State Corporation Commission issue a declaratory judgment regarding a material default (as defined in Section 56-568 of the Code of Virginia) pursuant to such Section 56-569, as a prerequisite to exercising any remedy set forth in this Agreement or such Section 56-569, will not apply to this Agreement.

(c) Satisfaction of the procedures set forth in Section 21.01 will be a condition precedent to instituting a legal action in court; provided, that if the Department determines, in its sole discretion, that a Dispute involves an issue that poses an immediate and serious threat to the public health, safety and welfare, the Department will be entitled to take whatever steps it deems appropriate and to initiate litigation of the matter in court without first submitting the Dispute to the dispute resolution procedures of this Agreement.

Section 21.03 Conduct During Pendency of Dispute

(a) Notwithstanding anything to the contrary in this Agreement, neither party will be required to await the resolution of dispute proceedings regarding the reasons for terminating this Agreement before exercising such party’s termination rights.

(b) Pending final resolution of any Dispute (except a Dispute regarding the cause for terminating this Agreement), the parties will continue to fulfill their respective obligations under this Agreement.

Section 21.04 Costs of Dispute Resolution

(a) Each party will bear its own attorneys’ fees and costs in any Dispute or litigation arising out of or pertaining to this Agreement, and no party will seek or accept an award of attorneys’ fees or costs, except as otherwise expressly provided herein.

(b) The fees and costs of any mediator will be borne equally by each party.

ARTICLE 22.

RESERVED RIGHTS

Section 22.01 Exclusions from the Concessionaire’s Interest

The Concessionaire’s rights and interests in the Project have been granted to the Concessionaire under the Permit in order to enable it to accomplish the Project Purposes. Subject to Section 22.04, the Concessionaire’s rights and interests consist only of those expressly granted by this Agreement and other Project Agreements and specifically exclude all Reserved Rights.

Section 22.02 Department Reservation of Rights

(a) The Department may, at any time at its sole cost and expense, devote, use or take advantage of the Reserved Rights for any public purpose without any financial participation
whatsoever by the Concessionaire. The Department hereby reserves to itself all ownership, development, maintenance, repair, replacement, operation, use and enjoyment of, and access to, the Reserved Rights. The Department will owe no compensation or damages on account of its exercise of Reserved Rights, unless such exercise qualifies as a Compensation Event.

(b) In addition to any rights it has, the Department reserves (for itself and its representatives, as well as others claiming by, through or under the Department) the right and will have the right to enter the Project Assets and each and every part thereof at all reasonable times in the following circumstances:

(i) in the event of an actual or reported emergency, danger, threat, circumstance or event that is reasonably believed by the Department or its designee (including relevant police, fire, emergency services, armed forces, and any other security or emergency personnel in accordance with Section 9.06) to have caused (or to present the imminent potential to cause) injury to individuals, damage to property, or threat to the Environment or to public safety, to take, at such times, as the Department determines necessary in its discretion and with notice to the Concessionaire if practicable under the circumstances, such actions as the Department or such designee determines necessary to respond to or to rectify such emergency, danger, threat, circumstance or event; and

(ii) in the event of any circumstance or event that is reasonably believed by the Department to have caused an impairment to the continuous operation of the HOT Lanes as a public highway, and if the Department in its discretion determines that the Concessionaire is not then taking all necessary steps to respond to or to rectify such circumstance or event, to take, at such times as the Department determines necessary in its discretion and with notice to the Concessionaire if practicable under the circumstances, such actions as the Department determines may be necessary to respond to or to rectify such circumstance or event or to restore the operation of the Project, and all costs and expenses incurred by the Department in connection with or related to such actions will be paid by the Concessionaire.

(c) The Concessionaire acknowledges and agrees that all rights to own, lease, sell, assign, transfer, utilize, develop or take advantage of the Reserved Rights are hereby reserved to the Department, and the Concessionaire will not engage in any activity infringing upon the Reserved Rights.

Section 22.03 Disgorgement

If a Concessionaire Default concerns a breach of the provisions of Section 22.01 or Section 22.02, in addition to any other remedies pursuant to this Agreement, the Department will be entitled to disgorgement of all profits from the prohibited activity and to sole title to and ownership of the prohibited assets and improvements.
Section 22.04 Alternate Treatment of Reserved Rights

Notwithstanding Section 22.01 and Section 22.02, the Department may elect in its sole discretion to treat any development of improvements respecting Reserved Rights that it undertakes as Project Enhancements, in which case all of the provisions of Section 12.02 will apply.

Section 22.05 Naming Rights

(a) The Department hereby grants the Concessionaire the naming rights for the Project, subject to (i) approval of any such name by the Department, which approval will not be unreasonably withheld, conditioned or delayed, and (ii) compliance with Law and Governmental Approvals. The Concessionaire will request the Department’s approval of a name for the Project in writing and no such approval will be effective unless and until provided in writing by the Department; provided, that the failure of the Department to respond in writing to such request within 21 Days following receipt of the Concessionaire’s request will be deemed the Department’s approval thereof. The Concessionaire may sub-license any such rights to the O&M Contractor.

(b) If the Concessionaire changes the name of the HOT Lanes, the Concessionaire will pay the Department for the cost of changing names on signs maintained by the Department pursuant to the Technical Requirements.

(c) For purposes of the Permit Fee calculation, any revenues received by the Concessionaire with respect to the naming rights granted to the Concessionaire under this Section 22.05 will be treated as Gross Revenues.

ARTICLE 23.

REPRESENTATIONS, WARRANTIES AND FINDINGS

Section 23.01 Department Representations and Warranties

The Department hereby represents and warrants to the Concessionaire as follows:

(a) the Department is an agency of the State and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with, and subject to the terms and conditions of this Agreement and other Project Agreements to which the Department is a party;

(b) each person executing this Agreement or any other Project Agreement on behalf of the Department to which the Department is a party has been or at such time will be duly authorized to execute each such document on behalf of the Department;

(c) neither the execution and delivery by the Department of this Agreement and the other Project Agreements executed concurrently herewith to which the Department is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will
result in a default under or violation of (i) any other agreements or instruments to which it is a party or by which it is bound or (ii) to its knowledge, any Law, where such violation will have a material adverse effect on the ability of the Department to perform its obligations under this Agreement;

(d) there is no action, suit, proceeding, investigation or litigation pending and served on the Department which challenges the Department’s authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Department is a party, or which challenges the authority of the Department official executing this Agreement or the other Project Agreements, and the Department has disclosed to the Concessionaire any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Department is aware;

(e) as of the Agreement Date, no agreement, contract, option, commitment or other right exists which binds, or which in the future may become binding on, the Department to sell, transfer, convey, dispose of or encumber the Project. The Department has not granted or assigned any interest in Gross Revenues to any other party other than the Concessionaire pursuant to this Agreement;

(f) this Agreement has been duly authorized, executed and delivered by the Department and constitutes a valid and legally binding obligation of the Department, enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;

(g) the Department has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Department is a party;

(h) the Department is in material compliance with all Laws and Governmental Approvals applicable to its obligations in connection with this Agreement; and

(i) other than with respect to portions of the Project Right of Way not yet acquired as of the Agreement Date, the Department has good and sufficient title and interest to the Project Right of Way, free and clear of all Liens or other exceptions to title, except Permitted Encumbrances.

Section 23.02 Concessionaire Representations and Warranties

The Concessionaire hereby represents and warrants to the Department as follows:

(a) the Concessionaire is a duly organized limited liability company created under the laws of the State of Delaware, is qualified to conduct business in the State, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute and perform each and all of its obligations under the Project Agreements;
(b) as of the Agreement Date, the membership interests in the Concessionaire are owned in 90% holdings by DRIVe USA Investments LLC and 10% holdings by Fluor and no other Person has a membership interest in the Concessionaire;

(c) the Concessionaire has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Concessionaire is a party;

(d) each person executing this Agreement or any other Project Agreement on behalf of the Concessionaire has been or will at such time be duly authorized to execute each such document on behalf of the Concessionaire;

(e) this Agreement and each Project Agreement to which the Concessionaire or a Concessionaire Financial Party is a party have been duly authorized, executed and delivered by the Concessionaire or the Concessionaire Financial Party and constitutes a valid and legally binding obligation of the Concessionaire or the Concessionaire Financial Party (as the case may be), enforceable against it in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;

(f) neither the execution and delivery by the Concessionaire of this Agreement and the other Project Agreements to which the Concessionaire is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or a violation of (i) the governing instruments of the Concessionaire or any other agreements or instruments to which it is a party or by which it is bound or (ii) to its knowledge, any Law, where such violation will have a material adverse effect on the ability of the Concessionaire to perform its obligations under this Agreement;

(g) there is no action, suit, proceeding, investigation or litigation pending and served on the Concessionaire which challenges the Concessionaire’s authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Concessionaire is a party, or which challenges the authority of the Concessionaire official executing this Agreement or the other Project Agreements; and the Concessionaire has disclosed to the Department any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Concessionaire is aware;

(h) the Concessionaire is in material compliance with all Laws applicable to the Concessionaire or its activities in connection with this Agreement and the other Project Agreements;

(i) none of the Concessionaire, any affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905), or the Design-Build Contractor or their affiliates (as so defined) is suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any Federal or State department or agency;
(j) to the best of the Concessionaire’s knowledge after diligent inquiry, no event which, with the passage of time or the giving of notice, would constitute a Concessionaire Default has occurred;

(k) to the best of the Concessionaire’s knowledge after diligent inquiry, no event which, with the passage of time or the giving of notice, would constitute a Delay Event or a Compensation Event under this Agreement has occurred;

(l) the Initial Base Case Financial Model (i) was prepared by or on the Concessionaire’s behalf in good faith, (ii) fully discloses all Financial Model Formulas, and all cost, revenue and other financial assumptions and projections that the Concessionaire used or is using in making its decision to enter into this Agreement, (iii) fully discloses all Financial Model Formulas disclosed to the Lenders under the Project Financing Agreements and (iv) as of the Agreement Date, represents the projections that the Concessionaire believes in good faith are realistic and reasonable for the Project; provided, that such projections are based upon a number of estimates and assumptions and are subject to significant business, economic and competitive uncertainties and contingencies and that, accordingly, no representation or warranty is made that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results;

(m) on or before the Agreement Date, the Concessionaire has delivered to the Department an audit report and an opinion of the Financial Model Auditor addressed to the Department to the effect that the Base Case Financial Model and the Financial Model Formulas reflect the terms of this Agreement and that the Financial Model Formulas and the Base Case Financial Model are suitable for use herein in connection with Compensation Events, Delay Events and early termination procedures, and covering such other matters as may have been reasonably requested by the Department, all in form and substance acceptable to the Department; and

(n) All Early Work performed by Fluor and Transurban prior to the Agreement Date was performed in accordance with (i) Law; (ii) Governmental Approvals; and (iii) prudent industry practices, methods, techniques and standards and using the degree of care that would be expected to be exercised by a prudent, skilled and experienced developer engaged in the same kinds of undertakings and under the same or similar circumstances, conditions, scope and limitations (including limitations on access to the Project Right of Way and limitations agreed with the Department as to the scope of the work to be undertaken prior to the Agreement Date) as those applying to such work.

Section 23.03 Department’s Findings Under the Act

The Department, as the Responsible Public Entity with respect to the Project, makes the following findings:

(a) the actions taken by the Department pursuant to the Act facilitate the development, design, construction, management, operation and maintenance of the Project and the timely development of any Project Enhancements, and such public need may not be wholly
satisfied by existing methods of procurement in which qualifying transportation facilities are
developed and/or operated;

(b) there is a public need to construct and operate a qualifying transportation facility
(as defined in Section 56-557 of the Code of Virginia) of the type of the Project;

(c) the Permit granted hereunder authorizing the Concessionaire to develop, design,
construct, manage and operate and maintain the Project, including the development of any
Project Enhancements, may result in their availability to the public in a more timely, more
efficient and less costly fashion, thereby serving the public safety and welfare;

(d) the Project, its interconnections with existing transportation facilities, and the
Concessionaire’s plans for the development, design, construction, operation and maintenance of
the Project are reasonable and compatible with the State transportation plan and with local
comprehensive plans;

(e) the estimated cost of developing, designing, constructing, operating and
maintaining the Project is reasonable in relation to similar transportation facilities;

(f) the Concessionaire’s plans will result in the timely construction and operation and
maintenance of the Project and in the development of any Project Enhancements;

(g) the Department will continue to have fee title or good and valid interest to the
Project and the Project will remain open for use by members of the public as a public road upon
payment of the applicable tolls;

(h) through this Agreement, the Department intends to encourage investment in the
State by the Concessionaire to facilitate the development, construction, operation and
maintenance of the Project and the development of any Project Enhancements; and

(i) the terms and conditions of this Agreement serve the public purpose of the Act.

ARTICLE 24.

CONTRACTING PRACTICES AND PUBLIC WELFARE CONSIDERATIONS

Section 24.01 Obligation to Refrain from Discrimination

The Concessionaire covenants and agrees that it will not discriminate and it will require
all Contractors not to discriminate against any person, or group of persons, on account of age,
sex, marital status, race, creed, color, national origin, religion or the presence of any sensory,
mental or physical handicap in the permitting, design, acquisition, construction, maintenance,
operation or management of the Project, nor will the Concessionaire establish or permit any such
practice or practices of discrimination or segregation with reference to the selection, use, hiring,
iring, promotion or termination of employees, Contractors, and vendors or with reference to the
use, occupancy or enjoyment of or access to or toll rates charged for use of the Project; provided,
that the prohibition against discrimination on the basis of sensory, mental or physical handicap
Section 24.02 Contracting

(a) General. The Concessionaire may perform the Work through use of its own personnel, materials and equipment, or by contracting to Persons with the expertise, qualifications, experience, competence, skills and know-how to perform the responsibilities being contracted in accordance with all Law, all Governmental Approvals, and the terms, conditions and standards set forth in this Agreement.

(b) Design-Build Contractor. The Concessionaire has entered into the Design-Build Contract. Notwithstanding its use of the Design-Build Contractor, the Concessionaire remains responsible for the Design-Build Work during the Term in accordance with this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement or removal of the Design-Build Contractor.

(c) Shared Facilities Agreement. The Concessionaire has entered into the Shared Facilities Agreement with CBE for the use of the Express Operations Center. In connection therewith, the Concessionaire agrees to provide to the Department copies of all notices received or given by the Concessionaire pursuant to the Shared Facilities Agreement, unless otherwise mutually agreed to by the parties.

(d) O&M Contractor.

(i) Subject to the Department’s approval, which will not be unreasonably withheld, the Concessionaire may contract with one or more separate O&M Contractors with the expertise, qualifications, experience, competence, skills and know-how to perform the operations and maintenance obligations of the Concessionaire in accordance with this Agreement; provided, that the Department’s approval will not be required with respect to any Contractor with respect to the O&M Work (other than the O&M Contractor) (A) whose Contract price is less than $4 million adjusted annually by the percentage increase in CPI and (B) is prequalified with the Department in accordance with the Department’s Rules Governing Prequalification Privileges. Notwithstanding its use of an O&M Contractor, the Concessionaire remains ultimately responsible for the operation and maintenance of the Project during the Term in accordance with this Agreement. The O&M Contractor will be subject at all times to the direction and control of the Concessionaire, and any delegation to an O&M Contractor does not relieve the Concessionaire of any of its obligations, duties or liability pursuant to this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement, removal or resignation of an O&M Contractor. Subject to the Direct Agreement, any agreement between the Concessionaire and any O&M Contractor will by its terms terminate, without penalty, at the election of the Department upon five Days’ notice to such O&M Contractor upon the termination of this Agreement. The O&M Contractor will have no interest in or rights pursuant to this Agreement or the Project.
(ii) Each O&M Contractor and its Contract will comply with this Section 24.02. In addition, the material terms of the proposed Contract of the O&M Contractor must be consistent with the corresponding duties and obligations of the Concessionaire pursuant to this Agreement and the other Project Agreements.

(iii) The O&M Contractor and its Affiliates may contract to receive or recover overhead costs ("O&M Overhead Costs") that are consistent with Part 31 of the Federal Acquisition Regulation principles and will provide the Department with a report on these costs. Any such O&M Overhead Costs will not include excluded costs of the nature described in subsection (b) of the definition of Operating Costs and will include only those costs that provide a direct and measurable benefit to the Project when compared with projects of similar scope and complexity. Any O&M Overhead Costs charged by an Affiliate of the O&M Contractor will be arms-length and commercially reasonable.

(e) Replacement of Design-Build Contractor or O&M Contractor. Before entering into any Contract replacing the initial Design-Build Contractor or O&M Contractor, as applicable, the Concessionaire will submit a true and complete copy of the proposed Contract for the Department’s review and approval, subject to the following:

(i) the Department may disapprove such proposed Contract if such Contract or the Work to be performed thereunder does not comply, or is inconsistent, in any material respect with the applicable requirements of this Agreement; and

(ii) the Department may disapprove, in its sole discretion, of the replacement Contractor after taking into account the following factors:

(A) the financial strength and integrity of the proposed Contractor, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;

(B) the capitalization of the proposed Contractor or any parent guarantor, as applicable;

(C) the experience of the proposed Contractor and each of its direct Contractors in constructing or operating toll roads or highways and performing other projects;

(D) the presence of any actions, suits or proceedings, at law or in equity, or before any Governmental Authority, pending or, to the best of such Contractor’s knowledge, threatened against such Contractor, that would or could reasonably be expected to have a material adverse effect on its ability to perform its obligations under the Contract;

(E) the background of the proposed Contractor, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees
and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person’s past or present performance on other projects); and

(F) the Contractor’s compliance with any of the other provisions of this Section 24.02.

(f) Each Contract for the performance of the Work that the Concessionaire executes at a minimum:

(i) will set forth a standard of professional responsibility or a standard for commercial practice equal to prudent industry standards for work of similar scope and scale and will set forth effective procedures for Claims and change orders;

(ii) will establish provisions for prompt payment by the Concessionaire in accordance with the provisions of Sections 2.2-4347 through 4355 of the Code of Virginia, which would apply if the Department was contracting with such Contractor;

(iii) will require the Contractor to carry out its scope of work in accordance with Law, the Technical Requirements, all Governmental Approvals, Good Industry Practice and the terms, conditions and standards set forth in this Agreement;

(iv) will set forth warranties, guaranties and liability provisions of the contracting party in accordance with Good Industry Practice for work of similar, scope and scale;

(v) will be fully assignable to the Department upon termination of this Agreement, such assignability to include the benefit of all Contractor warranties, indemnities, guarantees and professional responsibility;

(vi) will include express requirements that, if the Department succeeds to the Concessionaire’s rights under the subject Contract (by assignment or otherwise), then the relevant Contractor agrees that it will (A) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer, service provider), (B) permit audit thereof by the Concessionaire, and provide progress reports to the Concessionaire appropriate for the type of Contract it is performing sufficient to enable the Concessionaire to provide the reports it is required to furnish the Department pursuant to this Agreement and (C) allow the Department, to assume the benefit of the Concessionaire’s Contract rights and the work performed thereunder, with liability only for those remaining obligations accruing after the date of assumption, but excluding any monetary claims or obligations that the Concessionaire may have against such Contractor that existed prior to the Department’s assumption of such Contract;
(vii) will not be assignable by the Contractor without the Concessionaire’s prior written consent; provided, that the foregoing will not limit permitted subcontracting of the Work;

(viii) will expressly require the Contractor to participate in meetings between the Concessionaire and the Department, upon the Department’s reasonable request, concerning matters pertaining to such Contractor or its work; provided, that all direction to such Contractor will be provided by the Concessionaire; and provided further, that nothing in this Section 24.02(f)(viii) will limit the authority of the Department to give such direction or take such action which in the opinion of the Department is necessary to remove an immediate and present threat to the safety of life or property;

(ix) will expressly provide that all Liens and claims of any Contractors at any time will not attach to any interest of the Department in the Project or the Project Right of Way; and

(x) will be consistent in all other respects with the terms and conditions of this Agreement to the extent such terms and conditions are applicable to the scope of work of such Contractor.

(g) The Concessionaire will not enter into any Contract at any level with any Person if that Person or any of its affiliates (as “affiliate” is defined in 29 CFR §98.905), or any of their respective officers, directors and employees, (i) is then suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any Federal or State department or agency, (ii) has been convicted, pled guilty or nolo contendere to a violation of Law involving fraud, conspiracy, collusion, bribery, perjury, material misrepresentation, or any other violation that shows a similar lack of moral or ethical integrity or (iii) is then barred or restricted from owning, operating or providing services for the Project under Law, including the Foreign Investment and National Security Act of 2007, 50 USC App. 2170 (HR556).

(h) The Concessionaire will include provisions in each Contract for the performance of the Work that the Concessionaire executes requiring the Contractor: (i) to maintain all licenses required by Law; (ii) if the Department makes a direct payment under such Contract, to comply with the requirements of the eVA Business to Government Vendor System or its successor; and (iii) to include in Contracts for the performance of the Work that such Contractor executes the provisions set forth in this Section 24.02(h).

(i) The Concessionaire will include provisions in each Contract for the performance of the Work that the Concessionaire executes (i) naming the Department as a third-party beneficiary of all Contractor representations and warranties contained in such Contract and (ii) requiring the Contractor to include in Contracts for the performance of the Work that such Contractor executes to name the Department as a third-party beneficiary of all Contractor representations and warranties contained in such Contract; provided, that the Department will have the right to exercise its rights under such representations and warranties only so long as the Concessionaire, the Contractor or a Lender is not pursuing remedies thereunder.
(j) The Concessionaire will not contract any part of the Design-Build Work or the O&M Work to a Contractor who is not prequalified with the Department in accordance with the Department’s Rules Governing Prequalification Privileges, unless otherwise indicated in this Agreement. This restriction does not apply to contract specialty items, consultants, manufacturers, suppliers, haulers or snow removal service providers.

(k) The appointment of Contractors will not relieve the Concessionaire of its responsibility hereunder or for the quality of work, materials and services provided by it. The Concessionaire will at all times be held fully responsible to the Department for the acts and omissions of its Contractors and persons employed by them and no Contract entered into by the Concessionaire will impose any obligation or liability upon the Department to any such Contractor or any of its employees. Further, absent the Department’s express written consent, no Contract or delegation of Work thereunder will affect the obligation of the Concessionaire to directly communicate with the Department and to oversee the Work of the Contractor. Nothing in this Agreement will create any contractual relationship between the Department and a Contractor.

(l) The Concessionaire will not enter into or materially amend an Affiliate Contract without notice to and consent of the Department, which consent will not be unreasonably withheld or delayed if the Contract is entered into in the ordinary course of business and the Concessionaire demonstrates to the Department’s satisfaction that the Affiliate Contract is on overall terms no less favorable or unfavorable to the Concessionaire than terms the Concessionaire could obtain in an arm’s-length transaction for comparable services with a Person that is not an Affiliate of the Concessionaire; provided, that no consent will be required for (i) reasonable overhead sharing fees and reimbursement of third-party costs payable to an Affiliate for legal, accounting, tax, computer and other centralized management services provided to the Concessionaire in lieu of the Concessionaire having its own employees for such functions; or (ii) the joint ownership of assets or property used for the operation or maintenance of the Project and other projects owned or operated by Affiliates of the Concessionaire so long as the cost of such assets and properties are reasonably shared and documented.

(m) From and after the Agreement Date, the Concessionaire will be solely responsible for paying each Contractor and any other Person to whom any amount is due from the Concessionaire for services, equipment, materials and supplies in connection with the Work. Pursuant to Section 2.2-4354 of the Code of Virginia, the Concessionaire will require the Design-Build Contractor and O&M Contractor, within seven Days following receipt of monies from the Concessionaire for work performed by any Contractor of the Design-Build Contractor or O&M Contractor, to either (i) pay such Contractor for the proportionate share of the total payment received from the Concessionaire attributable to the Work performed by such Contractor or (ii) notify the Concessionaire and such Contractor, in writing, of the Design-Build Contractor’s or O&M Contractor’s intention to withhold all or a part of the Contractor’s payment, specifying the reason for the non-payment. The Concessionaire also agrees that it will require the Design-Build Contractor and O&M Contractor to include in all of its Contracts a provision that (A) obligates the Design-Build Contractor or O&M Contractor, as applicable, to pay interest to its Contractors on all amounts owed by the Design-Build Contractor or O&M
Contractor, as applicable, that remain unpaid after seven Days following receipt of monies from the Concessionaire for work performed by its Contractor, except for amounts withheld as allowed in clause (ii) of this Section 24.02(m); (B) states, “Unless otherwise provided under the terms of this contract, interest will accrue at the rate of one percent per month.” and (C) obligates each Contractor to include or otherwise be subject to the same payment and interest requirements as specified in this Section 24.02(m) with respect to each lower-tier Contractor.

(n) Upon entering into a Contract for the Design-Build Work or O&M Work in excess of $100,000, the Concessionaire will provide the Department with a copy of such Contract and, if such Contract is with an Affiliate of the Concessionaire, a list of all Contracts in effect to which such Affiliate is a party and under which all or a substantial portion of the Affiliate’s responsibilities or obligations under its Contract are delegated to its Contractor. The Concessionaire will allow the Department ready access to all Contracts and records regarding Contracts, including amendments and supplements to Contracts and guarantees thereof.

(o) As soon as the Concessionaire identifies a potential Contractor for a potential Contract described in the first sentence of Section 24.02(n), but in no event later than five Days after Contract execution, the Concessionaire will notify the Department in writing of the name, address, phone number and authorized representative of such Contractor.

Section 24.03 Small, Women-Owned and Minority Business (SWaM) and Disadvantaged Business Enterprise (DBE) Reporting

(a) Disadvantaged Business Enterprise (DBE).

(i) General.

(A) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the DBE program, where applicable.

(B) The Concessionaire and each Contractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Concessionaire and each Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the Concessionaire and each Contractor to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as set forth in Section 24.03(a)(v).

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, in an effort to comply with 49 CFR Part 26, the Department has established a goal of 10% for DBE participation.
(B) The Department and the Concessionaire agree to manage the foregoing goals as follows:

(1) the Concessionaire will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Concessionaire’s approach to meeting the DBE participation goals set forth in this Section 24.03(a);

(2) the Concessionaire will have dedicated resources to the DBE inclusion program to ensure compliance with 49 CFR Part 26, the DBE/SWaM Plan, nondiscrimination provisions, technical assistance activities, communication of subcontracting and generate reports specific to DBE utilization;

(3) the Concessionaire will be responsible for either achieving or making Good Faith Efforts to achieve the goal of 10% for DBE participation by providing maximum contracting opportunities for DBE businesses;

(4) the Concessionaire will provide to the Department each calendar quarter documentation of all executed Contracts and payments to DBE businesses;

(5) the Concessionaire will have the opportunity to establish DBE sub-contracting work packages; and

(6) the Concessionaire will provide Good Faith Efforts documentation using form C-49 and other supplemental information as appropriate for Contracts that do not include DBE participation. The Concessionaire agrees that if the Department accepts the Good Faith Efforts documentation on a particular bid item group, the Concessionaire will make reasonable efforts to accomplish the overall goal using other bid item groups.

(C) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the applicable DBE objectives. The Department will assist the Concessionaire in meeting the Design-Build Work goals by offering assistance to include the following items:

(1) the parties will jointly conduct outreach meetings for DBE firms;

(2) the Department will identify to the Concessionaire DBE firms that are eligible to bid on the specific bid item groups; and

(3) the Department will provide access to technical and managerial assistance to eligible DBE firms, including in part, through the VDOT/GEC Civil Rights Team and the Business Opportunity Workforce Development Center based upon available funds.
(D) The Concessionaire acknowledges that the Department’s assistance and cooperation will not eliminate or reduce the Concessionaire’s responsibility to achieve the Design-Build Work goals for DBE participation or demonstrate Good Faith Efforts. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the Project. The Concessionaire is expected to meet the goal or demonstrate that Good Faith Efforts have been made. The Concessionaire will submit quarterly reports of Good Faith Efforts documentation, and, DBE payments on form C-63 to the Department Representative.

(E) When there is a contract goal for the Design-Build Work, the Concessionaire and the Concessionaire Parties must make Good Faith Efforts to meet the goal either through obtaining enough DBE participation or documenting the Good Faith Efforts it made to do so. 49 CFR Part 26 explicitly provides that the Department must not disregard showings of Good Faith Efforts, and it gives the Concessionaire and the Concessionaire Parties the right to have the Department reconsider a decision that their Good Faith Efforts were insufficient. The Department must seriously consider the Concessionaire’s documentation of Good Faith Efforts. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for the Concessionaire.

(iii) O&M Work. During performance of the O&M Work, when contracting for such work the Concessionaire will encourage the participation of DBE firms in the Project. The Concessionaire will set annual goals and make Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The annual and long-term participation DBE goals for the Concessionaire in contracting for the O&M Work is 2%.

(iv) DBE Reporting and Assessment.

(A) The Concessionaire will report quarterly, within 15 Days after each calendar quarter ends, to the Chief of Administration on the Concessionaire’s efforts to (1) satisfy the DBE goals set forth in this Section 24.03(a) or (2) demonstrate Good Faith Efforts to accomplish the DBE goals set forth in this Section 24.03(a).

(B) The Chief of Administration will assess, confirm and communicate to the Concessionaire within 30 Days after receiving each quarterly report whether the Concessionaire has (1) satisfied the DBE goals, (2) demonstrated Good Faith Efforts, or (3) failed to satisfy the requirements of clause (1) and (2) of this Section 24.03(a)(iv)(B).

(v) Failure to Demonstrate DBE Good Faith Efforts Related to Design-Build Work.

(A) If the Chief of Administration notifies the Concessionaire pursuant to Section 24.03(a)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work
for a quarterly period, the Concessionaire will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals.

(B) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for two consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(a)(iv), the Concessionaire will prepare and submit, at the Concessionaire’s sole cost and expense, a DBE Performance Improvement Plan for the Department’s review and approval. The DBE Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of clause (1) and (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work. The Concessionaire will submit the DBE Performance Improvement Plan within 15 Days after receiving notice from the Chief of Administration pursuant to Section 24.03(a)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B). The Concessionaire will pay the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire’s compliance with the DBE Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work.

(C) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(a)(iv), the Department may debar or disqualify the Key Members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.03(a)(v).

(D) If the Chief of Administration determines at any time that the Concessionaire has satisfied the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work performed to date with respect to the applicable calendar quarter, then any prior determinations by the Chief of Administration of the Concessionaire’s failure to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and the Concessionaire’s failure to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals will be disregarded, the Concessionaire will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure to satisfy the requirements of clause (1)
of Section 24.03(a)(iv)(B) and a failure to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals will be pursuant to the provisions set forth in Section 24.03(a)(v)(A).

(E) Any decision or action taken by the Chief of Administration or the Department pursuant to Section 24.03(a) is subject to the dispute resolution procedures set forth in Article 21.

(b) Small, Women-Owned and Minority Business (SWaM).

(i) General.

(A) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the SWaM program, where applicable.

(B) The Concessionaire shall not and will not permit its Contractors to discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Concessionaire shall carry out applicable requirements of Executive Order 33 (2006), in the award and administration of this Agreement and the award and administration of subcontracts pursuant to this Agreement.

(C) Failure by the Concessionaire to carry out the requirements in this Section 24.03(b) relating to SWaM participation will subject the Concessionaire to only the remedies set forth in Section 24.03(b)(v) and shall not result in a Concessionaire Default.

(D) If debarment occurs as a result of the Department's exercise of such remedies, such debarment shall not result in a Concessionaire Default.

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, in an effort to support Executive Order 33 (2006), the Department has established a goal of 19% for SWaM participation.

(B) The Department and the Concessionaire agree to manage the foregoing goals as follows:

1. the Concessionaire will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Concessionaire’s approach to meeting the SWaM participation goals set forth in this Section 24.03(b);

2. the Concessionaire will have dedicated resources to the SWaM inclusion program to ensure compliance with Executive Order 33 (2006), the DBE/SWaM Plan, nondiscrimination provisions, technical assistance
activities, communication of subcontracting and generate reports specific to SWaM utilization;

(3) the Concessionaire will be responsible for either achieving or making Good Faith Efforts to achieve the goal of 19% for SWaM participation by providing maximum contracting opportunities for SWaM businesses;

(4) the Concessionaire will provide to the Department each calendar quarter documentation of all executed Contracts and payments to SWaM businesses;

(5) the Concessionaire will have the opportunity to establish SWaM-only statement of work packages; and

(6) the Concessionaire will provide Good Faith Efforts documentation using form C-49 and other supplemental information as appropriate for Contracts that do not include SWaM participation. The Concessionaire agrees that if the Department accepts the Good Faith Efforts documentation on a particular bid item group, the Concessionaire will make reasonable efforts to accomplish the overall goal using other bid item groups.

(C) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the applicable SWaM objectives. The Department will assist the Concessionaire in meeting the Design-Build Work goals by offering assistance to include the following items:

(1) the parties will jointly conduct outreach meetings for SWaM firms;

(2) the Department will identify to the Concessionaire SWaM firms that are eligible to bid on the specific bid item groups; and

(3) the Department will provide access to technical and managerial assistance to eligible SWaM firms, including in part, through the VDOT/GEC Civil Rights Team and the Business Opportunity Workforce Development Center based upon available funds.

(D) The Concessionaire acknowledges that the Department’s assistance and cooperation will not eliminate or reduce the Concessionaire’s responsibility to achieve the Design-Build Work goals for SWaM participation or demonstrate Good Faith Efforts. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the Project. The Concessionaire is expected to meet the goal or demonstrate that Good Faith Efforts have been made. The Concessionaire will submit quarterly reports of Good Faith Efforts documentation, and, SWaM payments on form C-63 to the Department Representative.
(E) When there is a contract goal for the Design-Build Work, the Concessionaire and the Concessionaire Parties must make Good Faith Efforts to meet the goal either through obtaining enough SWaM participation or documenting the Good Faith Efforts it made to do so. The Department must seriously consider the Concessionaire’s documentation of Good Faith Efforts. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for the Concessionaire.

(iii) O&M Work. During performance of the O&M Work, when contracting for such work the Concessionaire will encourage the participation of SWaM firms in the Project. The Concessionaire will set annual goals and make Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The Concessionaire will provide its participation on such matters to the Department Representative, and the Department may include those participation rates, as appropriately adjusted, with its own towards the State’s long-term goal established pursuant to the Office of the Governor’s Executive Order 33 (2006). The annual and long-term participation SWaM goal for the Concessionaire in contracting for the O&M Work is 4%.

(iv) SWaM Reporting and Assessment.

(A) The Concessionaire will report quarterly, within 15 Days after each calendar quarter ends, to the Chief of Administration on the Concessionaire’s efforts to (A) satisfy the SWaM goals set forth in this Section 24.03(b) or (B) demonstrate Good Faith Efforts to accomplish the SWaM goals set forth in this Section 24.03(b).

(B) The Chief of Administration will assess, confirm and communicate to the Concessionaire within 30 Days after receiving each quarterly report whether the Concessionaire has (1) satisfied the SWaM goals, (2) demonstrated Good Faith Efforts, or (3) failed to satisfy the requirements of clause (1) and (2) of this Section 24.03(b)(iv)(B).

(v) Failure to Demonstrate SWaM Good Faith Efforts Related to Design-Build Work.

(A) If the Chief of Administration notifies the Concessionaire pursuant to Section 24.03(b)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for a quarterly period, the Concessionaire will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals.

(B) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for two consecutive quarters based on the determinations by the Chief of
Administration pursuant to Section 24.03(b)(iv), the Concessionaire will prepare and submit, at the Concessionaire’s sole cost and expense, a SWaM Performance Improvement Plan for the Department’s review and approval. The SWaM Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of clause (1) and (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work. The Concessionaire will submit the SWaM Performance Improvement Plan within 15 Days after receiving notice from the Chief of Administration pursuant to Section 24.03(b)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B). The Concessionaire will pay the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire’s compliance with the SWaM Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work.

(C) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(b)(iv), the Department may debar or disqualify the Key Members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.03(b)(v).

(D) If the Chief of Administration determines that the Concessionaire has satisfied the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work performed to date, then any prior determinations by the Chief of Administration of the Concessionaire’s failure to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and the Concessionaire’s failure to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals will be disregarded, the Concessionaire will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and a failure to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals will trigger the provisions set forth in Section 24.03(b)(v)(A).

(E) Any decision or action taken by the Chief of Administration or the Department pursuant to Section 24.03(b) is subject to the dispute resolution procedures set forth in Article 21.
Section 24.04 Public Safety and Welfare

The parties recognize and agree that protection of the health, safety and welfare of the public and all persons engaged in connection with the performance of the Concessionaire’s obligations pursuant to this Agreement is a priority. Accordingly, the Concessionaire will comply with the following provisions, along with all other Laws and the Technical Requirements:

(a) the Concessionaire will comply, and will require all Contractors to comply, with all construction safety and health standards established by Law, including the State and Federal Occupational Health and Safety Acts. Neither the Concessionaire nor any Contractor will require any worker to work in surroundings or under working conditions that are unsanitary, hazardous or dangerous to their health or safety, as determined under construction safety and health standards promulgated by the U.S. Secretary of Labor in accordance with Section 107 of the Contract Work Hours and Safety Standards Act; and

(b) the Department will be entitled to require the Concessionaire to suspend any Work or other activities related to the Project, which, in the sole discretion of the Department, presents a risk to the public health, safety or welfare, and to take such other actions as the Department may require to prevent such risk; provided, that if it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then the suspension order and other actions will be treated as a Department Change pursuant to Section 14.02.

Section 24.05 Labor, Employment and DBE/SWaM Related Matters

The Concessionaire will comply, and will cause its Contractors to comply, with the provisions set forth in the Labor, Employment and DBE/SWaM Related Matters attached as Exhibit AA.

Section 24.06 Federal Immigration Reform and Control Act

In accordance with Section 2.2-4311.1 of the Code of Virginia, the Concessionaire certifies that it does not and agrees that it will not, during the Term, knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986. The Concessionaire further agrees that it will require all of its Contractors to certify that they do not and will not knowingly employ an unauthorized alien as defined by such Act.
ARTICLE 25.

MISCELLANEOUS

Section 25.01 Transfers by the Concessionaire

(a) **Lock-Up Period.** During the Lock-up Period, the Concessionaire will not, without the Department’s approval, Transfer, or otherwise permit the Transfer of, any or all of the Concessionaire’s Interest to or in favor of any Person (a “Transferee”) or permit any Person to:

(i) Transfer, or otherwise dispose of 50% or more of any direct or indirect ownership interest in the Concessionaire;

(ii) grant any security interest, Lien or other encumbrance over its direct or indirect ownership interest in the Concessionaire;

(iii) enter into any agreement in respect of any direct or indirect ownership interest in the Concessionaire or in respect of any votes attached to any such shares held by such Person in the Concessionaire, in each case (A) other than customary shareholder, partnership or organizational agreements among the Equity Members as of the Agreement Date solely with respect to the governance and management of the Concessionaire or (B) other than agreements for Transfers of less than 50% of any direct or indirect ownership interest in the Concessionaire; or

(iv) agree, whether or not subject to any condition precedent or subsequent, to do any of the foregoing.

Notwithstanding the foregoing, this Section 25.01 will not prohibit or restrict the following:

(A) a Transfer to the Collateral Agent or trustee or such Person’s nominee or transferee, as permitted in connection with the exercise of rights and remedies under the Project Financing Agreements, or a Transferee permitted or approved under the Direct Agreement;

(B) any other Transfer identified in clauses 1 through 8 of the definition of Change in Control; or

(C) any agreement to make any of the Transfers described in the preceding clauses (A) and (B) of this Section 25.01(a).

(b) **Post Lock-Up Period.** Following the Lock-up Period, the Concessionaire will not Transfer, any or all of the Concessionaire’s Interest to or in favor of a Transferee, unless:

(i) the Department has approved such proposed Transferee based upon a determination in accordance with Section 25.01(c) (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement); and
(ii) the proposed Transferee (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement) enters into an agreement with the Department in form and substance reasonably satisfactory to the Department wherein the Transferee acquires the rights and assumes the obligations of the Concessionaire and agrees to perform and observe all of the obligations and covenants of the Concessionaire pursuant to this Agreement.

(c) The Department’s approval of a proposed Transferee may be withheld only if the Department determines that the proposed Transfer is prohibited by Law or such proposed Transferee is not capable of performing the obligations and covenants of the Concessionaire pursuant to this Agreement, which determination may be based upon, or take into account, one or more of the following factors:

(i) the financial strength and integrity of the proposed Transferee, and its direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;

(ii) the capitalization of the proposed Transferee;

(iii) the experience of the proposed Transferee and each of its direct Contractors in operating toll roads or highways and performing other projects; and

(iv) the background of the proposed Transferee, each of its direct Contractors, and their direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person’s past or present performance on other projects).

If the Department is not satisfied that these conditions are met, it may condition its consent on provision of reasonable additional security or other reasonable arrangements.

(d) Except for a Transfer of all the Concessionaire’s Interest to the Collateral Agent upon its exercise of remedies under the Financing Assignments or to a Transferee that is permitted or has been approved under the Direct Agreement, no Transfer of all or any of the Concessionaire’s Interest will be made or have any force or effect if at the time of such Transfer there has occurred a Concessionaire Default that has not been remedied or an event that with the lapse of time, the giving of notice or otherwise would constitute a Concessionaire Default, unless the Transferee is prepared to cure such Concessionaire Default in accordance with the Direct Agreement.

(e) A Change in Control of the Concessionaire will be deemed to be a Transfer of the Concessionaire’s Interest for purposes of this Section 25.01.

(f) Any Transfer or other sale, transfer, disposition or other transaction made in violation of this Section 25.01 will be null and void ab initio and of no force and effect.
Section 25.02 Ethical Standards

(a) The Concessionaire has adopted and provided copies to the Department of its written policies establishing ethical standards of conduct for all its directors, officers and supervisory or management personnel in dealing with the Department and employment relations. Such policies including any amendments or modifications will include standards of ethical conduct concerning the following:

(i) restrictions on gifts and contributions to, and lobbying of, any State Party and any of their respective commissioners, directors, officers and employees;

(ii) protection of employees from unethical practices in the selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

(iii) protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false Claim), unethical or unsafe actions or failures to act by the Concessionaire or its personnel or any Contractors;

(iv) restrictions on directors, members, officers or supervisory or management personnel of the Concessionaire engaging in any transaction or activity, including receiving or offering a financial incentive, benefit, loan or other financial interest, that is, or to a reasonable person appears to be, in conflict with or incompatible with the proper discharge of duties or independence of judgment or action in the performance of duties, or adverse to the interests of the Project or employees;

(v) restrictions on use of an office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer or supervisory or management person, rather than primarily for the benefit of the Concessionaire or the Project, or primarily to achieve a private gain or an exemption from duty or responsibility for a director, member, officer or supervisory or management person; and

(vi) adherence to the Department’s organizational conflict of interest rules and policies pertaining to the hiring of any consultant which has assisted the Department in connection with the negotiation of this Agreement or the conduct of Oversight Services for the Project.

(b) The Concessionaire will cause its directors, members, officers and supervisory and management personnel, and require those of its Contractors, to adhere to and enforce the adopted policy on ethical standards of conduct. The Concessionaire will establish reasonable systems and procedures to promote and monitor compliance with the policy.
(c) Without limiting the foregoing provisions of this Section 25.02, the Concessionaire further agrees: (i) no gifts, gratuities, or favors of any nature whatsoever will be given or offered by any Concessionaire Party to personnel of the Department; and (ii) no Concessionaire Party will employ any personnel of the Department for any services during the Term, without the prior written consent of the Department. If the Department determines, after investigation, that a Concessionaire Party or any of its employees, representatives, or agents of any person acting in its behalf have violated this provision, the Concessionaire Party may, at the discretion of the Department, be disqualified from bidding on future contracts with the Department for a period of six months from the date of the Department’s determination of such a violation. Any implicated employees, agents, or representatives of the Contractor may be prohibited from working on any contract awarded by the Department for the period of disqualification.

Section 25.03 Assignment by the Department

The Department may, subject to giving the Concessionaire not less than 90 Days prior written notice or as required by Law, transfer and assign its interests, in whole or in part, in the Project, this Agreement and any other Project Agreements to any other public agency or public entity of the State as permitted by Law; provided, that the assignee (a) has assumed all of the Department’s obligations, duties and liabilities pursuant to this Agreement and the Project Agreements then in effect and has provided the Concessionaire with reasonable assurance of its legal authority and sufficient financial resources to honor and perform same and (b) will not be required to have financial resources in excess of those then available to the Department.

Section 25.04 Authorized Representatives

(a) Each of the Concessionaire and the Department hereby designates the following individuals as its initial Concessionaire Representative(s) and Department Representative(s), respectively, to administer this Agreement on its respective behalf:

(i) For the Concessionaire:
President
95 Express Lanes LLC
6440 General Green Way
Alexandria, Virginia 22312

(ii) For the Department:
Chief Engineer
Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219

(b) The Concessionaire Representatives and the Department Representatives will be reasonably available to each other during the Term and will have the authority to issue
instructions and other communications on behalf of the Concessionaire and Department, respectively, and will be the recipient of notices and other written communications from the other party pursuant to this Agreement (except any notice initiating or relating to the dispute resolution procedures of Article 21 will be given in accordance with Section 25.05). However, such Representatives will not have the authority to make decisions or give instructions binding upon the Concessionaire or the Department, except to the extent expressly authorized by the Concessionaire or the Department, as the case may be, in writing. In the event the Concessionaire or the Department designates different Representatives, it will give the other party written notice of the identity of and contact information for the new Concessionaire Representative(s) or Department Representative(s), as the case may be.

Section 25.05 Notices

(a) Whenever under the provisions of this Agreement it will be necessary or desirable for one party to serve any notice, request, demand, report or other communication on another party, the same will be in writing and will not be effective for any purpose unless and until actually received by the addressee or unless served (i) personally, (ii) by independent, reputable, overnight commercial courier, (iii) by facsimile transmission, where the transmitting party includes a cover sheet identifying the name, location and identity of the transmitting party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein or (iv) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

If to the Department:

Virginia Department of Transportation  
1401 E. Broad Street  
Richmond, VA 23219  
Attention: Commissioner of Highways  
Facsimile: (804) 786-2940

With copies to:

Office of the Attorney General  
900 E. Main Street  
Richmond, VA 23219  
Attention: Chief Transportation Section  
Facsimile: (804) 786-9136

If to the Concessionaire:

95 Express Lanes LLC
6440 General Green Way
Alexandria, Virginia 22312
Attention: President
Facsimile: (571) 419-6101

With copies to:

Orrick Herrington & Sutcliffe LLP
51 West 52nd Street
New York, New York 10019-6142
Attention: Dan Mathews
Facsimile: (212) 506-5151

(b) Any party may, from time to time, by notice in writing served upon the other party as aforesaid, designate an additional and/or a different mailing address or an additional and/or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally will be deemed delivered upon receipt, if served by mail or independent courier will be deemed delivered on the date of receipt as shown by the addressee’s registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier, and if served by facsimile transmission will be deemed delivered on the date of receipt as shown on the received facsimile (provided, that the original is thereafter delivered as aforesaid).

Section 25.06 Binding Effect

Subject to the limitations of Section 25.01 and Section 25.03, this Agreement will be binding upon and will inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the parties hereto, such reference also will be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such party, as if in every case so expressed.

Section 25.07 Relationship of Parties

(a) The relationship of the Concessionaire to the Department will be one of an independent contractor, not an agent, partner, lessee, joint or co-venturer or employee, and neither the Department nor the Concessionaire will have any rights to direct or control the activities of the other or their respective Affiliates, contractors or consultants, except as otherwise expressly provided in this Agreement.

(b) Officials, employees and agents of the Concessionaire or the Department will in no event be considered employees, agents, partners or representatives of the other.
Section 25.08 No Third-Party Beneficiaries

Nothing contained in this Agreement is intended or will be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement, except rights expressly contained herein for the benefit of the Lenders, the Collateral Agent and/or State Indemnitees.

Section 25.09 Limitation on Consequential Damages

Except as expressly provided in this Agreement to the contrary, neither party will be liable to the other for punitive damages or special, indirect, incidental or consequential damages of any nature, whether arising in contract, tort (including negligence) or other legal theory. The foregoing limitation will not, however, in any manner:

(a) prejudice the Department’s right to recover liquidated damages from the Concessionaire as provided in this Agreement;

(b) limit the Concessionaire’s liability for any type of damage arising out of the Concessionaire’s obligation to indemnify, protect, defend and hold each State Indemnitee harmless from Third Party Claims under Article 15 and Section 16.03 of this Agreement;

(c) limit the Concessionaire’s liability for any type of damage to the extent covered by the proceeds of insurance required hereunder; or

(d) limit the amounts expressly provided to be payable by the Department or the Concessionaire pursuant to this Agreement.

Section 25.10 Waiver

(a) No waiver by any party of any right or remedy pursuant to this Agreement or the other Project Agreements will be deemed to be a waiver of any other or subsequent right or remedy pursuant to this Agreement or the other Project Agreements. The consent by one party to any act by the other party requiring such consent will not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

(b) No act, delay or omission done, suffered or permitted by one party or its agents will be deemed to waive, exhaust or impair any right, remedy or power of such party pursuant to this Agreement or any other Project Agreement, or to relieve the other party from the full performance of its obligations pursuant to this Agreement and the other Project Agreements.

(c) No waiver of any term, covenant or condition of this Agreement will be valid unless in writing and executed by the obligee party.

(d) The acceptance of any payment or payment by a party will not (i) waive any preceding or then-existing breach or default by the other party of any term, covenant or condition of this Agreement, other than the other party’s prior failure to pay the particular amount or part
thereof so accepted, regardless of the paid party’s knowledge of such preceding or then-existing breach or default at the time of acceptance of such payment or payment or (ii) continue, extend or affect (A) the service of any notice, any suit, arbitration or other legal proceeding or final judgment, (B) any time within which the other party is required to perform any obligation or (C) any other notice or demand.

(c) No custom or practice between the parties in the administration of the terms of this Agreement will be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of this Agreement.

Section 25.11 No Brokers

Except for any financial adviser or investment banker whose fee will be paid by the party retaining such adviser or banker (or in the case of a Concessionaire Financial Party, by such party or the Concessionaire), each party represents and warrants that it has not dealt with any real estate or business opportunity broker or agent or any finder in connection with this Agreement. Each party agrees, to the extent permitted by Law, to indemnify, protect, defend with counsel acceptable to the other party and hold harmless the other party against any Claim for commission, finder’s fee or like compensation asserted by any real estate or business opportunity broker, agent, finder or other Person claiming to have dealt with the indemnifying party in connection with this Agreement.

Section 25.12 Governing Law; Compliance with Law and Federal Requirements

(a) This Agreement will be governed by and construed in accordance with the Laws of the State applicable to contracts executed and to be performed within the State.

(b) The Concessionaire will keep fully informed of and comply and require its Contractors to comply with Law. The Concessionaire will execute and file the documents, statements, and affidavits required under any Law required by or affecting this Agreement or the execution of the Work. The Concessionaire will permit examination of any records made subject to such examination by such Law.

(c) The Concessionaire will comply and require its Contractors to comply with all Laws applicable to the Project as a result of the costs of the Project being financed in part with State funds, federal-aid funds and State bond proceeds, including the applicable Federal Requirements attached as Exhibit U.

(d) The Concessionaire acknowledges and agrees that the USDOT will have certain approval rights with respect to the Project, including the right to provide certain oversight and technical services with respect to the Work. The Concessionaire will cooperate with USDOT and provide such access to the Project and information as USDOT may request in the exercise of USDOT’s duties, rights and responsibilities in connection with the Project.
Section 25.13 Use of Police Power

Nothing in this Agreement limits the authority of the Department to exercise its regulatory and police powers granted by Law.

Section 25.14 Survival

The dispute resolution procedures, the indemnifications, limitations, releases, obligations to pay termination compensation and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the Work will survive the expiration or earlier termination of this Agreement and/or the completion of the Work.

Section 25.15 Subpoena

Except as provided for in Section 33.1-4 of the Code of Virginia, the Concessionaire may subpoena any Department personnel; provided, that the Concessionaire will pay for such personnel’s time at its fully burdened rate (including overhead and fringe benefits), together with all out-of-pocket expenses incurred, no later than 30 Days after the Concessionaire’s receipt of an invoice reasonably documenting the amount of such time provided.

Section 25.16 Construction and Interpretation of Agreement

(a) The language in all parts of this Agreement will in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any party. The parties hereto acknowledge and agree that this Agreement has been prepared jointly by the parties and has been the subject of arm’s length and careful negotiation over a considerable period of time, that each party has been given the opportunity to independently review this Agreement with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of this Agreement, this Agreement will not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction will be utilized.

(b) If any court of competent jurisdiction issues a final, non-appealable judicial order finding that a term or provision of this Agreement is invalid or unenforceable, the remainder of this Agreement will not be affected thereby and each other term and provision of this Agreement will be valid and enforceable to the fullest extent permitted by Law. It is the intention of the parties to this Agreement, and the parties hereto agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the parties in good faith will supply as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

(c) The captions of the articles and sections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.
(d) References in this instrument to this “Agreement” mean, refer to and include this instrument as well as any riders, exhibits, addenda and attachments hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking “herein,” “hereunder” or “pursuant hereto” (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument will be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. All references to a subsection or clause “above” or “below” refer to the denoted subsection or clause within the section in which the reference appears. Unless expressly provided otherwise, all references to Articles and Sections refer to the Articles and Sections set forth in this Agreement. Unless otherwise stated in this Agreement or the Project Agreements, words which have well-known technical or construction industry meanings are used in this Agreement or the Project Agreements in accordance with such recognized meaning. Wherever the word “including,” “includes” or “include” is used in this Agreement or the Project Agreements, except where immediately preceded by the word “not”, it will be deemed to be followed by the words “without limitation”. Wherever reference is made in the Project Agreements to a particular Governmental Authority, it includes any public agency succeeding to the powers and authority of such Governmental Authority.

(e) As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

(f) The Project Agreements are intended to be complementary and consistent and to be read together as a complete agreement. In the event of any conflict or inconsistency between the Articles of this Agreement and the exhibits to this Agreement, the conflict or inconsistency will be resolved by applying the following order of document precedence, from highest to lowest:

(i) Change Orders and amendments to the articles of this Agreement and Definitions;

(ii) the Articles of this Agreement and Definitions;

(iii) Project Description and Scope Documentation;

(iv) the Technical Requirements, as amended; and

(v) the other exhibits to this Agreement, as amended.

(g) A Project Agreement to which the Department is not a party will have no effect upon the terms and conditions of this Agreement or the construction or interpretation thereof.
(h) Any standard or specification with which the Concessionaire is required to comply by a provision of this Agreement during the Construction Period, shall be the specific edition or version identified in the Technical Requirements, and the Concessionaire shall not be required during the Construction Period to comply with any newer, updated or revised edition or version unless the parties so agree or the Concessionaire is so directed by the Department as a Department Change.

Section 25.17 Counterparts

This instrument may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

Section 25.18 Entire Agreement; Amendment

(a) THIS AGREEMENT AND THE PROJECT AGREEMENTS TO WHICH THE DEPARTMENT AND THE CONCESSIONAIRE ARE BOTH PARTIES CONSTITUTE THE ENTIRE AND EXCLUSIVE AGREEMENT BETWEEN THE PARTIES RELATING TO THE SPECIFIC MATTERS COVERED HEREIN AND THEREIN. ALL PRIOR WRITTEN AND PRIOR OR CONTEMPORANEOUS VERBAL AGREEMENTS, UNDERSTANDINGS, REPRESENTATIONS AND/OR PRACTICES RELATIVE TO THE FOREGOING, INCLUDING THE INTERIM AGREEMENT, ARE HEREBY SUPERSEDED, REVOKED AND RENDERED INEFFECTIVE FOR ANY PURPOSE. THIS AGREEMENT MAY BE ALTERED, AMENDED OR REVOKED ONLY BY AN INSTRUMENT IN WRITING SIGNED BY EACH PARTY HERETO, OR ITS PERMITTED SUCCESSOR OR ASSIGNEE, EXCEPT TO THE EXTENT THE DEPARTMENT HAS THE RIGHT TO AMEND BY DEPARTMENT CHANGE OR DIRECTIVE LETTER PURSUANT TO ARTICLE 14. NO VERBAL AGREEMENT OR IMPLIED COVENANT WILL BE HELD TO VARY THE TERMS HEREOF, ANY STATUTE, LAW OR CUSTOM TO THE CONTRARY NOTWITHSTANDING.

(b) This Agreement and the other Project Agreements attempt to set forth in full all requirements applicable under the Act as to the development, operation, maintenance, repair, management and financing of the Project and attempt to define in full the rights and responsibilities of each party in connection therewith. To the extent requirements and rights and responsibilities have not been addressed in this Agreement and the other Project Agreements, the parties agree to carry out their respective responsibilities in the spirit of cooperation contemplated by the Act, recognizing that they may not have defined in a sufficient detail or anticipated fully all activities necessary for the full implementation of the Project.

Section 25.19 Payment of Concessionaire Damages and Other Amounts by the Department

(a) THE DEPARTMENT'S PAYMENT OF ANY CONCESSIONAIRE DAMAGES, LOSSES OR ANY OTHER AMOUNTS DUE AND OWING BY THE DEPARTMENT PURSUANT TO THIS AGREEMENT WILL BE SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY AND ALLOCATION BY THE CTB.
Upon determination of Concessionaire Damages or such other amounts due and owing by the Department, the Department will with all practical dispatch consistent in all respects with Law and its obligations pursuant to this Agreement:

(i) deliver to the Governor and the Director of the Department of Planning and Budget of the State, before December 1 with respect to any such payment requested to be appropriated by the next regular session of the General Assembly, a statement of the amount of any such payment due or expected to be due and a request that the Governor include in his budget to be delivered to the next session of the General Assembly a provision that there be appropriated such amounts for such purpose to the extent required, from any legally available funds;

(ii) use its diligent efforts to have (A) the Governor include, in each biennial or any supplemental budget the Governor presents to the General Assembly, the amounts set forth in any statement delivered pursuant to (i) above, (B) the General Assembly appropriate and reappropriate, as applicable, such amounts to or on behalf of the Department for the purpose of paying any Concessionaire Damages or other amounts due and owing by the Department to the Concessionaire pursuant to this Agreement, and (C) the CTB allocates such appropriated amounts as applicable for payment to the Concessionaire; and

(iii) notify the Concessionaire promptly upon becoming aware of any failure by (A) the Governor to include such amounts in his budget delivered to the next session of the General Assembly, (B) the General Assembly to appropriate such amounts during such next session of the General Assembly or (C) the CTB to so allocate such amounts for payment to the Concessionaire.

(b) The parties hereto agree and acknowledge that, subject to appropriation, such obligation of the Department to pay the Concessionaire Damages and other amounts was and is a material inducement and consideration for the execution and delivery of this Agreement by the Concessionaire.

(c) The Department will pay any sum due pursuant to Section 20.03, Section 20.05, Section 20.06 or Section 20.07 within 60 Days after the date of determination of the applicable termination compensation amount; provided, in each case, that the Department may defer payment of such sum for an additional 270 Days if it reasonably determines that such additional period is necessary in order to obtain funds to pay such sum; provided further, that any payment of such sum will be made together with interest thereon (A) at the average earnings rate on the State’s Transportation Trust Fund or any successor thereto during the period that runs from the date such sum would have otherwise become due to the date that is 60 Days thereafter and (B) after such period, at the Bank Rate until the date of payment thereof; except that to the extent such payment is based on the Concessionaire Debt or the amounts required for the Concessionaire to achieve the Base Case Equity IRR, such amounts will be re-calculated as of the date of payment.
(d) The Department will proceed to make payment to the Concessionaire of the undisputed amount of any sum due pursuant to Section 20.03, Section 20.05, Section 20.06 or Section 20.07 without regard to the dispute resolution procedures.

Section 25.20 Taxes

The Concessionaire is solely responsible for the payment of Taxes accrued or arising out of the performance of its obligations pursuant to this Agreement.

Section 25.21 Payments to Department or Concessionaire

(a) Except as otherwise expressly provided herein or in any Project Agreement, payments due to the Department or the Concessionaire hereunder, as applicable, will be due and payable within 30 Days of receipt by the Concessionaire or the Department, as applicable, of an invoice therefor, together with any supporting documentation.

(b) Each party will be entitled to deduct, offset or withhold from any amounts due from one party to the other party any amounts then due and owing from such other party.

(c) Except as otherwise provided, neither party is required to pay amounts due that are being contested in accordance with the dispute resolution procedures described in Article 21.

Section 25.22 Interest on Overdue Amounts

Any amount not paid when due pursuant to this Agreement will bear interest from the date such payment is due until payment is made (after as well as before judgment) at a variable rate per annum at all times equal to the Bank Rate (except as provided otherwise in Section 25.19(c)), which interest will be payable on demand. Interest will be compounded annually and payable on the date on which the related overdue amount is paid.

[SIGNATURE PAGE(S) TO FOLLOW]
IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Comprehensive Agreement Relating to the I-95 HOV/HOT Lanes Project as of the date first written above.

VIRGINIA DEPARTMENT OF TRANSPORTATION,
an agency of the Commonwealth of Virginia

By: ________________________________
   Gregory A. Hirlemy, Sr.
   Commissioner of Highways

95 EXPRESS LANES LLC,
a Delaware limited liability company

By: ________________________________
   Name: ________________________________
   Title: ________________________________

Signature on file with VDOT
95 EXPRESS LANES LLC,
a Delaware limited liability company

Signature on file with VDOT

By: ____________________________
    Name: Michelle Le Plante
    Title: _________________________
EXHIBIT AA

LABOR, EMPLOYMENT AND DBE/SWAM RELATED MATTERS

In the event of any discrepancy between the provisions of this Exhibit AA that are intended to incorporate or summarize statutes, rules or regulations promulgated by a Governmental Authority and the actual statutes, rules or regulations in effect from time to time, the actual statutes, rules or regulations shall apply and supersede the inconsistent provisions set forth herein. Further, such statutes, rules and regulations shall apply to the Project at any time only to the extent such statutes, rules and regulations are required to apply to the Project by applicable Law or regulation. In addition, in the event the Agreement and this Exhibit AA apply different standards, procedures or requirements for the same matters, the standards, procedures and requirements specified in the Agreement shall control.

1. Labor and Wages

The Concessionaire shall comply with the provisions and requirements of the workers’ compensation law and public statutes that regulate hours of employment on public work.

(a) Predetermined Minimum Wages: The provisions of laws requiring the payment of a minimum wage of a predetermined minimum wage scale for the various classes of laborers and mechanics, when such a scale is incorporated in the Agreement, shall be expressly made a part of any Project Agreement. The Concessionaire and its agents shall promptly comply with all such applicable provisions.

Any classification not listed and subsequently required shall be classified or reclassified in accordance with the wage determination. If other classifications are used, omission of classifications shall not be cause for additional compensation. The Concessionaire shall be responsible for determining local practices with regard to the application of the various labor classifications.

(b) Labor Rate Forms: The Concessionaire shall complete Form C-28, indicating by classification the total number of employees, excluding executive and administrative employees, employed on the project. The Concessionaire shall also indicate on the form the compensation rate per hour for each classification. The Concessionaire shall submit an original and two copies of the form prior to the due date of the second estimate for payment and for each 90-day period thereafter until the work specified in the Agreement has been completed. If at the time of Final Acceptance the period since the last labor report is 30 days or more, the Concessionaire shall furnish an additional labor report as outlined herein prior to payment of the final estimate.
2. **Equal Employment Opportunity**

(a) The Concessionaire shall comply with the applicable provisions of presidential executive orders and the rules, regulations, and orders of the President’s Committee on Equal Employment Opportunity (“EEO”). The Concessionaire shall maintain the following records and reports as required by the EEO provisions:

- record of all applicants for employment
- new hires by race, work classification, hourly rate, and date employed
- minority and non-minority employees employed in each work classification
- changes in work classifications
- employees enrolled in approved training programs and the status of each
- minority subcontractor or subcontractors with meaningful minority group representation
- copies of Form C-57 (Contractor’s Monthly EEO Report) submitted by subcontractors

The Concessionaire shall cooperate with the Department in carrying out EEO obligations and in the Department’s review of activities under the Agreement. The Concessionaire shall comply with the specific EEO requirements specified in this Exhibit and shall include these requirements in every subcontract of $10,000 or more with such modification of language as may be necessary to make them binding on the subcontractors.

(b) **EEO Policy:** The Concessionaire shall accept as operating policy the following statement:

It is the policy of this Company to assure that applicants are employed and that employees are treated during employment without regard to their race, religion, sex, color, or national origin. Such action shall include employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship or on-the-job training.

(c) **EEO Officer:** The Concessionaire shall designate and make known to the Department an EEO Officer who can effectively administer and promote an active Concessionaire EEO program and who shall be assigned adequate authority and responsibility to do so.

(d) **Dissemination of Policy:**

1. Members of the Concessionaire’s staff who are authorized to hire, supervise, promote, and discharge employees or recommend such action
or are substantially involved in such action shall be made fully aware of and shall implement the Concessionaire’s EEO policy and contractual responsibilities to provide equal employment opportunity in each grade and classification of employment. The following actions shall be taken as a minimum:

a. Periodic meetings of supervisory and personnel office employees shall be conducted before the start of work and at least once every 6 months thereafter, at which time the Concessionaire’s EEO policy and its implementation shall be reviewed and explained. The meetings shall be conducted by the EEO Officer or another knowledgeable company official.

b. New supervisory or personnel office employees shall be given a thorough indoctrination by the EEO Officer or another knowledgeable company official covering all major aspects of the Concessionaire’s EEO obligations within 30 days following their reporting for duty with the Concessionaire.

c. The EEO Officer or appropriate company official shall instruct employees engaged in the direct recruitment of employees for the project relative to the methods followed by the Concessionaire in locating and hiring minority group employees.

2. In order to make the Concessionaire’s EEO policy known to all employees, prospective employees, and potential sources of employees such as, but not limited to, schools, employment agencies, labor unions where appropriate, and college placement officers, the Concessionaire shall take the following actions:

a. Notices and posters setting forth the Concessionaire’s EEO policy shall be placed in areas readily accessible to employees, applicants for employment, and potential employees.

The Concessionaire shall furnish, erect, and maintain at least two bulletin boards having dimensions of at least 48 inches in width and 36 inches in height at locations readily accessible to all personnel concerned with the project. The boards shall be erected immediately upon initiation of the Agreement work and shall be maintained until the completion of such work, at which time they shall be removed from the project. Each bulletin board shall be equipped with a removable glass or plastic cover that when in place shall protect posters from weather or damage. The Concessionaire shall promptly post official notices on the bulletin boards.
b. The Concessionaire’s EEO policy and the procedures to implement such policy shall be brought to the attention of employees by means of meetings, employee handbooks, or other appropriate means.

(e) Recruitment:

1. When advertising for employees, the Concessionaire shall include in all advertisements for employees the notation “An Equal Opportunity Employer” and shall insert all such advertisements in newspapers or other publications having a large circulation among minority groups in the area from which the project work force would normally be derived.

2. Unless precluded by a valid bargaining agreement, the Concessionaire shall conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minority group applicants, including, but not limited to, state employment agencies, schools, colleges, and minority group organizations. The Concessionaire shall identify sources of potential minority group employees and shall establish procedures with such sources whereby minority group applicants may be referred to it for employment consideration.

3. The Concessionaire shall encourage its employees to refer minority group applicants for employment by posting appropriate notices or bulletins in areas accessible to all employees. In addition, information and procedures with regard to referring minority group applicants shall be discussed with employees.

(f) Personnel Actions: Wages, working conditions, and employee benefits shall be established and administered, and personnel action of any type shall be taken without regard to race, color, religion, sex, or national origin.

1. The Concessionaire shall conduct periodic inspections of project sites to ensure that working conditions and employee facilities do not indicate discriminatory treatment of personnel.

2. The Concessionaire shall periodically evaluate the spread of wages paid within each classification to determine whether there is evidence of discriminatory wage practices.

3. The Concessionaire shall periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the Concessionaire shall promptly take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, corrective action shall include all affected persons.
4. The Concessionaire shall investigate all complaints of alleged discrimination made to it in connection with obligations under the Agreement, attempt to resolve such complaints, and take appropriate corrective action. If the investigation indicates that the discrimination may affect persons other than the complainant, corrective action shall include those persons. Upon completion of each investigation, the Concessionaire shall inform every complainant of all avenues of appeal.

(g) Training:

1. The Concessionaire shall assist in locating, qualifying, and increasing the skills of minority group and women employees and applicants for employment.

2. Consistent with work force requirements and as permissible under Federal and state regulations, the Concessionaire shall make full use of training programs, i.e., apprenticeship and on-the-job training programs for the geographical area of Agreement performance. Where feasible, 25 percent of apprentices or trainees in each occupation should be in their first year of apprenticeship or training.

3. The Concessionaire shall advise employees and applicants for employment of available training programs and the entrance requirements for each.

4. The Concessionaire shall periodically review the training and promotion potential of minority group employees and shall encourage eligible employees to apply for such training and promotion.

5. If the Agreement provides a pay item for trainees, training shall be in accordance with the requirements of Section 518 of the 2007 Road and Bridge Specification.

(h) Unions: If the Concessionaire relies in whole or in part on unions as a source of employees, best efforts shall be made to obtain the cooperation of such unions to increase opportunities for minority groups and women in the unions and to effect referrals by such unions of minority and women employees. Actions by the Concessionaire, either directly or through its agents or subcontractors, shall include the following procedures:

1. In cooperation with the unions, best efforts shall be used to develop joint training programs aimed toward qualifying more minority group members and women for membership in the unions and to increase the skills of minority group employees and women so that they may qualify for higher-paying employment.
2. Best efforts shall be used to incorporate an EEO clause into union agreements to the end that unions shall be contractually bound to refer applicants without regard to race, color, religion, sex, or national origin.

3. Information shall be obtained concerning referral practices and policies of the labor union except that to the extent the information is within the exclusive possession of the union. If the labor union refuses to furnish the information to the Concessionaire, the Concessionaire shall so certify to the Department and shall set forth what efforts he made to obtain the information.

4. If a union is unable to provide the Concessionaire with a reasonable flow of minority and women referrals within the time limit set forth in the union agreement, the Concessionaire shall, through its recruitment procedures, fill the employment vacancies without regard to race, color, religion, sex, or national origin, making full efforts to obtain qualified or qualifiable minority group persons and women. If union referral practice prevents the Concessionaire from complying with the EEO requirements, the Concessionaire shall immediately notify the Department.

(i) Subcontracting: The Concessionaire shall use best efforts to use minority group subcontractors or subcontractors with meaningful minority group and female representation among their employees. The Concessionaire shall use best efforts to ensure subcontractor compliance with its EEO obligations.

1. Records and Reports: The Concessionaire shall keep such records as are necessary to determine compliance with its EEO obligations. The records shall be designed to indicate the following:

   i. the number of minority and nonminority group members and females employed in each work classification on the project

   ii. the progress and efforts being made in cooperation with unions to increase employment opportunities for minorities and females if unions are used as a source of the work force

   iii. the progress and efforts being made in locating, hiring, training, qualifying, and upgrading minority and female employees

   iv. the progress and efforts being made in securing the services of minority group subcontractors or subcontractors with meaningful minority group and female representation among their employees

2. Records shall be retained for a period of three years following completion of the Work and shall be available at reasonable times and places for inspection by authorized Representatives of the Department.
3. **Form C-57 shall be submitted each month for the first three months after each Contractor commences the Work pursuant to a notice to proceed issued by the Department pursuant to Section 8.03(b) or Section 9.02 (as applicable) of the Agreement and every month of July thereafter for the duration of the Project. Form C-57 shall be completed to indicate the number of minority, nonminority, and female employees currently engaged in each work classification shown on the form. The completed Form C-57 shall be submitted within three weeks after the reporting period. Failure to do so may result in delay of approval of the Concessionaire’s monthly progress estimate for payment.**

3. **Use of Small, Women and Minority-Owned Businesses (SWaMs)**

The Concessionaire shall comply with all the requirements of the Department’s “Special Provision 1 for Section 107.15 – Use of Small, Women and Minority Owned-Businesses (SWaMs)” dated September 19, 2011 (attached hereto as Attachment 1). Attachment 1 and “Special Provision 2 for Section 107.15 – Use of Disadvantaged Business Enterprises (DBEs)” (described in more detail below) amend and supersede Section 107.15 of the 2007 Road and Bridge Specification in its entirety and shall be read in conjunction with Section 24.03 of the Agreement.

4. **Civil Rights**

   (a) **DBE-SWaM Forms:** The Concessionaire shall complete the following forms or equivalent forms as part of its compliance with the DBE-SWaM goals set forth in the Agreement.

   - Form C-111 (Minimum DBE Requirements)
   - Form C-112 (Certification Of Binding Agreement)
   - Form C-48 (Subcontractor/Supplier Solicitation And Utilization Form)
   - Form C-49 (DBE Good Faith Efforts Documentation)

   (b) **On-the-Job Training Forms:** The Concessionaire shall comply with the Special Provision Copied Note for Section 518 of the 2007 Road and Bridge Specifications.

   (c) **Design Requirements and Submittals:** Payments made to DBE and SWaM consultants must be submitted on form C-63 (DBE Activity Report) or an equivalent form on a quarterly basis. Form C-63 and submittal information for the form is set forth in the Department’s Construction Directive Memorandum CD-2007-6.
(d) Construction Requirements and Submittals:

1. EEO Contract Compliance:
   
   i. The following forms and associated submittal information are required from the Design-Build Contractor and its subcontractors (including haulers and suppliers as applicable).
      
      - Form C-64 (Company Employment)
      - Letter Designating EEO Officer
      - Semi-annual Minutes of an EEO Meeting
      - Form C-57 (Contractor’s Monthly EEO Report)
   
   ii. The Design-Build Contractor and its subcontractors are subject to formal Department EEO Contractor Compliance Reviews at least annually.

2. Labor Compliance: The Concessionaire shall submit, or cause the submission, of the following. In addition, the Concessionaire’s employees (and the employees of its subcontractors) may be subject to interviews by the Department.
   
   i. weekly payrolls from the Design-Build Contractor and its subcontractors and haulers;
   
   ii. Form C-28 (Basic Hourly Rates paid by Contractor); and
   
   iii. Form C-56 (Statement of Compliance).

3. DBE Compliance:
   
   i. DBE subcontractors, suppliers, manufacturers and haulers must be listed and submitted on Form C-111 or an equivalent form, indicating the task(s) assigned and the approximate dollar value of the planned work pursuant to “Special Provision 2 for Section 107.15 – Use of Disadvantaged Business Enterprises (DBEs)” dated April 26, 2011 (attached hereto as Attachment 2). Attachments 1 and 2 amend and supersede Section 107.15 of the 2007 Road and Bridge Specification in its entirety and shall be read in conjunction with Section 24.03 of the Agreement.

   ii. Payments made to DBE firms must be submitted on form C-63 on a quarterly basis. Form C-63 and submittal information for the form is provided in the Department’s Construction Directive Memorandum CD-2007-6 included in Attachment 5.
iii. All DBE firms are subject to formal DBE contract compliance reviews at least once during active participation on the project.

iv. Attachment 2 provides guidance on removal of a DBE firm from the contract or for substituting another firm for all or portions of items of work designated to be performed by a DBE firm. Advance approval must be obtained from the district Civil Rights Office.

4. SWaM Compliance:

i. SWaM subcontractors, suppliers, manufacturers and haulers shall be listed and submitted on Form C-111 or an equivalent form, indicating the task(s) assigned and the approximate dollar value of the planned work pursuant to Attachment 1.

ii. Payments made to SWaM firms must be submitted on form C-63 on a quarterly basis in order to receive credit. See Construction Memorandum CD-2007-6.

5. On-the-Job Training Compliance (applicable only during the performance of the Design-Build Work):

i. The Project has been assigned a goal of 24 trainees, as indicated in the Special Provision for Section 518 of the 2007 Road and Bridge Specifications.

ii. Upon notification of intent to assign employees into an approved program, the Department’s Civil Rights office shall provide Form C-65, which initiates the training process. The Concessionaire is responsible for submitting the completed form for approval by the District Civil Rights Manager (“DCRM”). Trainees may not have received prior training in the classification planned for the training opportunity. A journeyman in that classification must be on site and be available to assist with the training. The DCRM must be in agreement with the selected candidate.

iii. Trainees may be current employees, newly hired employees, or individuals from the Business Opportunity and Workforce Development (“BOWD”) Program. The BOWD Program is a Department developmental supportive services program and partnering initiative funded by FHWA for selected DBE firms of various skill and competence levels interested in entering, enhancing, or expanding highway contracting opportunities with prime contractors/consultants. The BOWD Program also supports On-the-Job Training supportive services to increase the participation of minority, disadvantaged persons, and women through a pre-employment training program into journey-level
positions to ensure that a competent workforce is available to meet highway construction hiring needs and to address the historical under-representation of these groups in highway construction skilled and semi-skilled crafts. The partnering initiative between prime contractors/consultants, subcontractors and perspective trainees provides the opportunity for the further development of DBE firms through performance on contracts and guidance from prime contractors/consultants. The intent of this partnering initiative is to increase capacity by perfecting existing skills and knowledge, expanding into new work areas, and prime contractor/consultant joint venturing with DBE firms. The Concessionaire is encouraged to achieve all or a percentage of the required DBE participation/goals determined for this project by the utilization of approved BOWD firms. To assist the Concessionaire in taking advantage of this opportunity for utilization of approved BOWD firms, please contact the BOWD Center for additional information, details, resources, and support. For further information on the BOWD Center and to view the DBE profiles, please go to www.virginia.org/business/BOWD.asp. The BOWD Center can be contacted at (804) 662-9555 or via email to BOWDCenter@vdotvirginia.gov.

iv. Form C-67, weekly training hours report, is required and must have concurrence from the DCRM as to the number of hours of training received for that week.
Section 107.15—Use Small, Women-Owned and Minority-Owned Businesses (SWaMs)

It is the policy of the Department that Small, Women-Owned, and Minority-Owned Businesses (SWaMs) shall have the maximum opportunity to participate in the performance of the Contract. The Contractor is encouraged to take necessary and reasonable steps to ensure that SWaMs have the maximum opportunity to compete for and perform work on the Contract, including participation in any subsequent subcontracts.

A SWaM firm shall mean a small business concern (as defined pursuant to the Code of Virginia, Title 2.2 -1401 for the purpose of reporting small, women-owned, and minority-owned business participation in state contracts and purchases pursuant to §§ 2.2-1404 and 2.2-1405. To that end the following terms shall apply:

**Small business** means an independently owned and operated business which, together with affiliates, has 250 or fewer employees, or average annual gross receipts of $10 million or less

**Women-owned business** means a business concern that is at least 51% owned by one or more women who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest is owned by one or more women who are citizens of the United States or non-citizens who are in full compliance with the United States immigration law, and both the management and daily business operations are controlled by one or more women who are U.S. citizens or legal resident aliens.

**Minority-owned business** means a business concern that is at least 51% owned by one or more minority individuals or in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more minority individuals and both the management and daily business operations are controlled by one or more minority individuals.

**Minority individual** means an individual who is a citizen of the United States or a non-citizen who is in full compliance with United States immigration law and who satisfies one or more of the following definitions:
1. African American means a person having origins in any of the original peoples of Africa and who is regarded as such by the community of which this person claims to be a part.

2. Asian American means a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands, including but not limited to Japan, China, Vietnam, Samoa, Laos, Cambodia, Taiwan, Northern Mariana, the Philippines, a U.S. territory of the Pacific, India, Pakistan, Bangladesh, or Sri Lanka and who is regarded as such by the community of which this person claims to be a part.

3. Hispanic American means a person having origins in any of the Spanish-speaking peoples of Mexico, South or Central America, or the Caribbean Islands or other Spanish or Portuguese cultures and who is regarded as such by the community of which this person claims to be a part.

4. Native American means a person having origins in any of the original peoples of North America and who is regarded as such by the community of which this person claims to be a part or who is recognized by a tribal organization.

5. a member of another group, or other individual, found to be economically and socially disadvantaged by the Small Business Administration under 8(a) of the Small Business Act as amended (15 U.S.C. 637(a)).

State agency means any authority, board, department, instrumentality, institution, agency, or other unit of state government. "State agency" shall not include any county, city, or town.

A list of Virginia Department of Minority Business Enterprise (DMBE) certified SWaM firms is maintained on the DMBE web site (http://www.dmbe.state.va.us/) under the SWaM Vendor Directory link.

SWaM certification entitles firms to participate in VDOT's SWaM program; however, this certification does not guarantee that the firm will obtain work nor does it attest to the firm’s abilities to perform any particular work.

The Contractor is encouraged to use the services of banks owned or controlled by minorities or females; however, use of such services will not be credited toward participation achievement for the Contract. The Department has on file, and will make available on request, the names and addresses of known minority and female owned banks in the Commonwealth of Virginia.

The Contractor shall designate and make known to the Department a liaison officer who is assigned the responsibility of actively and effectively administering, encouraging and promoting a responsive program for the use of SWaMs.

The performance of the Contract for the purpose of this specification shall be interpreted to include, but not necessarily be limited to, subcontracting; furnishing materials, supplies, and services; and, leasing equipment or where applicable, any combination thereof.

If the Contractor intends to sublet a portion of the work on the project in accordance with the provisions of Section 105.06 of the Specifications, the Contractor is encouraged to seek out and consider SWaMs as potential subcontractors. The Contractor is encouraged to contact SWaMs
to solicit their interest, capability, and prices and shall retain on file the proper documentation to substantiate such contacts.

By signing the bid, the bidder certifies to the following:

- That on the work proposed to be sublet and shown on Form C-31 for Contractors Proposal to Sublet, the bidder has taken reasonable steps to seek out and consider SWaMs as potential subcontractors.

- That, if awarded the project, any work proposed to be sublet and not shown on the form for Contractors Proposal to Sublet, the same reasonable steps certified herein will be taken.

If the Department has determined that specific opportunities for participation by SWaMs are available on a particular Contract and the bidder chooses to claim credit for SWaM participation, the extent of such participation will be shown as a percentage of the Contract amount and will be indicated on Form C-111, SWaM Participation.

If the bidder is a SWaM that is owned and controlled by a minority female(s), participation achievement may be shown as either minority or female, but not both, as the certification indicates. Further, each bidder shall comply with the requirements of Section 102.01.

If the apparent low bidder is a currently certified SWaM firm, the SWaM requirements of this provision will not be applicable except for those referring to the reporting of participation achievement.

The following are examples of efforts the Department encourages bidders and Contractors to make in soliciting SWaM participation. Other factors or types of efforts may be relevant in appropriate cases. The Contractor is encouraged to:

(a) attend any pre-solicitation or pre-bid meetings at which SWaMs could be present and/or informed of contracting and subcontracting opportunities;

(b) advertise in general circulation, trade association and minority-focus media concerning the subcontracting opportunities;

(c) provide written notice to a reasonable number of specific SWaMs that their interest in the Contract is being solicited in sufficient time to allow the SWaMs to participate effectively;

(d) follow-up initial solicitations of interest by contacting SWaMs to determine with certainty whether the SWaMs are interested;

(e) select portions of the work to be performed by SWaMs in order to increase the likelihood of obtaining SWaM participation (including, where appropriate, breaking
down proposed contract work into economically feasible units to facilitate SWaM participation);

(f) provide interested SWaMs with adequate information about the plans, Specifications, and requirements of the Contract

(g) negotiate in good faith with interested SWaMs, not rejecting SWaMs as unqualified without sound reasons based on a thorough investigation of their capabilities;

(h) make efforts to assist interested SWaMs in obtaining bonding, lines of credit, or insurance required by the Department or Contractor;

(i) make efforts to assist interested SWaMs in obtaining necessary equipment, supplies, materials, or other necessary or related assistance or services; and,

(j) effectively use the services of available minority, woman and small business community organizations; minority, woman and small business contractors’ groups; local, state and federal minority, woman and small business assistance offices; and other organizations that provide assistance in the recruitment and placement of SWaMs.

Any agreement between a bidder and a SWaM whereby the SWaM agrees not to provide quotations for performance of work to other bidders is prohibited.

The Contractor shall submit to the Department a fully executed Form C-111 showing the name(s) and certification number(s) of any currently certified SWaMs who will perform work eligible to be reported as said participation credit.

The Contractor shall furnish, and require each subcontractor to furnish, on a quarterly basis, information relative to all SWaM involvement on the project. The information shall be indicated on Form C-63, DBE and SWAM Payment Compliance Report or by copies of canceled checks with appropriate identifying notations. If participation achievement is to be fulfilled with a SWaM whose name has not been previously furnished to the Department for the Contract in question, an initial or revised Form C-111, whichever is appropriate, shall be submitted prior to such SWaM beginning the work. Failure to provide the Department the forms by the fifth of the month following each quarterly reporting period may result in delay of the Contractor’s estimate for payment.

If a SWaM, through no fault of the Contractor, is unable or unwilling to fulfill his agreement with the Contractor, the Contractor shall immediately notify the Department and provide all relevant facts. If any subcontractor is relieved of the responsibility to perform work under their subcontract, the Contractor is encouraged to take the appropriate steps to obtain a SWaM to perform an equal or greater dollar value of the remaining subcontracted work. The substitute SWaM’s name, description of the work, and dollar value of the work shall be submitted to the Department on Form C-111 prior to such SWaM beginning the work, if such work is to be counted for participation achievement.
Section 107.15—Use of Disadvantaged Business Enterprises (DBEs)

A. Disadvantaged Business Enterprise (DBE) Program Requirements

Any Contractor, subcontractor, supplier, DBE firm, and contract surety involved in the performance of work on a federal-aid contract shall comply with the terms and conditions of the United States Department of Transportation (USDOT) DBE Program as the terms appear in Part 26 of the Code of Federal Regulations (49 CFR as amended), the USDOT DBE Program regulations; and the Virginia Department of Transportation’s (VDOT or the Department) Road and Bridge Specifications and DBE Program rules and regulations.

For the purposes of this provision, Contractor is defined as the Prime Contractor of the contract; and sub-contractor is defined as any DBE supplier, manufacturer, or subcontractor performing work or furnishing material, supplies or services to the contract. The Contractor shall physically include this same contract provision in every supply or work/service subcontract that it makes or executes with a subcontractor having work for which it intends to claim credit.

In accordance with 49 CFR Part 26 and VDOT’s DBE Program requirements, the Contractor, for itself and for its subcontractors and suppliers, whether certified DBE firms or not, shall commit to complying fully with the auditing, record keeping, confidentiality, cooperation, and anti-intimidation or retaliation provisions contained in those federal and state DBE Program regulations. By bidding on this contract, and by accepting and executing this contract, the Contractor agrees to assume these contractual obligations and to bind the Contractor’s subcontractors contractually to the same at the Contractor’s expense.

The Contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award, administration, and performance of this contract. Failure by the Contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or other such remedy, as VDOT deems appropriate.

All administrative remedies noted in this provision are automatic unless the Contractor exercises the right of appeal within the required timeframe(s) specified herein. Appeal requirements, processes, and procedures shall be in accordance with
guidelines stated herein and current at the time of the proceedings. Where applicable, the Department will notify the Contractor of any changes to the appeal requirements, processes, and procedures after receiving notification of the Contractor’s desire to appeal.

All time frames referenced in this provision are expressed in business days unless otherwise indicated. Should the expiration of any deadline fall on a weekend or holiday, such deadline will automatically be extended to the next normal business day.

B. DBE Certification

The only DBE firms eligible to perform work on a federal-aid contract for DBE contract goal credit are firms certified as Disadvantaged Business Enterprises by the Virginia Department of Minority Business Enterprise (DMBE) or the Metropolitan Washington Airports Authority (MWAA) in accordance with federal and VDOT guidelines. DBE firms must be certified in the specific work listed for DBE contract goal credit. A directory listing of certified DBE firms can be obtained from the Virginia Department of Minority Business Enterprise and the Metropolitan Washington Airports Authority Internet websites: http://www.dmbe.virginia.gov/; http://mwaa.com/362.htm

C. Bank Services

The Contractor and each subcontractor are encouraged to use the services of banks owned and controlled by socially and economically disadvantaged individuals. Such banking services and the fees charged for services typically will not be eligible for DBE Program contract goal credit.

D. DBE Program-Related Certifications Made by Bidders/Contractors

By submitting a bid and by entering into any contract on the basis of that bid, the bidder/Contractor certifies to each of the following DBE Program-related conditions and assurances:

1. That the management and bidding officers of its firm agree to comply with the bidding and project construction and administration obligations of the USDOT DBE Program requirements and regulations of 49 CFR Part 26 as amended, and VDOT’s Road and Bridge Specifications and DBE Program requirements and regulations.

2. Under penalty of perjury and other applicable penal law that it has complied with the DBE Program requirements in submitting the bid, and shall comply fully with these requirements in the bidding, award, and execution of the contract.
3. To ensure that DBE firms have been given full and fair opportunity to participate in the performance of the contract. The bidder certifies that all reasonable steps were, and will be, taken to ensure that DBE firms had, and will have, an opportunity to compete for and perform work on the contract. The bidder further certifies that the bidder shall not discriminate on the basis of race, color, age, national origin, or sex in the performance of the contract or in the award of any subcontract. Any agreement between a bidder and a DBE whereby the DBE promises not to provide quotations for performance of work to other bidders is prohibited.

4. As a bidder, good faith efforts were made to obtain DBE participation in the proposed contract at or above the goal for DBE participation established by VDOT. It has submitted as a part of its bid true, accurate, complete, and detailed documentation of the good faith efforts it performed to meet the contract goal for DBE participation. The bidder, by signing and submitting its bid, certifies the DBE participation information submitted within the stated time thereafter is true, correct, and complete, and that the information provided includes the names of all DBE firms that will participate in the contract, the specific line item(s) that each listed DBE firm will perform, and the creditable dollar amounts of the participation of each listed DBE. The specific line item must reference the VDOT line number and item number contained in the proposal.

5. The bidder further certifies, by signing its bid, it has committed to use each DBE firm listed for the specific work item shown to meet the contract goal for DBE participation. Award of the contract will be conditioned upon meeting these and other listed requirements of 49 CFR Part 26.53 and the contract documents. By signing the bid, the bidder certifies on work that it proposes to sublet; it has made good faith efforts to seek out and consider DBEs as potential subcontractors. The bidder shall contact DBEs to solicit their interest, capability, and prices in sufficient time to allow them to respond effectively, and shall retain on file proper documentation to substantiate its good faith efforts. Award of the contract will be conditioned upon meeting these and other listed requirements of 49 CFR Part 26.53 and the contract documents.

6. Once awarded the contract, the Contractor shall make good faith efforts to utilize DBE firms to perform work designated to be performed by DBEs at or above the amount or percentage of the dollar value specified in the bidding documents. Further, the Contractor understands it shall not unilaterally terminate, substitute for, or replace any DBE firm that was designated in the executed contract in whole or in part with another DBE, any non-DBE firm, or with the Contractor's own forces or those of an affiliate of the Contractor without the prior written consent of VDOT as set out within the requirements of this provision.

7. Once awarded the contract, the Contractor shall designate and make known to the Department a liaison officer who is assigned the responsibility of administering and promoting an active and inclusive DBE program as required by 49 CFR Part
26 for DBEs. The designation and identity of this officer need be submitted only once by the Contractor during any twelve (12) month period at the preconstruction conference for the first contract the Contractor has been awarded during that reporting period. The Department will post such information for informational and administrative purposes at VDOT’s Internet Civil Rights Division website.

8. Once awarded the contract, the Contractor shall comply fully with all regulatory and contractual requirements of the USDOT DBE Program, and that each DBE firm participating in the contract shall fully perform the designated work items with the DBE’s own forces and equipment under the DBE’s direct supervision, control, and management. Where a contract exists and where the Contractor, DBE firm, or any other firm retained by the Contractor has failed to comply with federal or VDOT DBE Program regulations and/or their requirements on that contract, VDOT has the authority and discretion to determine the extent to which the DBE contract regulations and/or requirements have not been met, and may assess against the Contractor any remedies available at law or provided in the contract in the event of such a contract breach.

9. In the event a bond surety assumes the completion of work, if for any reason VDOT has terminated the prime Contractor, the surety shall be obligated to meet the same DBE contract terms and requirements as were required of the original prime Contractor in accordance with the requirements of this specification.

E. Disqualification of Bidder

Bidders may be disqualified from bidding for failure to comply with the requirements of this Special Provision, the contract specifications, and VDOT Road and Bridge Specifications.

F. Bidding Procedures

The following bidding procedures shall apply to the contract for DBE Program compliance purposes:

1. Prequalification of Subcontractors: All prospective DBE subcontractors shall prequalify with the Department prior to bidding and shall have received a certification of qualification to perform VDOT work prior to the bidder/Contractor submitting their bid. Suppliers, haulers and consultants are not required to be prequalified.

2. Contract Goal, Good Faith Efforts Specified: All bidders evidencing the attainment of DBE goal commitment equal to or greater than the required DBE goal established for the project must submit completed Form C-111, Minimum DBE Requirements, and Form C-48, Subcontractor/Supplier Solicitation and Utilization.
Forms C-48, C-49, C-111, and C-112 can be obtained from the VDOT website at: http://vdotforms.vdot.virginia.gov/

Instructions for submitting Form C-111 can be obtained from the VDOT website at:

3. **Bid Rejection:** The failure of a bidder to submit the required documentation within the timeframes specified in the **Contract Goal, Good Faith Efforts Specified** section of this Special Provision may be cause for rejection of that bidder’s bid.

If the lowest bidder is rejected for failure to submit the required documentation in the specified time frames, the Department may award the work to the next lowest bidder, or re-advertise the proposed work at a later date or proceed otherwise as determined by the Commonwealth.

4. **Good Faith Efforts Described:** In order to award a contract to a bidder that has failed to meet DBE contract goal requirements, VDOT will determine if the bidder’s efforts were adequate good faith efforts, and if given all relevant circumstances, those efforts were made actively and aggressively to meet the DBE requirements. Efforts to obtain DBE participation are not good faith efforts if they could not reasonably be expected to produce a level of DBE participation sufficient to meet the DBE Program and contract goal requirements.

Good faith efforts may be determined through use of the following list of the types of actions the bidder may make to obtain DBE participation. This is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts of similar intent may be relevant in appropriate cases:

(a) Soliciting through reasonable and available means, such as but not limited to, attendance at pre-bid meetings, advertising, and written notices to DBEs who have the capability to perform the work of the contract. Examples include: advertising in at least one daily/weekly/monthly newspaper of general circulation, as applicable; phone contact with a completely documented telephone log, including the date and time called, contact person, or voice mail status; and internet contacts with supporting documentation, including dates advertised. The bidder shall solicit this interest no less than five (5) business days before the bids are due so that the solicited DBEs have enough time to reasonably respond to the solicitation. The bidder shall determine with certainty if the DBEs are interested by taking reasonable steps to follow up initial solicitations as evidenced by documenting such efforts as requested on Form C-49, DBE Good Faith Efforts Documentation.
(b) Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the Contractor might otherwise prefer to completely perform all portions of this work in its entirety or use its own forces;

(c) Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner, which will assist the DBEs in responding to a solicitation;

(d) Negotiating for participation in good faith with interested DBEs;

1. Evidence of such negotiation shall include the names, addresses, and telephone numbers of DBEs that were considered; dates DBEs were contacted; a description of the information provided regarding the plans, specifications, and requirements of the contract for the work selected for subcontracting; and, if insufficient DBE participation seems likely, evidence as to why additional agreements could not be reached for DBEs to perform the work;

2. A bidder using good business judgment should consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and should take a firm’s price, qualifications, and capabilities, as well as contract goals, into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not sufficient reason for a bidder’s failure to meet the contract goal for DBE participation, as long as such costs are reasonable and comparable to costs customarily appropriate to the type of work under consideration. Also, the ability or desire of a bidder to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make diligent good faith efforts. Bidders are not, however, required to accept higher quotes from DBEs if the price difference can be shown by the bidder to be excessive, unreasonable, or greater than would normally be expected by industry standards;

(e) A bidder cannot reject a DBE as being unqualified without sound reasons based on a thorough investigation of the DBE’s capabilities. The DBE’s standing within its industry, membership in specific groups, organizations, associations, and political or social affiliations, and union vs. non-union employee status are not legitimate causes for the rejection or non-solicitation of bids in the bidder’s efforts to meet the project goal for DBE participation;

(f) Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by VDOT or by the bidder/Contractor;
(g) Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services subject to the restrictions contained in these provisions;

(h) Effectively using the services of appropriate personnel from VDOT and from DMBE; available minority/women community or minority organizations; contractors’ groups; local, state, and Federal minority/ women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and utilization of qualified DBEs.

G. Documentation and Administrative Reconsideration of Good Faith Efforts

**During Bidding:** As described in the Contract Goal, Good Faith Efforts Specified section of this Special Provision, the bidder must provide Form C-49, DBE Good Faith Efforts Documentation, of its efforts made to meet the DBE contract goal as proposed by VDOT within the time frame specified in this provision. The means of transmittal and the risk for timely receipt of this information shall be the responsibility of the bidder. The bidder shall attach additional pages to the certification, if necessary, in order to fully detail specific good faith efforts made to obtain the DBE firms participation in the proposed contract work.

**During the Contract:** If a DBE, through no fault of the Contractor, is unable or unwilling to fulfill his agreement with the Contractor, the Contractor shall immediately notify the Department and provide all relevant facts. If a Contractor relieves a DBE subcontractor of the responsibility to perform work under their subcontract, the Contractor is encouraged to take the appropriate steps to obtain a DBE to perform an equal dollar value of the remaining subcontracted work. In such instances, the Contractor is expected to seek DBE participation towards meeting the goal during the performance of the contract.

If the Contractor fails to conform to the schedule of DBE participation as shown on the progress schedule, or at any point at which it is clearly evident that the remaining dollar value of allowable credit for performing work is insufficient to obtain the scheduled participation, and the Contractor has not taken the preceding actions, the Contractor and any aforementioned affiliates may be subject to disallowance of DBE credit until such time as conformance with the schedule of DBE participation is achieved.

**Project Completion:** If the Contractor fails upon completion of the project to meet the required participation, the Contractor and any prime contractual affiliates, as in the case of a joint venture, may be enjoined from bidding as a prime Contractor, or participating as a subcontractor on VDOT projects for a period of 90 days.

Prior to enjoinder from bidding or denial to participate as a subcontractor for failure to comply with participation requirements, as provided hereinbefore, the Contractor
may submit documentation to the State Construction Engineer to substantiate that failure was due solely to quantitative underrun(s), elimination of items subcontracted to DBEs, or to circumstances beyond their control, and that all feasible means have been used to obtain the required participation. The State Construction Engineer upon verification of such documentation shall make a determination whether or not the Contractor has met the requirements of the contract.

If it is determined that the aforementioned documentation is insufficient or the failure to meet required participation is due to other reasons, the Contractor may request an appearance before the Administrative Reconsideration Panel to establish that all feasible means were used to meet such participation requirements. The decision of the Administrative Reconsideration Panel shall be administratively final. If the decision is made to enjoin the Contractor from bidding on other VDOT work as described herein, the enjoinder period will begin upon the Contractor’s failure to request a hearing within the designated time frame or upon the Administrative Reconsideration Panel’s decision to enjoin, as applicable.

H. DBE Participation for Contract Goal Credit

DBE participation on the contract will count toward meeting the DBE contract goal in accordance with the following criteria:

1. Cost-plus subcontracts will not be considered to be in accordance with normal industry practice and will not normally be allowed for credit.

2. The applicable percentage of the total dollar value of the contract or subcontract awarded to the DBE will be counted toward meeting the contract goal for DBE participation in accordance with the DBE Program-Related Certifications Made by Bidders/Contractors section of this Special Provision for the value of the work, goods, or services that are actually performed or provided by the DBE firm itself or subcontracted by the DBE to other DBE firms.

3. When a DBE performs work as a participant in a joint venture with a non-DBE firm, the Contractor may count toward the DBE goal only that portion of the total dollar value of the contract equal to the distinctly defined portion of the contract work that the DBE has performed with the DBE’s own forces or in accordance with the provisions of this Section. The Department shall be contacted in advance regarding any joint venture involving both a DBE firm and a non-DBE firm to coordinate Department review and approval of the joint venture’s organizational structure and proposed operation where the Contractor seeks to claim the DBE’s credit toward the DBE contract goal.

4. When a DBE subcontracts part of the work of the contract to another firm, the value of that subcontracted work may be counted toward the DBE contract goal only if the DBE’s subcontractor at a lower tier is a certified DBE. Work that a DBE subcontracts to either a non-DBE firm or to a non-certified DBE firm will
not count toward the DBE contract goal. The cost of supplies and equipment a
DBE subcontractor purchases or leases from the prime Contractor or the prime’s
affiliated firms will not count toward the contract goal for DBE participation.

5. The Contractor may count expenditures to a DBE subcontractor toward the DBE
contract goal only if the DBE performs a Commercially Useful Function (CUF)
on that contract.

6. A Contractor may not count the participation of a DBE subcontractor toward the
Contractor's final compliance with the DBE contract goal obligations until the
amount being counted has actually been paid to the DBE. A Contractor may
count sixty (60) percent of its expenditures actually paid for materials and
supplies obtained from a DBE certified as a regular dealer, and one hundred (100)
percent of such expenditures actually paid for materials and supplies obtained
from a certified DBE manufacturer.

(a) For the purposes of this Special Provision, a regular dealer is defined as a firm
or person that owns, operates, or maintains a store, warehouse, or other
establishment in which the materials, supplies, articles, or equipment required
and used under the contract are bought, kept in stock, and regularly sold or
leased to the public in the usual course of business. To be a regular dealer, the
DBE firm\person shall be an established business that regularly engages, as
its principal business and under its own name, in the purchase and sale or
lease of the products or equipment in question. Packagers, brokers,
manufacturers' representatives, or other persons who arrange or expedite
transactions will not be considered regular dealers.

(b) A DBE firm or person may be a regular dealer in such bulk items as
petroleum products, steel, cement, gravel, stone, or asphalt without owning,
operating, or maintaining a place of business where it keeps such items in
stock if the DBE both owns and operates distribution equipment for the
products it sells and provides for the contract work, provided further that the
DBE firm or person has been certified with an appropriate NAICS code for
supply of such bulk items. Any supplementation of a regular dealer's own
distribution equipment shall be by a long-term lease agreement and not on an
ad hoc or contract-by-contract basis to be eligible for credit to meet the DBE
contract goal.

(c) If a DBE regular dealer is used for DBE contract goal credit, no additional
credit will be given for hauling or delivery to the project site goods or
materials sold by that DBE regular dealer. Those delivery costs shall be
deemed included in the price charged for the goods or materials by the DBE
regular dealer, who shall be responsible for their distribution.

(d) For the purposes of this Special Provision, a manufacturer will be defined as a
firm that operates or maintains a factory or establishment that produces on the
premises the materials, supplies, articles, or equipment required under the contract and of the general character described by the project specifications. A manufacturer shall include firms that produce finished goods or products from raw or unfinished material, or purchase and substantially alter goods and materials to make them suitable for construction use before reselling them.

(g) A Contractor may count toward the DBE contract goal the following expenditures to DBE firms that are not regular dealers or manufacturers for DBE program purposes:

1. The entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of the federal-aid contract, if the fee is reasonable and not excessive or greater than would normally be expected by industry standards for the same or similar services.

2. The entire amount of that portion of the construction contract that is performed by the DBE's own forces and equipment under the DBE's supervision. This includes the cost of supplies and materials ordered and paid for by the DBE for contract work, including supplies purchased or equipment leased by the DBE, except supplies and equipment a DBE subcontractor purchases or leases from the prime Contractor or its affiliates.

(h) A Contractor may count toward the DBE contract goal one hundred (100) percent of the fees paid to a DBE trucker or hauler for the delivery of material and supplies required on the project job site, but not for the cost of those materials or supplies themselves, provided that the trucking or hauling fee is determined by VDOT to be reasonable, as compared with fees customarily charged by non-DBE firms for similar services. A Contractor shall not count costs for the removal or relocation of excess material from or on the job site when the DBE trucking company is the manufacturer of or a regular dealer in those materials and supplies. The DBE trucking firm shall also perform a Commercially Useful Function (CUF) on the project and not operate merely as a pass through for the purposes of gaining credit toward the DBE contract goal. Prior to submitting a bid, the Contractor shall determine, or contact the VDOT Civil Rights Division or its district Offices for assistance in determining, whether a DBE trucking firm will meet the criteria for performing a CUF on the project. See section on Miscellaneous DBE Program Requirements; Factors used to Determine if a DBE Trucking Firm is Performing a CUF.

(i) The Contractor will receive DBE contract goal credit for the fees or commissions charged by and paid to a DBE broker who arranges or expedites sales, leases, or other project work or service arrangements provided that
those fees are determined by VDOT to be reasonable and not excessive as compared with fees customarily charged by non-DBE firms for similar services. For the purposes of this Special Provision, a broker is defined as a person or firm that regularly engages in arranging for delivery of material, supplies, and equipment, or regularly arranges for the providing of project services as a course of routine business but does not own or operate the delivery equipment necessary to transport materials, supplies, or equipment to or from a job site.

I. Performing a Commercially Useful Function (CUF)

No credit toward the DBE contract goal will be allowed for contract payments or expenditures to a DBE firm if that DBE firm does not perform a CUF on that contract. A DBE performs a CUF when the DBE is solely responsible for execution of a distinct element of the contract work and the DBE actually performs, manages, and supervises the work involved with the firm’s own forces or in accordance with the provisions of the **DBE Participation for Contract Goal Credit** section of this Special Provision. To perform a CUF the DBE alone shall be responsible and bear the risk for the material and supplies used on the contract, selecting a supplier or dealer from those available, negotiating price, determining quality and quantity, ordering the material and supplies, installing those materials with the DBE’s own forces and equipment, and paying for those materials and supplies. The amount the DBE firm is to be paid under the contract shall be commensurate with the work the DBE actually performs and the DBE credit claimed for the DBE’s performance.

**Monitoring CUF Performance:** It shall be the Contractor's responsibility to ensure that all DBE firms selected for subcontract work on the contract, for which he seeks to claim credit toward the contract goal, perform a CUF. Further, the Contractor is responsible for and shall ensure that each DBE firm fully performs the DBE’s designated tasks with the DBE’s own forces and equipment under the DBE’s own direct supervision and management or in accordance with the provisions of the **DBE Participation for Contract Goal Credit** section of this Special Provision. For the purposes of this provision the DBE’s equipment will mean either equipment directly owned by the DBE as evidenced by title, bill of sale or other such documentation, or leased by the DBE, and over which the DBE has control as evidenced by the leasing agreement from a firm not owned in whole or part by the prime Contractor or an affiliate of the Contractor under this contract.

VDOT will monitor the Contractor’s DBE involvement during the performance of the contract. However, VDOT is under no obligation to warn the Contractor that a DBE's participation will not count toward the goal.

**DBEs Must Perform a Useful and Necessary Role in Contract Completion:** A DBE does not perform a commercially useful function if the DBE’s role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.
DBEs Must Perform The Contract Work With Their Own Workforces: If a DBE does not perform and exercise responsibility for at least thirty (30) percent of the total cost of the DBE’s contract with the DBE’s own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involve, VDOT will presume that the DBE is not performing a CUF and such participation will not be counted toward the contract goal.

VDOT Makes Final Determination On Whether a CUF Is Performed: VDOT has the final authority to determine whether a DBE firm has performed a CUF on a federal-aid contract. To determine whether a DBE is performing or has performed a CUF, VDOT will evaluate the amount of work subcontracted by that DBE firm or performed by other firms and the extent of the involvement of other firms’ forces and equipment. Any DBE work performed by the Contractor or by employees or equipment of the Contractor shall be subject to disallowance under the DBE Program, unless the independent validity and need for such an arrangement and work is demonstrated.

J. Verification of DBE Participation and Imposed Damages

Within fourteen days after contract execution, the Contractor shall submit to the Responsible Engineer, with a copy to the District Civil Rights Office (DCRO), a fully executed subcontract agreement for each DBE used to claim credit in accordance with the requirements stated on Form C-112. The subcontract agreement shall be executed by both parties stating the work to be performed, the details or specifics concerning such work, and the price which will be paid to the DBE subcontractor. Because of the commercial damage that the Contractor and its DBE subcontractor could suffer if their subcontract pricing, terms, and conditions were known to competitors, the Department staff will treat subcontract agreements as proprietary Contractor trade secrets with regard to Freedom of Information Act requests. In lieu of subcontract agreements, purchase orders may be submitted for haulers, suppliers, and manufacturers. These too, will be treated confidentially and protected. Such purchase orders must contain, as a minimum, the following information: authorized signatures of both parties; description of the scope of work to include contract item numbers, quantities, and prices; and required federal contract provisions.

The Contractor shall also furnish, and shall require each subcontractor to furnish, information relative to all DBE involvement on the project for each quarter during the life of the contract in which participation occurs and verification is available. The information shall be indicated on Form C-63, DBE and SWAM Payment Compliance Report. The department reserves the right to request proof of payment via copies of cancelled checks with appropriate identifying notations. Failure to provide Form C-63 to the District Civil Rights Office (DCRO) within five (5) business days after the reporting period may result in delay of approval of the Contractor’s monthly progress estimate for payment. The names and certification numbers of DBE firms provided
by the Contractor on the various forms indicated in this Special Provision shall be exactly as shown on the DMBE’s or MWAA’s latest list of certified DBEs. Signatures on all forms indicated herein shall be those of authorized representatives of the Contractor as shown on the Prequalification Application, Form C-32 or the Prequalification/Certification Renewal Application, Form C-32A, or authorized by letter from the Contractor. If DBE firms are used which have not been previously documented with the Contractor’s bid and for which the Contractor now desires to claim credit toward the project goal, the Contractor shall be responsible for submitting necessary documentation in accordance with the procedures stipulated in this Special Provision to cover such work prior to the DBE beginning work.

Form C-63 can be obtained from the VDOT website at:
http://vdotforms.vdot.virginia.gov/

The Contractor shall submit to the Responsible Engineer its progress schedule with a copy to the DCRO, as required by Section 108.03 of the Specifications or other such specific contract scheduling specification that may include contractual milestones, i.e., monthly or VDOT requested updates. The Contractor shall include a narrative of applicable DBE activities relative to work activities of the Contractor’s progress schedule, including the approximate start times and durations of all DBE participation to be claimed for credit that shall result in full achievement of the DBE goal required in the contract.

On contracts awarded on the basis of good faith efforts, narratives or other agreeable format of schedule information requirements and subsequent progress determination shall be based on the commitment information shown on the latest Form C-111 as compared with the appropriate Form C-63.

Prior to beginning any major component or quarter of the work, as applicable, in which DBE work is to be performed, the Contractor shall furnish a revised Form C-111 showing the name(s) and certification number(s) of any current DBEs not previously submitted who will perform the work during that major component or quarter for which the Contractor seeks to claim credit toward the contract DBE goal. The Contractor shall obtain the prior approval of the Department for any assistance it may provide to the DBE beyond its existing resources in executing its commitment to the work in accordance with the requirements listed in the Good Faith Efforts Described section of this Special Provision. If the Contractor is aware of any assistance beyond a DBE’s existing resources that the Contractor, or another subcontractor, may be contemplating or may deem necessary and that have not been previously approved, the Contractor shall submit a new or revised narrative statement for VDOT’s approval prior to assistance being rendered.

If the Contractor fails to comply with correctly completing and submitting any of the required documentation requested by this provision within the specified time frames, the Department will withhold payment of the monthly progress estimate until such time as the required submissions are received VDOT. Where such failures to provide
required submittals or documentation are repeated the Department will move to enjoin the Contractor and any prime contractual affiliates, as in the case of a joint venture, from bidding as a prime Contractor, or participating as a subcontractor on VDOT projects until such submissions are received.

K. Documentation Required for Semi-final Payment

On those projects nearing completion, the Contractor must submit Form C-63 marked “Semi-Final” within twenty (20) days after the submission of the last regular monthly progress estimate to the DCRO. The form must include each DBE used on the contract work and the work performed by each DBE. The form shall include the actual dollar amount paid to each DBE for the accepted creditable work on the contract. The form shall be certified under penalty of perjury, or other applicable law, to be accurate and complete. VDOT will use this certification and other information available to determine applicable DBE credit allowed to date by VDOT and the extent to which the DBEs were fully paid for that work. The Contractor shall acknowledge by the act of filing the form that the information is supplied to obtain payment regarding a federal participation contract. A letter of certification, signed by both the prime Contractor and appropriate DBEs, will accompany the form, indicating the amount, including any retainage, if present, that remains to be paid to the DBE(s).

L. Documentation Required for Final Payment

On those projects that are complete, the Contractor shall submit a final Form C-63 marked “Final” to the DCRO, within thirty (30) days of the final estimate. The form must include each DBE used on the contract and the work performed by each DBE. The form shall include the actual dollar amount paid to each DBE for the creditable work on the contract. VDOT will use this form and other information available to determine if the Contractor and DBEs have satisfied the DBE contract goal percentage specified in the contract and the extent to which credit was allowed. The Contractor shall acknowledge by the act of signing and filing the form that the information is supplied to obtain payment regarding a federal participation contract.

M. Prompt Payment Requirements

The Contractor shall make prompt and full payment to the subcontractor(s) of any retainage held by the prime Contractor after the subcontractor’s work is satisfactorily completed.

For purposes of this Special Provision, a subcontractor’s work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished, documented, and accepted as required by the contract documents by VDOT. When VDOT has made partial acceptance of a portion of the prime contract, the Department will consider the work of any subcontractor covered by that partial acceptance to be
satisfactorily completed. Payment will be made in accordance with the requirements of Section 107.01, Section 109.08, and Section 109.09 of the Specifications.

Upon VDOT’s payment of the subcontractor’s portion of the work as shown on the monthly progress estimate and the receipt of payment by the Contractor for such work, the Contractor shall make compensation in full to the subcontractor for that portion of the work satisfactorily completed and accepted by the Department. For the purposes of this Special Provision, payment of the subcontractor’s portion of the work shall mean the Contractor has issued payment in full, less agreed upon retainage, if any, to the subcontractor for that portion of the subcontractor’s work that VDOT paid to the Contractor on the monthly progress estimate.

The Contractor shall make payment of the subcontractor’s portion of the work within seven (7) days of the receipt of payment from VDOT in accordance with the requirements of Section 107.01, Section 109.08, and Section 109.09 of the Specifications.

If the Contractor fails to make payment for the subcontractor’s portion of the work within the time frame specified herein, the subcontractor shall contact the Responsible Engineer and the Contractor’s bonding company in writing. The bonding company and VDOT will investigate the cause for non-payment and, barring mitigating circumstances that would make the subcontractor ineligible for payment, ensure payment in accordance with the requirements of Section 107.01, Section 109.08, and Section 109.09 of the Specifications.

By bidding on this contract, and by accepting and executing this contract, the Contractor agrees to assume these contractual obligations, and to bind the Contractor’s subcontractors contractually to those prompt payment requirements.

Nothing contained herein shall preclude the Contractor from withholding payment to the subcontractor in accordance with the terms of the subcontract in order to protect the Contractor from loss or cost of damage due to a breach of agreement by the subcontractor.

N. Miscellaneous DBE Program Requirements

Loss of DBE Eligibility: When a DBE firm has been removed from eligibility as a certified DBE firm, the following actions will be taken:

1. When a Bidder/Contractor has made a commitment to use a DBE firm that is not currently certified, thereby making the Contractor ineligible to receive DBE participation credit for work performed, and a subcontract has not been executed, the ineligible DBE firm does not count toward either the contract goal or overall goal. The Contractor shall meet the contract goal with a DBE firm that is eligible to receive DBE credit for work performed, or must demonstrate to the Contract Engineer that it has made good faith efforts to do so.
2. When a Bidder/Contractor has executed a subcontract with a certified DBE firm prior to official notification of the DBE firm’s loss of eligibility, the Contractor may continue to use the firm on the contract and shall continue to receive DBE credit toward its DBE goal for the subcontractor’s work.

3. When VDOT has executed a prime contract with a DBE firm that is certified at the time of contract execution but that is later ruled ineligible, the portion of the ineligible firm’s performance on the contract before VDOT has issued the notice of its ineligibility shall count toward the contract goal.

**Termination of DBE:** If a certified DBE subcontractor is terminated, or fails, refuses, or is unable to complete the work on the contract for any reason, the Contractor must promptly request approval to substitute or replace that firm in accordance with this section of this Special Provision.

The Contractor, as aforementioned in **DBE Program-Related Certifications Made by Bidders/Contractors**, shall notify VDOT in writing before terminating and/or replacing the DBE that was committed as a condition of contract award or that is otherwise being used or represented to fulfill DBE contract obligations during the contract performance period. Written consent from the Department for terminating the performance of any DBE shall be granted only when the Contractor can demonstrate that the DBE is unable, unwilling, or ineligible to perform its obligations for which the Contractor sought credit toward the contract DBE goal. Such written consent by the Department to terminate any DBE shall concurrently constitute written consent to substitute or replace the terminated DBE with another DBE. Consent to terminate a DBE shall not be based on the Contractor’s ability to negotiate a more advantageous contract with another subcontractor whether that subcontractor is, or is not, a certified DBE.

1. All Contractor requests to terminate, substitute, or replace a certified DBE shall be in writing, and shall include the following information:

   (a) The date the Contractor determined the DBE to be unwilling, unable, or ineligible to perform.

   (b) The projected date that the Contractor shall require a substitution or replacement DBE to commence work if consent is granted to the request.

   (c) A brief statement of facts describing and citing specific actions or inaction by the DBE giving rise to the Contractor’s assertion that the DBE is unwilling, unable, or ineligible to perform;

   (d) A brief statement of the affected DBE’s capacity and ability to perform the work as determined by the Contractor;
(e) A brief statement of facts regarding actions taken by the Contractor which are believed to constitute good faith efforts toward enabling the DBE to perform;

(f) The current percentage of work completed on each bid item by the DBE;

(g) The total dollar amount currently paid per bid item for work performed by the DBE;

(h) The total dollar amount per bid item remaining to be paid to the DBE for work completed, but for which the DBE has not received payment, and with which the Contractor has no dispute;

(i) The total dollar amount per bid item remaining to be paid to the DBE for work completed, but for which the DBE has not received payment, and over which the Contractor and/or the DBE have a dispute.

2. Contractor’s Written Notice to DBE of Pending Request to Terminate and Substitute with another DBE.

The Contractor shall send a copy of the “request to terminate and substitute” letter to the affected committed DBE firm, in conjunction with submitting the request to the DCRO. The affected DBE firm may submit a response letter to the Department within two (2) business days of receiving the notice to terminate from the Contractor. The affected DBE firm shall explain its position concerning performance on the committed work. The Department will consider both the Contractor’s request and the DBE’s response and explanation before approving the Contractor’s termination and substitution request, or determining if any action should be taken against the Contractor.

If, after making its best efforts to deliver a copy of the “request to terminate and substitute” letter, the Contractor is unsuccessful in notifying the affected DBE firm, the Department will verify that the affected, committed DBE firm is unable or unwilling to continue the contract. The Department will immediately approve the Contractor’s request for a substitution.

3. Proposed Substitution of Another Certified DBE

Upon termination of a DBE, the Contractor shall use reasonable good faith efforts to replace the terminated DBE. The termination of such DBE shall not relieve the Contractor of its obligations pursuant to this section, and the unpaid portion of the terminated DBE’s contract will not be counted toward the contract goal.

When a DBE substitution is necessary, the Contractor shall submit an amended Form C-111 with the name of another DBE firm, the proposed work to be performed by that firm, and the dollar amount of the work to replace the unfulfilled portion of the work of the originally committed DBE firm. The
Contractor shall furnish all pertinent information including the contract I.D. number, project number, bid item, item description, bid unit and bid quantity, unit price, and total price. In addition, the Contractor shall submit documentation for the requested substitute DBE as described in this section of this Special Provision.

Should the Contractor be unable to commit the remaining required dollar value to the substitute DBE, the Contractor shall provide written evidence of good faith efforts made to obtain the substitute value requirement. The Department will review the quality, thoroughness, and intensity of those efforts. Efforts that are viewed by VDOT as merely superficial or pro-forma will not be considered good faith efforts to meet the contract goal for DBE participation. The Contractor must document the steps taken that demonstrated its good faith efforts to obtain participation as set forth in the Good Faith Efforts Described section of this Special Provision.

Factors Used to determine if a DBE Trucking Firm is performing a CUF:

The following factors will be used to determine whether a DBE trucking company is performing a CUF:

1. To perform a CUF the DBE trucking firm shall be completely responsible for the management and supervision of the entire trucking operation for which the DBE is responsible by subcontract on a particular contract. There shall not be a contrived arrangement, including, but not limited to, any arrangement that would not customarily and legally exist under regular construction project subcontracting practices for the purpose of meeting the DBE contract goal;

2. The DBE must own and operate at least one fully licensed, insured, and operational truck used in the performance of the contract work. This does not include a supervisor’s pickup truck or a similar vehicle that is not suitable for and customarily used in hauling the necessary materials or supplies;

3. The DBE receives full contract goal credit for the total reasonable amount the DBE is paid for the transportation services provided on the contract using trucks the DBE owns, insures, and operates using drivers that the DBE employs and manages;

4. The DBE may lease trucks from another certified DBE firm, including from an owner-operator who is certified as a DBE. The DBE firm that leases trucks from another DBE will receive credit for the total fair market value actually paid for transportation services the lessee DBE firm provides on the contract;

5. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of the transportation services provided by non-DBE lessees, not to exceed the value of transportation services provided by DBE-owned trucks on the
contract. For additional participation by non-DBE lessees, the DBE will only receive credit for the fee or commission it receives as a result of the lease arrangement.

**EXAMPLE**

DBE Firm X uses two (2) of its own trucks on a contract. The firm leases two (2) trucks from DBE Firm Y and six (6) trucks from non-DBE Firm Z.

<table>
<thead>
<tr>
<th>Firm X</th>
<th>Value of Trans. Serv.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Truck 1</td>
<td>Owned by DBE $100 per day</td>
</tr>
<tr>
<td>Truck 2</td>
<td>Owned by DBE $100 per day</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Firm Y</th>
<th>Value of Trans. Serv.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Truck 1</td>
<td>Leased from DBE $110 per day</td>
</tr>
<tr>
<td>Truck 2</td>
<td>Leased from DBE $110 per day</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Firm Z</th>
<th>Value of Trans. Serv.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Truck 1</td>
<td>Leased from Non DBE $125 per day</td>
</tr>
<tr>
<td>Truck 2</td>
<td>Leased from Non DBE $125 per day</td>
</tr>
<tr>
<td>Truck 3</td>
<td>Leased from Non DBE $125 per day</td>
</tr>
<tr>
<td>Truck 4</td>
<td>Leased from Non DBE $125 per day</td>
</tr>
<tr>
<td>Truck 5</td>
<td>Leased from Non DBE* $125 per day</td>
</tr>
<tr>
<td>Truck 6</td>
<td>Leased from Non DBE* $125 per day</td>
</tr>
</tbody>
</table>

DBE credit would be awarded for the total transportation services provided by DBE Firm X and DBE Firm Y, and may also be awarded for the total value of transportation services by four (4) of the six (6) trucks provided by non-DBE Firm Z (not to exceed the value of transportation services provided by DBE-owned trucks).

**Credit = 8 Trucks**

**Total Value of Transportation Services = $840**
In all, full DBE credit would be allowed for the participation of eight (8) trucks (twice the number of DBE trucks owned and leased) and the dollar value attributable to the Value of Transportation Services provided by the 8 trucks.

* With respect to the other two trucks provided by non-DBE Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks that DBE Firm X receives as a result of the lease with non-DBE Firm Z.

6. For purposes of this section, the lease must indicate that the DBE firm leasing the truck has exclusive use of and control over the truck. This will not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, provided the lease gives the DBE absolute priority for and control over the use of the leased truck. Leased trucks must display the name and identification number of the DBE firm that has leased the truck at all times during the life of the lease.

Data Collection: In accordance with 49CFR Section 26.11, all firms bidding on prime contracts and bidding or quoting subcontracts on federal-aid projects shall provide the following information to the Contract Engineer annually.

- Firm name
- Firm address
- Firm’s status as a DBE or non-DBE
- The age of the firm and
- The annual gross receipts of the firm

The means of transmittal and the risk for timely receipt of this information shall be the responsibility of the bidder. However, the above information can be submitted by means of the Annual Gross Receipts Survey as required in the Prequalification/Certification application.

All bidders, including DBE prime Contractor bidders, shall complete and submit to the Contract Engineer the Subcontractor/Supplier Solicitation and Utilization Form C-48 for each bid submitted; to be received within ten (10) business days after the bid opening. Failure of bidders to submit this form in the time frame specified may be cause for disqualification of the bidder and rejection of their bid in accordance with the requirements of this Special Provision, the contract specifications, and VDOT Road and Bridge specifications.

O. Suspect Evidence of Criminal Behavior
Failure of a bidder, Contractor, or subcontractor to comply with the Virginia Department of Transportation Road and Bridge Specifications and these Special Provisions wherein there appears to be evidence of criminal conduct shall be referred to the Attorney General for the Commonwealth of Virginia and/or the FHWA Inspector General for criminal investigation and, if warranted, prosecution.

Suspected DBE Fraud

In appropriate cases, VDOT will bring to the attention of the U. S. Department of Transportation (USDOT) any appearance of false, fraudulent, or dishonest conduct in connection with the DBE program, so that USDOT can take the steps, e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules provided in 49CFR Part 31.

P. Summary of Remedies for Non-Compliance with DBE Program Requirements

Failure of any bidder\Contractor to comply with the requirements of this Special Provision for Section 107.15 of the Virginia Road and Bridge Specifications, which is deemed to be a condition of bidding, or where a contract exists, is deemed to constitute a breach of contract shall be remedied in accordance with the following:

1. Disadvantaged Business Enterprise (DBE) Program Requirements

The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award, administration, and performance of this contract. Failure by the Contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or other such remedy, as VDOT deems appropriate.

All administrative remedies noted in this provision are automatic unless the Contractor exercises the right of appeal within the required timeframe(s) specified herein.

2. DBE Program-Related Certifications Made by Bidders\Contractors

Once awarded the contract, the Contractor shall comply fully with all regulatory and contractual requirements of the USDOT DBE Program, and that each certified DBE firm participating in the contract shall fully perform the designated work items with the DBE’s own forces and equipment under the DBE’s direct supervision, control, and management. Where a contract exists and where the Contractor, DBE firm, or any other firm retained by the Contractor has failed to comply with federal or VDOT DBE Program regulations and/or their requirements on that contract, VDOT has the authority and discretion to determine the extent to which the DBE contract requirements have not been met,
and will assess against the Contractor any remedies available at law or provided in the contract in the event of such a contract breach.

3. Disqualification of Bidder

Bidders may be disqualified from bidding for failure to comply with the requirements of this Special Provision, the contract specifications, and VDOT Road and Bridge Specifications.

4. Bidding Procedures

The failure of a bidder to submit the required documentation within the timeframes specified in the **Contract Goal, Good Faith Efforts Specified** section of this Special Provision may be cause for rejection of that bidder’s bid. If the lowest bidder is rejected for failure to submit required documentation in the specified time frames, the Department may either award the work to the next lowest bidder, or re-advertise and construct the work under contract or otherwise as determined by the Commonwealth.

In order to award a contract to a bidder that has failed to meet DBE contract goal requirements, VDOT will determine if the bidder’s efforts were adequate good faith efforts, and if given all relevant circumstances, those efforts were to the extent a bidder actively and aggressively seeking to meet the requirements would make. Regardless of the DBE contract goal participation level proposed by the bidder or the extent of good faith efforts shown, all bidders shall timely and separately file their completed and executed Forms C-111, C-112, C-48, and Form C-49, as aforementioned. The Contractor is encouraged to seek additional participation during the life of the contract.

If the Contractor fails to conform to the schedule of DBE participation as shown on the progress schedule, or at any point at which it is clearly evident that the remaining dollar value of allowable credit for performing work is insufficient to obtain the scheduled participation, the Contractor and any aforementioned affiliates may be enjoined from bidding for 60 days or until such time as conformance with the schedule of DBE participation is achieved. In such instances, the Contractor is expected to seek DBE participation towards meeting the goal during the prosecution of the contract.

If the Contractor fails upon completion of the project to meet the required participation, the Contractor and any prime contractual affiliates, as in the case of a joint venture, may be enjoined from bidding as a prime Contractor, or participating as a subcontractor on VDOT projects for a period of 90 days.

Prior to enjoinment from bidding or denial to participate as a subcontractor for failure to comply with participation requirements, as provided hereinbefore, the Contractor may submit documentation to the State Construction Engineer to
substantiate that failure was due solely to quantitative underrun(s) or elimination of items subcontracted to DBEs, and that all feasible means have been used to obtain the required participation. The State Construction Engineer upon verification of such documentation shall make a determination whether or not the Contractor has met the requirements of the contract.

If it is determined that the aforementioned documentation is insufficient or the failure to meet required participation is due to other reasons, the Contractor may request an appearance before the Administrative Reconsideration Panel to establish that all feasible means were used to meet such participation requirements. The decision of the Administrative Reconsideration Panel shall be administratively final. The enjoinment period will begin upon the Contractor’s failure to request a hearing within the designated time frame or upon the Administrative Reconsideration Panel’s decision to enjoin, as applicable.

5. Verification of DBE Participation and Imposed Damages

If the Contractor fails to comply with correctly completing and submitting any of the required documentation requested by this provision within the specified time frames, the Department will withhold payment of the monthly progress estimate until such time as the required submissions are received by VDOT. Where such failures to provide required submittals or documentation are repeated the Department will move to enjoin the Contractor and any prime contractual affiliates, as in the case of a joint venture, from bidding as a prime Contractor, or participating as a subcontractor on VDOT projects until such submissions are received.

In addition to the remedies described heretofore in this provision VDOT also exercises its rights with respect to the following remedies:

**Suspect Evidence of Criminal Behavior**

Failure of a bidder, Contractor, or subcontractor to comply with the Virginia Department of Transportation Road and Bridge Specifications and these Special Provisions wherein there appears to be evidence of criminal conduct shall be referred to the Attorney General for the Commonwealth of Virginia and/or the FHWA Inspector General for criminal investigation and, if warranted prosecution.

In appropriate cases, VDOT will bring to the attention of the U. S. Department of Transportation (USDOT) any appearance of false, fraudulent, or dishonest conduct in connection with the DBE program, so that USDOT can take the steps, e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules provided in 49 CFR Part 31.
COMPREHENSIVE AGREEMENT

RELATING TO THE I-95 HOV/HOT LANES PROJECT

DATED AS OF JULY 31, 2012

BY AND BETWEEN

VIRGINIA DEPARTMENT OF TRANSPORTATION,
an Agency of the Commonwealth of Virginia

AND

95 EXPRESS LANES LLC,
a Delaware limited liability company

**THE VIRGINIA DEPARTMENT OF TRANSPORTATION RESERVES THE RIGHT TO MODIFY ANY OF THE TERMS PRESENTED IN THIS DRAFT COMPREHENSIVE AGREEMENT**
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This COMPREHENSIVE AGREEMENT RELATING TO THE I-95 HOV/HOT LANES PROJECT (this “Agreement”) is made and entered into as of July 31, 2012 by and between the VIRGINIA DEPARTMENT OF TRANSPORTATION (the “Department”), an agency of the Commonwealth of Virginia (the “State”), the address of which Department is 1401 East Broad Street, Richmond, Virginia 23219; and 95 EXPRESS LANES LLC, a Delaware limited liability company (the “Concessionaire”), the address of which is 6440 General Green Way, Alexandria, Virginia 22312.

ARTICLE 1.

RECITALS

WHEREAS, on March 25, 1995, the Governor of the State signed into law, effective July 1, 1995, the Public-Private Transportation Act, which was amended and re-enacted by Chapters 504 and 562 of the 2005 Acts of Assembly and signed into law by the Governor, effective July 1, 2005 (as amended, the “Act”).

WHEREAS, the Act grants the Department the authority to allow private entities to develop and/or operate qualifying transportation facilities if the Department determines there is a need for the facilities and private involvement would provide the facilities to the public in a timely and cost-effective fashion.

WHEREAS, pursuant to the Act, on September 24, 2003, Clark/Shirley submitted an unsolicited conceptual proposal to the Department for the Proposed Project. In accordance with the Department’s Act guidelines then in effect, the Department posted and published notice of the conceptual proposal and solicited competing proposals. On March 17, 2004, Fluor (as defined herein) submitted a conceptual proposal to the Department for the development, design, financing, construction, operation and maintenance of the HOT Lanes on I-95.

WHEREAS, both competing proposals were referred to an initial review committee (the “Initial Review Committee”) for preliminary review.

WHEREAS, following a determination by the Initial Review Committee that the conceptual proposals offered by both proposers merited further review, the Commonwealth Transportation Board on January 20, 2005 adopted a resolution approving both such conceptual proposals for further evaluation. The Deputy Secretary of Transportation invited both proposers to submit detailed proposals for consideration by the Public-Private Transportation Advisory Panel (the “Advisory Panel”) in accordance with the Department’s Act guidelines.

WHEREAS, on June 3, 2005, Clark/Shirley and Fluor and Transurban (as defined herein), which was identified as a subcontractor in Fluor’s conceptual proposal, submitted detailed proposals to the Advisory Panel for consideration.

WHEREAS, the Advisory Panel evaluated the detailed proposals, and on November 1, 2005, recommended to the Acting Commissioner that the detailed proposal submitted by Fluor and Transurban be further developed pursuant to the Act.
WHEREAS, on October 24, 2006, the Department, Fluor Virginia, Inc. and Transurban (USA) Development Inc. entered into an Interim Agreement, which was amended as of May 6, 2008, and further amended by an Amendment No. 2 dated as of March 23, 2012, each by and among the Department, Fluor Enterprises, Inc. (the successor-in-interest to Fluor Virginia, Inc.) (“Fluor”) and Transurban (USA), Inc. (“Transurban”) (as so amended, the “Interim Agreement”).

WHEREAS, on January 7, 2009, the FHWA issued a Categorical Exclusion for the Proposed Project. The FHWA approved the Department’s Special Experimental Project 14 work plan on June 27, 2006.

WHEREAS, on February 2, 2011, the Department (i) reduced the scope of the Proposed Project by eliminating the originally planned construction of six miles of HOV/HOT lanes on I-395 and planned upgrades to specific interchanges and (ii) changed the name of the Proposed Project to the I-95 HOV/HOT Lanes Project.

WHEREAS, on November 7, 2011, the Department submitted to FHWA the Environmental Assessment, and requested that FHWA issue a FONSI for the Project.

WHEREAS, FHWA reviewed the Environmental Assessment and other information and issued the FONSI on December 5, 2011.

WHEREAS, the Department, the Concessionaire, Fluor and Transurban entered into an agreement dated as of the date hereof terminating the Interim Agreement.

WHEREAS, the Department and the Concessionaire desire to herein set forth the terms to develop and operate the Project pursuant to a long-term concession arrangement granted to the Concessionaire by the Department by this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the covenants contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE 2.

DEFINITIONS

All capitalized terms used in this Agreement, but not expressly defined in this Agreement, have the respective meanings set forth in Exhibit A attached to this Agreement.
ARTICLE 3.

BASIC ROLES AND RESPONSIBILITIES

Section 3.01 Basic Agreement

(a) The parties hereto agree that the Project will be developed, designed, financed, constructed, operated, and maintained in accordance with this Agreement.

(b) The Concessionaire will perform the Work in accordance with (i) the Project Agreements, (ii) Law (including, without limitation, the State’s right to work Laws, and to the extent applicable, with all Federal Requirements and Laws applicable to a transportation project that has received or receives federal-aid funds); (iii) Governmental Approvals; (iv) Good Industry Practice; and (v) the requirements of insurance policies required to be maintained in accordance with this Agreement so as not to knowingly void or omit to take any action that would void any such policy or limit the coverage of any such policy in a way that materially and adversely affects the Department.

(c) The Concessionaire will provide appropriate oversight, management and reporting of all phases of the Project and its Contractors such that the Project is delivered, operated and maintained in accordance with this Agreement.

(d) The Concessionaire may retain Contractors to perform certain of its responsibilities pursuant to this Agreement, subject to the terms and conditions of this Agreement. Performance of any of the Work by a Contractor will satisfy the obligation of the Concessionaire to perform such Work; provided that any such Work performed will be binding on the Concessionaire and the foregoing shall not relieve the obligation of the Concessionaire to manage such Contractor. Except with regard to Limited Notices to Proceed, notices relating to Substantial Completion pursuant to Section 8.08(e), notices relating to Final Acceptance pursuant to Section 8.09(b), and notices relating to Service Commencement pursuant to Section 9.02(a), the making of any submittals or the giving of any notices to the Department by the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work) will satisfy the obligation of the Concessionaire to make such submittal or give such notice; provided that any such submittal made or notice given by the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work) will be binding on the Concessionaire and the foregoing shall not relieve the obligation of the Concessionaire to manage the Design-Build Contractor (with respect to the Design-Build Work) or the O&M Contractor (with respect to the O&M Work). In any such event, the Concessionaire will remain fully and primarily responsible for the performance of the Work, the making of submittals or the giving of any notices by any Contractors.

(e) The Department will be entitled to exercise such oversight of the activities of the Concessionaire and its Contractors in accordance with this Agreement, but will also be entitled to rely upon the Concessionaire to directly manage, oversee and resolve disputes involving its Contractors, without the involvement of the Department (except as otherwise provided in this Agreement).
(f) The Department will use reasonable efforts in performing its rights and duties under this Agreement to minimize any disruption to or impairment of the performance of the Concessionaire’s rights and obligations under this Agreement; provided, that nothing in this Section 3.01(f) will limit the Department’s rights and obligations under this Agreement.

Section 3.02 Project Agreements

The following Project Agreements (all as more particularly described by this Agreement), will be executed on or before the Agreement Date, and the Concessionaire will promptly deliver to the Department executed copies of the same:

(a) Escrow Agreement attached as Exhibit D;
(b) Design-Build Contract attached as Exhibit E;
(c) Design-Build Work Guarantee attached as Exhibit F;
(d) Operations and Maintenance Agreement attached as Exhibit I; and
(e) Shared Facilities Agreement attached as Exhibit X.

Section 3.03 Nature of Parties’ Interests Pursuant to This Agreement

(a) This Agreement does not grant to the Concessionaire any fee title, leasehold estate, easement or other real property interest of any kind in or to the Project Assets or the Project Right of Way. The Concessionaire’s interests pursuant to this Agreement are limited to the Permit granted by this Agreement under Section 4.01.

(b) The Department and the Concessionaire acknowledge their mutual intent that, despite the Department’s retention of fee title to (or other good and valid real property interest in) the Project Assets and the Project Right of Way, as a result of the Concessionaire’s rights and interests therein pursuant to the Permit granted to the Concessionaire under this Agreement, to the maximum extent permitted by Law, for federal income tax purposes the Concessionaire will be treated as having acquired (i) an ownership interest in those Project Assets that have an expected economic useful life equal to or less than the Term, (ii) an interest in the Project Right of Way and those Project Assets that have an expected economic useful life greater than the Term (with the amount allocable under this clause (ii) treated for purposes of section 467 as giving rise to rent that is allocated ratably to each year during the Term) and (iii) a franchise and license, permit, or other right within the meaning of section 197(d)(1)(F) and 197(d)(1)(D) of the Internal Revenue Code of 1986, as amended, and in that regard an amount equal to the Concessionaire’s cost of development, design, construction and start-up of the Project represents acquisition cost of such assets (the “Cost”), and no payment by the Department to the Concessionaire pursuant to Section 7.02 will be treated as part of the Cost. The Cost will be allocated for all income tax purposes in the manner determined by the Concessionaire, which allocation will be consistent with Section 1060 of the Internal Revenue Code of 1986, as amended and the Concessionaire will execute and file all income tax returns with the Internal Revenue Service in accordance with the requirements of section 1060 of the Internal Revenue Code.
Revenue Service in a manner consistent with such allocation, including Form 8594. The Department and the Concessionaire do not contemplate that the Department will be required to file any return with the Internal Revenue Service with respect to such allocation, but that if required to do so the Department will file such return in a manner consistent with such allocation.

Section 3.04 Quiet Possession and Enjoyment

The Department agrees that, except as otherwise provided herein, the Concessionaire will, at all times during the Term, be entitled to, and will have, the quiet possession and enjoyment of the Project and the Project Right of Way and be entitled to hold the Permit and exercise the rights granted to the Concessionaire under this Agreement, subject to the exercise by the Department of its rights under the Project Agreements. The Department will, at all times during the Term, defend (a) the Department’s title or real property interest to the Project and Project Right of Way and (b) the Permit and related rights the Department grants to the Concessionaire hereunder, or any portion thereof, in each case against any Person claiming any interest adverse to the Department, the State or the Concessionaire in the Project or the Project Right of Way, or any portion thereof, except where such adverse interest arises as a result of act or omission by the Concessionaire or any other Concessionaire Party in breach of the provisions of this Agreement or the negligence, misconduct or violation of Law by the Concessionaire or any other Concessionaire Party.

ARTICLE 4.

GRANT OF PERMIT; TERM

Section 4.01 Grant of Permit

(a) Pursuant to the Act and subject to the terms and conditions of this Agreement, the Department grants to the Concessionaire the exclusive right, and the Concessionaire accepts (i) the obligation to develop, design, finance, construct, operate and maintain the Project and (ii) the right to establish, impose, charge, collect, use and enforce payment of tolls and related charges (the “Permit”).

(b) The Department’s grant of the Permit pursuant to Section 4.01(a), and the Concessionaire’s obligations with respect thereto pursuant to Section 4.01(a), are conditional upon Financial Close having occurred in accordance with Section 7.03; provided however that portions of the Work may be performed by the Concessionaire prior to Financial Close pursuant to Section 8.02 and Section 8.04.

(c) In consideration of the Permit granted to the Concessionaire by the Department pursuant to this Section 4.01, the Concessionaire will perform the Work at its own expense except as otherwise provided herein and pay (to the extent required) to the Department the Permit Fee in accordance with the Permit Fee calculation attached as Exhibit J.
Section 4.02 Term

This Agreement will take effect on the Agreement Date and will remain in effect, until the first to occur of (i) the 73rd anniversary of the Service Commencement Date or (ii) the effective date of the termination of this Agreement pursuant to Article 20 (the “Term”).

ARTICLE 5.

TOLLING

Section 5.01 Tolling of the Project

(a) Toll Revenues.

(i) From and after the Service Commencement Date and continuing during the Term, the Concessionaire will have the exclusive right to establish, impose, charge, collect, use and enforce the collection and payment of the Toll Revenues, in accordance with the terms of this Agreement. The Concessionaire will have no right to charge or collect the Toll Revenues, except as expressly authorized by this Agreement. Except as otherwise provided in this Agreement, beginning on the Service Commencement Date and through the end of the Term, the Concessionaire will have the exclusive right, title, entitlement and interest in and to the Toll Revenues, subject to the provisions of the Electronic Toll Collection Agreement substantially in the form attached as Exhibit K.

(ii) The Concessionaire acknowledges and agrees that it will not be entitled to receive from the Department any compensation, return on investment or other profit for providing the services contemplated by this Agreement and the other Project Agreements, other than the Public Funds Amount and other payments to the extent and in the manner specified in this Agreement. The foregoing will not affect the Concessionaire’s entitlement to Toll Revenues as provided herein.

(b) Users of the HOT Lanes.

(i) Only Permitted Vehicles will be allowed to use the HOT Lanes.

(ii) High Occupancy Vehicles equipped with a transponder (in the absence of other available technologies as provided in Section 5.01(e)) will be entitled to use the HOT Lanes at a 100% discount from otherwise applicable tolls.

(iii) Mass Transit Vehicles and Commuter Buses, school buses, motorcycles and Exempt Vehicles equipped with a transponder (in the absence of other available technologies as provided in Section 5.01(e)) will be entitled to use the HOT Lanes at a 100% discount from otherwise applicable tolls.

(iv) Permitted Vehicles (other than vehicles referred to in clauses (ii) and (iii) above) equipped with a transponder (in the absence of other available technologies as
provided in Section 5.01(e)) will be entitled to use the HOT Lanes subject to payment of the applicable tolls.

(c) **Concerning Tolls.** The Concessionaire’s rights under Section 5.01(a) are limited by, and conditioned on, compliance with Law and all other provisions in this Agreement, including the following provisions.

(i) All tolling on the HOT Lanes will be done by electronic means and there will be no toll booths. The Concessionaire will not (A) accept cash tolls on the HOT Lanes or (B) impose or collect any fee, charge or other amount for the use of the HOT Lanes other than as authorized by this Article 5.

(ii) The Concessionaire may charge, debit and collect tolls through Open Road Tolling facilities that comply with Section 5.04, or use remote sensing or other technologies (including global positioning system technology) which must be interoperable with E-ZPass (or any successor to E-ZPass utilized on State Highways at that time) to charge, debit and collect tolls for actual vehicular use of the HOT Lanes.

(d) **Incidental Charges.** The foregoing authorization to establish, impose, charge, collect, use and enforce the collection and payment of tolls includes the right, to the extent permitted by Law, and subject to the requirement to be interoperable with E-ZPass (and any successor to E-ZPass utilized on State Highways at that time) as set forth in Section 5.01(e), to impose, charge, collect, use and enforce, with respect to electronic tolling accounts managed by or on behalf of the Concessionaire, the following incidental charges:

(i) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable administrative fees for account maintenance, account statements and customer service;

(ii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable amounts for the purchase or rental of transponders or other electronic tolling devices;

(iii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable, refundable security deposits for the distribution of transponders or other electronic toll devices;

(iv) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable video surcharges or other reasonable fees for permitted travel on the Project Assets by vehicles that are not equipped with a transponder or other available equipment allowing the processing of the applicable tolls through E-ZPass (or any successor to E-ZPass utilized on State Highways at that time); and

(v) reasonable fees, penalties and interest for toll violations, including costs of collection in accordance with Law; and
(vi) other incidental fees and charges reasonable and customary in connection with the services being provided at that time by the Concessionaire; provided, that the amount of any such other incidental fees and charges will not exceed the amount reasonably necessary for the Concessionaire to recover its Allocable Costs, directly incurred with respect to the items, services and work for which they are levied.

Except to the extent such fees and charges are covered in the Electronic Toll Collection Agreement, the Concessionaire may apply incidental charges set forth in this Section 5.01(d) to any Permitted Vehicles other than Exempt Vehicles.

(e) Interoperability. From and after the Service Commencement Date through the end of the Term, the Concessionaire will operate and maintain a toll collection system with respect to the Project which will be interoperable with E-ZPass and any successor to E-ZPass utilized on State Highways at that time. If the Department (or its successor) intends to change any State interoperability or compatibility standards, requirements or protocols for toll collection systems, it will coordinate with the Concessionaire prior to the implementation of such change so as to minimize the loss of Toll Revenues, disruption and cost to the Concessionaire, but the Department will not be liable in any event for any loss of Gross Revenues, disruption or cost attributable to such change. If the Concessionaire selects an electronic toll and traffic management system other than the system then utilized on other State Highways, it will coordinate with the Department prior to the implementation or any change of such system to ensure interoperability and compatibility with E-ZPass (or any successor to E-ZPass utilized on State Highways at that time) or with such other system then utilized on other State Highways in accordance with the Technical Requirements.

(f) Toll Collection Administration. The Concessionaire will be responsible for all toll transaction account management services; provided, however, (i) that the Concessionaire will engage and contract with the Department for the provision of toll transaction account management services in accordance with and for the initial term set forth in the Electronic Toll Collection Agreement, in substantially the form attached as Exhibit I, in which the Department will perform back-office, customer service and related activities for the Project as it relates to transactions processed through E-ZPass (and any successor to E-ZPass utilized on State Highways at that time), and (ii) that the Department will make available to the public, without charge to the Concessionaire, transponders or other electronic toll devices allowing the processing of the applicable tolls (or 100% discount from tolls) for use of the HOT Lanes. The Electronic Toll Collection Agreement is subject to renewal pursuant to the terms thereof.

(g) Transaction Costs.

(i) Without limiting the immediately succeeding sentence, the Department or its agents will use commercially reasonable efforts to work with the Concessionaire to limit transaction costs charged to the Project by the Department, including charges for toll transaction account management services. The Department will not charge the Concessionaire or the Project any fees or other transaction amounts for toll transaction account management services, other than as set forth in the Electronic Toll Collection Agreement.
(ii) If the Department, or its successors or assigns, ceases to provide all or a material part of the ETC Services and as a result the Concessionaire incurs costs related to self-performing, or engaging a Contractor to perform, the ETC Services no longer provided by the Department, or its successors or assigns, then the Department agrees to pay the Concessionaire the amount of such reasonable costs. If the Concessionaire self-performs or contracts with a Contractor to provide ETC Services, the Department, or its successors or assigns, will provide the same access to customer accounts as if the Department continued to provide the ETC Services, if such access is permitted by Law and if the Concessionaire pays to the Department, or its successors or assigns, the reasonable costs of providing such access.

(h) Violations Processing Services.

(i) The Department has implemented and maintains a processing system for the enforcement of penalties for toll violations in Virginia for electronic toll collection systems on State Highways. The Concessionaire may, but is not obligated to, enter into an agreement with the Department to obtain the benefits of such enforcement system, in accordance with the Violation Processing Services Agreement in the form attached as Exhibit L. In consideration of such services, the Concessionaire will pay the Department its customary charges for such services in effect from time to time. For purposes of identifying and apprehending toll violators of the Project, provided it is authorized under Law, and any applicable agreements or arrangements, the Department will make available to the Concessionaire the benefits of any agreements or arrangements which the Department has in place with other state authorities or agencies that provide access to records in their possession relating to vehicle and vehicle owner data, and will coordinate with the Virginia State Police in accordance with Section 9.06(a) with respect to the provision of policing services, emergency services, traffic patrol and traffic law enforcement services on the Project.

(ii) The Concessionaire understands and agrees that, notwithstanding anything to the contrary in this Agreement or any other Project Agreement, the risk of enforcement and collection of tolls and related charges (including user fees and civil penalties and administrative fees) remains with the Concessionaire, and that the Department does not, and will not be deemed to, guarantee collection or collectability of such tolls and related charges to the Concessionaire or any other Person; provided, however, that the foregoing will not limit the Department’s obligations or duties under the Electronic Toll Collection Agreement or any other Project Agreement with the Concessionaire.

(i) License Plate Look-up Fees. While the parties do not anticipate that the Virginia Department of Motor Vehicles will charge the Concessionaire a fee for license plate identification pursuant to the Concessionaire’s violation processing services, in the event that the Virginia Department of Motor Vehicles does charge the Concessionaire a fee for license plate identification pursuant to the Concessionaire’s violation processing services, the Concessionaire will promptly notify the Department of any such fee. Upon receipt of such notice, the Department may contact the Virginia Department of Motor Vehicles and attempt to negotiate a lower fee or to eliminate such fee. The Department agrees to pay the Concessionaire the amount
of such fees charged to the Concessionaire, if any, by the Department of Motor Vehicles related to the Project. Prior to the payment by the Department of such amounts, the Concessionaire will submit to the Department on a monthly basis an invoice to the Department for such fees paid by the Concessionaire, including supporting documentation.

(j) No Continuing Department Obligations. Nothing in this Agreement will obligate or be construed as obligating the Department, or any assignee thereof, to continue or cease collecting tolls after the end of the Term.

Section 5.02 Toll Rates

(a) The Concessionaire will impose congestion pricing on the HOT Lanes, which may include dynamic tolling with potential toll rate changes at frequent intervals and there will be no restrictions on toll rates, except as set forth in this Article 5. The Concessionaire’s congestion pricing methodology:

(i) will not be inconsistent with the Department’s plans and programs for highway system management of the overall transportation network in Northern Virginia;

(ii) when implemented, will assure that the Project will not become a federal Degraded Facility (as defined in 23 U.S.C. §166), as set forth in the Technical Requirements; and

(iii) when implemented, will be designed to assure that the Project will meet the OSPS.

(b) The toll rates will be the same for persons using the HOT Lanes under like conditions, and for this purpose “like conditions” may take into consideration:

(i) type, weight and occupancy of the vehicle;

(ii) number of axles;

(iii) time of day and/or week;

(iv) time and location of entry or exit to or from the HOT Lanes;

(v) traffic volume, vehicle speed, vehicle type; and

(vi) similar variables or combinations of such variables.

Notwithstanding the foregoing, (A) the Concessionaire may adopt and implement discount programs for different classes or groups of persons using the HOT Lanes under like conditions, subject to the provisions of Section 24.01 and (B) it is understood that dynamic tolling may result in vehicles that enter the HOT Lanes at different times being subject to different toll rates as well as in vehicles travelling on the same section of the HOT Lanes being subject to different toll rates.
Section 5.03 Reserved

Section 5.04 User Confidentiality

The Concessionaire will comply with all Laws related to confidentiality and privacy of users of the HOT Lanes.

Section 5.05 Suspension of Tolls

(a) In addition to its rights under Law and Section 22.02(b) (but without limiting the Concessionaire’s rights in the event of the occurrence of a Department Change or a Compensation Event), the Department will have the right, in its sole discretion, to order immediate suspension of tolling on any or all portions of the HOT Lanes that are designated for immediate use as an emergency mass evacuation route. The Department will have no liability to the Concessionaire for the loss of Toll Revenues or the increase in costs and expenses attributable to any such order issued pursuant to Law by the Department or any other Governmental Authority, provided that the Department:

   (i) concurrently (A) suspends tolling on all other Department-operated tolled facilities that are located within the area designated for evacuation or facilitation of evacuation and (B) orders suspension of tolling on all other tolled facilities operated by others within such area and over which the Department has the authority to order such suspension; and

   (ii) lifts the order on the HOT Lanes before or concurrently with the lifting of the order for all other designated tolled facilities within the area designated for evacuation or facilitation of evacuation.

(b) The Department will have the right to order the diversion of traffic onto the HOT Lanes, and to order immediate temporary suspension of tolling on the HOT Lanes in the direction(s) of diversion, if the HOT Lanes are designated for immediate use as the alternate route for the diversion of such traffic from another State Highway or the GP Lanes temporarily closed to all lanes in one or both directions due to:

   (i) an emergency declared pursuant to Law by the Department or any other Governmental Authority; or

   (ii) a significant incident involving one or more casualties requiring hospitalization or treatment by a medical professional or a fatality on the affected State Highway or GP Lanes from which such traffic is diverted.

The Department and the Concessionaire will consult with each other on any such diversion of traffic and any suspension of tolling. The Department will have no liability to the Concessionaire for the loss of Gross Revenues or the increase in costs and expenses attributable to the period that such order is in effect. The Department will lift an order given in accordance with this Section 5.05(b) as soon as the need for such order ceases.
(c) If the Department receives an order, request, notice or demand from federal authorities, the Department will have the right to close the HOT Lanes to the public for such period of time as may be necessary for secret service, national security and homeland security purposes. The Department will have no liability to the Concessionaire for the loss of Gross Revenues or the increase in costs and expenses attributable to any such event. The Department will lift an order given in accordance with this Section 5.05(c) as soon as the need for such order ceases.

(d) Each party will provide reasonable assistance to the other party in seeking any available reimbursement from Federal sources for lost Toll Revenues and expenses incurred as a result of a suspension pursuant to Section 5.05(a) or (b) or a closure of the HOT Lanes pursuant to Section 5.05(c) and for pursuing insurance coverage related thereto. If either the Concessionaire or the Department receives reimbursement from Federal sources for lost Toll Revenues as a result of actions taken in the preceding sentence, the proceeds of such reimbursement will be applied in the following order of priority: first to repair any uninsured physical damage to the HOT Lanes directly caused by the suspension of tolling or diversion of traffic onto the HOT Lanes pursuant to this Section 5.05; second, pro rata, to pay the Allocable Costs of the Department and the Concessionaire in obtaining reimbursement from Federal sources pursuant to this Section 5.05(d); and third, to the Concessionaire as reimbursement for lost Toll Revenues.

(e) The Department agrees that the minimum average operating speed during periods when the tolling on the HOT Lanes has been suspended or the HOT Lanes have been closed pursuant to this Section 5.05 will be excluded from any calculation of OSPS.

(f) To the extent that the Concessionaire engages in any emergency services activities while complying or attempting to comply with Chapter 3.2 of Title 44 of the Code of Virginia, the "Commonwealth of Virginia Emergency Services and Disaster Law of 2000" (§ 44-146.13 et seq.), or any rule, regulation, or executive order adopted or issued thereunder, the Concessionaire may enjoy the immunity from liability granted by § 44-146.23.

Section 5.06 Disposition of Gross Revenues

(a) Gross Revenues will be used first to pay all due and payable Operating Costs, specifically including all amounts due to the Department pursuant to this Agreement (which amounts will be paid on a pari passu basis with all other operations and maintenance costs), before they may be used and applied for any other purpose.

(b) The Concessionaire will not use Gross Revenues to make any Distributions (or to pay any amount payable pursuant to an Affiliate Contract subject to approval but not approved by the Department pursuant to Section 24.02(l)), unless and until the Concessionaire first pays the following:

(i) any undisputed amounts due to the Department pursuant to the terms of this Agreement;
(ii) current and delinquent operating and maintenance costs (including any payments to Affiliates made solely in accordance with the applicable Affiliate Contracts entered into in accordance with Section 24.02(l));

(iii) current and delinquent debt service and other current and delinquent amounts, due under any Concessionaire Debt;

(iv) all Taxes affecting the Project that are currently due and payable or delinquent;

(v) all current and delinquent deposits to any Major Maintenance Reserve Fund and any other reserve contemplated by this Agreement; and

(vi) all current and delinquent costs and expenses for Major Maintenance.

In the event there are any disputed amounts due to the Department pursuant to the terms of this Agreement, the Concessionaire will maintain a cash reserve for such disputed amounts in accordance with GAAP or any other generally accepted accounting principles which are acceptable to the Department as a condition precedent to making any Distribution or payment to an Affiliate. If the Concessionaire makes any Distribution or payment to an Affiliate in violation of this Section 5.06(b), the same will be deemed to be held in trust by such Person for the benefit of the Department and the Collateral Agent, and will be payable to the Department or the Collateral Agent on demand. If the Department collects any such amounts held in trust, it will make them available for any of the purposes set forth above and, at the request of the Collateral Agent, deliver them to the Collateral Agent.

(c) The Concessionaire will have no right to use Gross Revenues to pay any debt, obligation or liability unrelated to this Agreement, the Project, or the Concessionaire’s services pursuant to this Agreement, provided, that this Section 5.06(c) does not apply to or otherwise affect the Concessionaire’s right to make Distributions in accordance with the Concessionaire’s governing instruments and this Agreement and the ability of the recipients thereof to apply the same in their sole discretion, subject to compliance with Section 5.06(b).

Section 5.07 Revenue Risk Related to Traffic Volume

(a) Except for its specific obligations to the Concessionaire under the terms and conditions of this Agreement, the Department will not have any risk or liability related to actual traffic volume and revenue, including but not limited to the risk that actual traffic volume is less than the traffic volume projected in the Base Case Financial Model.

(b) (i) From the period beginning on the second anniversary of the Service Commencement Date to December 31, 2030 (the “First Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of 35% of the total flow of all Permitted Vehicles in two consecutive Toll Sections that are then using such Toll Sections going in the same direction
for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “First Threshold HOV Percentage and Rate”) of 1,450 vehicles per hour per traffic lane; provided, however, that the Department will not be required to make any payment, in question pursuant to this Section 5.07(b)(i) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeds the First Threshold HOV Percentage and Rate.

(ii) From January 1, 2031 to December 31, 2040 (the “Second Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of 37% of the total flow of all Permitted Vehicles in two consecutive Toll Sections that are then using such Toll Sections going in the same direction for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “Second Threshold HOV Percentage and Rate”) of 1,550 vehicles per hour per traffic lane; provided, however, that the Department will not be required to make any payment, in question pursuant to this Section 5.07(b)(ii) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeds the Second Threshold HOV Percentage and Rate.

(iii) From January 1, 2041 to the 40th anniversary of the Financial Close Date (the “Third Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of 38% of the total flow of all Permitted Vehicles in two consecutive Toll Sections that are then using such Toll Sections going in the same direction for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “Third Threshold HOV Percentage and Rate”) of 1,550 vehicles per hour per traffic lane; provided, however, that the Department will not be required to make any payments pursuant to this Section 5.07(b)(iii) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeded the Third Threshold HOV Percentage and Rate.

(iv) For purposes of determining the High Occupancy Vehicles as a percentage of flow, (A) HOV-2 or below vehicles and (B) Permitted Vehicles violating the High
Occupancy Requirement will not be counted as High Occupancy Vehicle usage but will be counted as part of total flow.

(v) If the Annual Budget submitted to the Department for any Agreement Year pursuant to Section 9.08 contemplates that the Highest Revenue Share IRR will be achieved during such Agreement Year, any amounts otherwise payable to the Concessionaire under this Section 5.07(b) for any month occurring during or after the month which the Highest Revenue Share IRR estimated to be achieved will be deposited by the Department into an escrow account. Within 90 Days following the end of the Agreement Year in which such deposits were made, the Concessionaire and the Department will direct the escrow agent to transfer the moneys in such escrow fund to the Concessionaire to the extent that, upon receipt of the moneys, the Highest Revenue Share IRR has not been exceeded, and, upon confirmation that such amount has been duly paid and received by the Concessionaire, the Concessionaire and the Department shall direct the escrow agent to transfer any excess remaining after the foregoing transfer to the Department.

(vi) Failure by the Concessionaire to notify the Department in writing of its claim for a payment pursuant to this Section 5.07(b) within 30 Days after the end of each calendar month with respect to which this provision applies will constitute a permanent waiver of any such claim with respect to such month. If the Department disagrees with a claim filed by the Concessionaire, the Department may direct the Concessionaire to provide audited or otherwise independently verified information relevant to its claim for a payment. The Department will have 30 Days upon receipt of this information to review the information and calculations provided and if the Department agrees with the calculation, make the calculated payment, together with interest on such amount, which interest shall commence accruing 30 Days after the month to which the payment relates. To the extent there are amounts on deposit in the Project Enhancement Account, such payments shall be made first from the Project Enhancement Account and the interest due shall be calculated based on the average earnings rate on the Project Enhancement Account, during such period. If there are no amounts on deposit therein then interest shall be based on the average earnings rate on the State’s Transportation Trust Fund or any successor thereto, during such period.

(vii) Notwithstanding the foregoing, this Section 5.07(b) will cease to apply on the first to occur of: (A) the date on which the Highest Revenue Share IRR has been reached and (B) the 40th anniversary of the Financial Close Date.

Section 5.08 Failure to Meet OSPS

(a) At any time after the second full month following the Service Commencement Date, the Concessionaire will notify the Department if the Concessionaire’s scheduled monthly report identifies an instance of the Project’s failure to meet the OSPS (as provided in the Technical Requirements). The notice will describe such failure in reasonable detail. The Department will notify the Concessionaire within 30 Days of its receipt of the Concessionaire’s report whether or not it requires an OSPS Improvement Plan (the “OSPS Improvement Plan”).
(b) Upon a notification from the Department pursuant to Section 5.08(a) that the Project requires an OSPS Improvement Plan, the Concessionaire (at its sole cost and expense) will prepare and submit the OSPS Improvement Plan to the Department for its approval. The OSPS Improvement Plan will not be required to propose a general strategy to improve overall OSPS compliance, but will be required to propose a strategy to address the specific reasons which the Concessionaire reasonably believes caused such failure as described in the Concessionaire’s report. The OSPS Improvement Plan will be delivered to the Department within 30 Days of the Department’s notice (or longer if mutually agreed to by the parties) and will cover the matters set forth in Section 5.08(a). The Department will review the OSPS Improvement Plan in accordance with the provisions of Section 10.05. The Concessionaire will diligently implement the elements of the approved OSPS Improvement Plan that are within the control of the Concessionaire promptly following the Department’s approval thereof and within the schedule set forth in such OSPS Improvement Plan.

(c) Each OSPS Improvement Plan will be in writing and will set forth a schedule and describe specific actions the Concessionaire and the Department, as applicable, will undertake to improve its OSPS compliance with respect to the failure described in the Concessionaire’s scheduled report. At any time after initial implementation of an OSPS Improvement Plan, or upon a material revision of the OSPS during such time, either party may request a revision of such OSPS Improvement Plan by giving at least 30 Days written notice to the other party, whereupon both parties will review the existing OSPS Improvement Plan and agree in writing to any revisions required to such OSPS Improvement Plan.

(d) The current OSPS requirements will apply for a ten (10) year period from the Service Commencement Date. Prior to the tenth anniversary of the Service Commencement Date, the Concessionaire and the Department will review the current OSPS, as the OSPS requirements may be modified in the most recent OSPS Improvement Plan, to determine the future need for OSPS or an alternative form of performance monitoring. The Concessionaire agrees that the Department has the right to implement a form of OSPS for subsequent ten-year periods throughout the Term of this Agreement. The Department agrees that such subsequent OSPS requirements:

   (i) will not be higher than 55 mph;

   (ii) will not be lower than the FHWA / 23 U.S.C. §166 requirements; and

   (iii) will not, on the basis of the Concessionaire’s updated traffic modeling and other data, result in a known failure to meet the OSPS requirements.

Section 5.09 SAFETEA-LU Compliance

(a) The Department agrees to provide to FHWA the certifications required of a State agency under 23 U.S.C. §166 and acknowledges that it has entered into the Toll Agreement attached as Exhibit M. The delivery of a certification by the Department that the HOT Lanes do not comply with the applicable requirements of 23 U.S.C. §166, or such other federal, rule or regulation will not constitute a default by the Department under this Agreement.
(b) The Concessionaire agrees to maintain and operate the HOT Lanes, at all times, in compliance with the provisions of 23 U.S.C. §166 and 23 U.S.C. §129, successor provisions, all regulations promulgated thereunder, and the Toll Agreement. Accordingly, the Concessionaire will be responsible for the satisfaction of the requirements of 23 U.S.C. §166(b)(4), in accordance with the terms of this Agreement, and will otherwise coordinate its compliance efforts with the Department so as to enable the Department to provide the certifications required by Section 5.09(a).

Section 5.10 USDOT Reporting Requirements

(a) The Concessionaire agrees to collect and provide to the Department data and other information regarding the Project and prepare reports regarding the Project (i) required to be provided by the Department to the USDOT in relation to the TIFIA Credit Assistance, TIGER Credit Assistance or other financing program or (ii) deemed necessary by the Department to satisfy the Department’s reporting obligations under the TIFIA Credit Assistance, TIGER Credit Assistance or other financing program.

(b) Upon receiving prior notice from the Department, the Concessionaire will provide the data, information and reports that it is required to provide and prepare pursuant to Section 5.10(a) to the Department at least 30 Days prior to the date on which the Department is required to submit the same to USDOT.

(c) If the Concessionaire enters into one or more agreements with the USDOT in connection with the TIFIA Credit Assistance, TIGER Credit Assistance or other financing program, the Concessionaire agrees to provide the Department with executed versions of such agreements together with any agreements or instruments evidencing or securing the Concessionaire’s obligations thereunder, including any collateral pledge agreements. In Exhibit G, the Department is providing the Concessionaire with a listing of the reports, notices and other filings, copies of which are to be provided to the Department concurrently with the Concessionaire’s delivery (or receipt) thereof. The Concessionaire agrees to provide the Department with copies of such reports, notices and other filings made under such agreements as are requested by the Department pursuant to the preceding sentence; provided however, that the Concessionaire, in its reasonable discretion, may determine not to provide the Department with reports, notices and filings that it believes are not germane to the Project and the Department. The Concessionaire will provide within ten days after its receipt of a request by the Department, its rationale for not providing a report, notice or other filing requested by the Department pursuant to this Section 5.10(c).

(d) If the Concessionaire enters into a Project Financing Agreement with the Collateral Agent that provides for the collection and distribution of Gross Revenues, the Concessionaire agrees to provide to the Department, as soon as reasonably practicable after the Concessionaire’s actual receipt of the same, a copy of: any written notice of resignation or removal of the Collateral Agent; any written notice of the appointment of a successor Collateral Agent; any written notice of any merger of the Collateral Agent; any written notice of any transfer by the Collateral Agent of its rights under the Project Financing Agreements to an affiliate; and any written notice of any change in any Deposit Account Bank.
ARTICLE 6.

BASE CASE FINANCIAL MODEL

Section 6.01 Initial Base Case Financial Model and Base Case Financial Model

(a) The Concessionaire and the Department agree to the composition of the Initial Base Case Financial Model as of the Agreement Date, which is included in the Escrow Documents and which will be deposited with the Escrow Agent as described in Section 18.05.

(b) The Initial Base Case Financial Model will be updated upon Financial Close in accordance with Section 7.03(b)(i) through (vi) and will become the Adjusted Financial Model.

(c) The Adjusted Financial Model will be updated upon Financial Close in accordance with Section 7.03(b)(vii) and this Agreement and such update will become the Base Case Financial Model.

(d) The Concessionaire will not cause (or permit any other Person to cause) the Initial Base Case Financial Model, the Adjusted Financial Model or the Base Case Financial Model to contain any hidden data. The Concessionaire will furnish to the Department any password or other access rights for each of the Initial Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model.

Section 6.02 Base Case Financial Model Updates

(a) Other than in accordance with the terms of this Agreement, in no event will the Base Case Financial Model, the Adjusted Financial Model, the Adjusted Financial Model Update or any Base Case Financial Model Update be changed except with the prior written approval of both the Department and the Concessionaire. The Concessionaire will furnish to the Department any password or other access rights for the Base Case Financial Model Update or Adjusted Financial Model Update.

(b) Upon the occurrence of the following events, the Concessionaire will provide to the Department a proposed Base Case Financial Model Update which will (except as otherwise agreed by the parties) include new projections and calculations, which will set forth the impact of the event:

(i) upon submission of a notice of a Refinancing under Section 7.05;

(ii) within 60 Days after the delivery of a Delay Event Notice that extends the Guaranteed Substantial Completion Date;

(iii) within 60 Days after the delivery of a Compensation Event Notice;

(iv) within 60 Days after the delivery of a notice of a Net Cost Savings or positive Net Revenue Impact under Section 14.04;
(v) within 60 Days after the Concessionaire notifies the Department that it proposes to undertake a Concessionaire Project Enhancement; and

(vi) within 60 Days after the parties agree that any amendments to this Agreement have had or will have a material effect on future costs or Gross Revenues.

(c) Any proposed Base Case Financial Model Update shall become the Base Case Financial Model Update following its approval by the Department in accordance with Section 6.03.

(d) Within 150 Days following the end of each fiscal year, the most recent undisputed Base Case Financial Model Update (or, if there has been no undisputed Base Case Financial Model Update, the Base Case Financial Model) will be updated to reflect audited historical cash flows for the most recently audited fiscal year; provided, however, such Base Case Financial Model Update will not: (i) include changes in Financial Model Formulas, (ii) include changes in forecast cash flows or (iii) allow such historical information to flow through the Financial Model Formulas.

Section 6.03 Certain Adjustments

(a) Within five days of its receipt of TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) pursuant to Section 7.07(a)(i), the Concessionaire will provide the Department with:

(i) a proposed Adjusted Financial Model Update, modified in accordance with Section 7.07(b) to take into account the new Department TIFIA Protection Amount in the TIFIA Loan Documentation; and

(ii) a proposed Base Case Financial Model Update that incorporates the modifications made to the Adjusted Financial Model pursuant to Section 6.03(a)(i).

(b) On the TIFIA Closing Date, the Concessionaire will provide the Department with:

(i) the Adjusted Financial Model, modified in accordance with Section 7.07(b) to take into account the Department TIFIA Protection Amount; and

(ii) a Base Case Financial Model Update that incorporates the modifications made to the Adjusted Financial Model pursuant to Section 6.03(b)(i).

(c) The Department will have the right to dispute any proposed Adjusted Financial Model Update or Base Case Financial Model Update provided to the Department pursuant to Sections 6.03(a) and (b). Within 10 Days after receipt, the Department will accept or dispute a proposed Adjusted Financial Model Update or proposed Base Case Financial Model Update (as applicable) and, if it disputes a proposed Adjusted Financial Model Update or Base Case Financial Model Update (as applicable), specifying its reasons for such dispute in sufficient detail to enable the Concessionaire to correct the errors or deficiencies. To the extent that the
Concessionaire and the Department cannot agree on the changes within 20 Days of the Concessionaire delivering the proposed Adjusted Financial Model Update or Base Case Financial Model Update (as applicable) to the Department, the Dispute will be resolved in accordance with the dispute resolution procedures described in Article 21.

**Section 6.04 Financial Model Disputes**

(a) Except as provided in Section 6.03(c), the Department will have the right to dispute any proposed Base Case Financial Model or Base Case Financial Model Update. Within 21 Days after receipt, the Department will accept or dispute a proposed Base Case Financial Model or Base Case Financial Model Update (as applicable) and, if it disputes a proposed Base Case Financial Model or Base Case Financial Model Update (as applicable), specifying its reasons for such dispute in sufficient detail to enable the Concessionaire to correct the errors or deficiencies. To the extent that the Concessionaire and the Department cannot agree on the changes within 90 Days of the Concessionaire delivering the proposed Base Case Financial Model or Base Case Financial Model Update (as applicable) to the Department, the Dispute will be resolved in accordance with the dispute resolution procedures described in Article 21.

(b) In the event of a Dispute, the Initial Base Case Financial Model, the immediately preceding Adjusted Financial Model or the immediately preceding Base Case Financial Model Update (as applicable) that is not being disputed (or, if there has been no undisputed Base Case Financial Model Update and no disputed Adjusted Financial Model, the Base Case Financial Model) will remain in effect until such Dispute is resolved or a new Adjusted Financial Model or a new Base Case Financial Model Update is issued and not disputed. If a proposed Base Case Financial Model, Adjusted Financial Model or Base Case Financial Model Update (as applicable) has not been disputed, or if any such Dispute has been so resolved, the proposed Base Case Financial Model, Adjusted Financial Model or Base Case Financial Model Update (as applicable) will serve as the Base Case Financial Model, new Adjusted Financial Model Update or the current Base Case Financial Model Update (as applicable) and will be submitted to the Escrow Agent in accordance with Section 18.05(d).

**Section 6.05 Audit of Financial Model**

(a) (i) Within 30 Days after any change to the Financial Model Formulas as a result of a proposed Base Case Financial Model Update pursuant to Section 6.02(b)(ii) through (vi), or (ii) within 10 Days after any change to the Financial Model Formulas as a result of adjustments made pursuant to Section 6.03, the Concessionaire will deliver to the Department an audit report and opinion of the Financial Model Auditor to the effect that the Financial Model Formulas reflect the terms of this Agreement and are suitable for use herein in connection with Compensation Events, Delay Events, the impact of the execution and delivery of proposed TIFIA Loan Documentation, and early termination procedures, and covering such other matters as may be reasonably requested by the Department, all in form and substance acceptable to the Department. With respect to any change to Financial Model Formulas as a result of a proposed Base Case Financial Model Update due to a proposed Refinancing or upon the execution and delivery of TIFIA Loan Documentation, such audit report and opinion will be delivered to the Department no later than seven Days prior to the proposed date of a Refinancing.
(b) Copies of the audit reports and opinions delivered by the Financial Model Auditor will be addressed to the Department, and the Department will be expressly identified therein as an entity entitled to rely upon such audit.

(c) The Concessionaire will pay the fees and expenses of the Financial Model Auditor.

ARTICLE 7.

PROJECT FINANCING; FINANCIAL CLOSE;
LENDER RIGHTS AND REMEDIES; REFINANCING

Section 7.01 Concessionaire Responsibility for Project Financing; No Department Liability for Concessionaire Debt

(a) The Concessionaire is solely responsible for obtaining and repaying all financing, at its own cost and risk and without recourse to any State Party, necessary to develop, design, construct, maintain and operate the Project and any Concessionaire Project Enhancement.

(b) Each bond or promissory note evidencing Concessionaire Debt must include a conspicuous recital on its face to the effect that payment of the principal thereof and interest thereon does not constitute a claim against the Department’s fee simple title to or other good and valid real property interest in the Project Assets, the Project Right of Way, the Department’s interest hereunder or its interest and estate in and to the Project Assets or any part thereof, is not an obligation of any State Party, moral or otherwise, and neither the full faith and credit nor the taxing power of any State Party is pledged to the payment of the principal thereof and interest thereon.

(c) No State Party will have any liability whatsoever for payment of the principal sum of any Concessionaire Debt, any other obligations issued or incurred by the Concessionaire in connection with this Agreement, the Project, the Base Case Financial Model or any Traffic and Revenue Study. The Department’s review of any Financing Assignments or other project financing documents is not:

(i) a guarantee or endorsement of the Concessionaire Debt, any other obligations issued or incurred by the Concessionaire in connection with this Agreement, the Project, the Base Case Financial Model or any Traffic and Revenue Study; nor

(ii) a representation, warranty or other assurance as to (A) the ability of the Concessionaire to perform its obligations with respect to the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project or (B) the adequacy of the Gross Revenues to provide for payment of the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project.
(d) The Concessionaire will make or cause to be made Equity Contributions (the “Equity Contribution Amount”) equal to: (i) an amount equal to the Base Capital Contributions set forth in Section 2.2 of each Equity Funding Agreement (the “Base Equity Contributions”), as adjusted pursuant to this Agreement (the “Initial Equity Commitment Amount”); provided, however, that after the Agreement Date, the Concessionaire will not adjust the Initial Equity Commitment Amount without the approval of the Department in its sole discretion, (ii) an amount equal to the Contingent Capital Contributions set forth in Section 2.3 of each Equity Funding Agreement, as required pursuant to such Equity Funding Agreement (the “Contingent Capital Contribution Amount”); and (iii) $108,413,295 (the “Concessionaire TIFIA Protection Amount”), which is subject to adjustment or cancellation pursuant to Section 7.07.

Section 7.02 Public Funds

(a) The Department will make or cause to be made payments of the Initial Public Funds Amount to the Concessionaire in accordance with the terms set forth in the Public Funds Amount Payment Terms attached as Exhibit N. The Initial Public Funds Amount will be (i) decreased by any amounts paid by the Department to the Concessionaire prior to the Financial Close Date for the performance of Early Work and (ii) adjusted pursuant to Section 7.03(b).

(b) The Department will make or cause to be made a supplemental Public Funds Amount for the Project equal to $223,950,000 (the “Department TIFIA Protection Amount”), subject to adjustment or cancellation pursuant to Section 7.07.

Section 7.03 Financial Close

(a) Conditions for Financial Close. Except to the extent permitted in writing by the Department, Financial Close will only be achieved once all of the following conditions precedent are satisfied:

(i) the Concessionaire has provided the Department: (A) a list of and proposed initial drafts of the Initial Project Financing Agreements and Financing Assignments set forth in Exhibit O and (B) a proposed initial draft of the Base Case Financial Model reflecting any changes in financing from the Initial Base Case Financial Model, contemporaneously with the distribution of such drafts to the Lenders and other parties to Financial Close for the Department’s review and comment, and has included the Department on all subsequent distributions of such drafts to the Lenders and other parties to Financial Close up and until the Concessionaire has furnished the proposed final drafts pursuant to Section 7.03(a)(ii);

(ii) the Concessionaire has provided the Department: (A) proposed final drafts of the Initial Project Financing Agreements and Financing Assignments and (B) a proposed final draft of the Base Case Financial Model reflecting any changes in financing from the Initial Base Case Financial Model, contemporaneously with the distribution of such final drafts to the Lenders and other parties to Financial Close at least 10 Days prior to the scheduled Financial Close Date for the Department’s review and comment, and has
included the Department on all subsequent distributions of such final drafts to the Lenders and other parties to Financial Close up and until Financial Close;

(iii) the Concessionaire has provided the Department the Base Case Financial Model and an update of the audit report and opinion delivered pursuant to Section 23.02(m) for such Base Case Financial Model;

(iv) the Concessionaire has provided the Department true and complete copies of the executed Initial Project Financing Agreements and Financing Assignments;

(v) the Concessionaire has provided the Department true and complete executed copies of the Equity Funding Agreements and the Equity Funding Guaranties in an amount at least equal to the Equity Contribution Amount and reflecting the commitment of each Equity Member to provide the equity funds reflected in the Base Case Financial Model which are required for meeting its obligations related to the Project;

(vi) the Concessionaire has provided the Department evidence, satisfactory to the Department, that all conditions precedent required for Financial Close to the availability and utilization of Concessionaire Debt have been satisfied in full;

(vii) if utilized, the Concessionaire has caused the PABs Issuer to issue the PABs as provided by and in accordance with the Initial Project Financing Agreements and has made a Financing Assignment with respect to the PABs as described in the Initial Project Financing Agreements;

(viii) the Concessionaire has delivered to the Department certificates, as may be reasonably requested by the Department, certifying as to the Concessionaire’s compliance with the terms and conditions of this Agreement, the satisfaction of the conditions precedent to Financial Close, and the validity of the Concessionaire’s representations and warranties set forth in Section 23.02; and

(ix) the Department has received the following documents executed by the Concessionaire and/or the Collateral Agent, as applicable:

(A) Electronic Toll Collection Agreement substantially in the form attached as Exhibit K;

(B) Violation Processing Services Agreement substantially in the form attached as Exhibit L; and

(C) Direct Agreement, substantially in the form attached as Exhibit R;

(x) the Department has received copies of the following executed documents:

(A) Design-Build Contract substantially in the form attached as Exhibit E;
(B) Design-Build Work Guarantee substantially in the form attached as Exhibit F;

(C) Design-Build Letter of Credit;

(D) Shared Facilities Agreement substantially in the form attached as Exhibit X;

(E) Letter Agreement dated July 31, 2012 between CBE and the Department regarding the treatment of the Access Fee (as such term is defined in the Shared Facilities Agreement) as Toll Revenue (as such term is defined in the Capital Beltway Comprehensive Agreement);

(F) Indenture of Trust, dated as of July 1, 2012, between the Virginia Small Business Financing Authority and the Trustee;

(G) Loan Agreement, dated as of July 1, 2012, between the Virginia Small Business Financing Authority and the Concessionaire;

(H) Collateral Agency and Account Agreement, dated as of July 1, 2012, by and among the Concessionaire, the Trustee and the Collateral Agent;

(I) Security Agreement, dated as of July 1, 2012, between the Concessionaire and the Collateral Agent;

(J) Transurban Membership Interest Pledge Agreement, dated as of July 1, 2012 between Transurban Drive USA LLC and the Collateral Agent;

(K) Fluor Membership Interest Pledge Agreement, dated as of July 1, 2012, between Fluor and the Collateral Agent; and

(L) the Equity Funding Agreements; and

(M) the Equity Funding Guaranties.

If the Concessionaire has satisfied all conditions precedent (or the Department, in its sole discretion, has waived any such conditions) identified in this Section 7.03(a), the Department will issue a certificate on the Financial Close Date confirming that all conditions precedent have been satisfied.

(b) **Financing Adjustments.** The following adjustments will be made on the Financial Close Date. Such adjustments will be implemented in accordance with the provisions of Exhibit BB.

(i) **Changes in Initial Public Funds Amount Due to Review of Initial Base Case Financial Model.** In the event that a review by the Financial Model Auditor of the Initial Base Case Financial Model discloses errors or discrepancies in such financial
model that results in an increase to the Initial Equity IRR in excess of 5 bps, the Initial Public Funds Amount will be decreased in an amount so as to return the Base Case Equity IRR to the Initial Equity IRR, and the Initial Base Case Financial Model will be updated to reflect such adjustment. If a review by the Financial Model Auditor of the Initial Base Case Financial Model discloses errors or discrepancies in such financial model that results in a decrease to the Initial Equity IRR in excess of 5 bps, the Department and the Concessionaire will engage in discussions as promptly as reasonably possible and exercise good faith efforts to agree to any adjustments or other resolutions reasonably satisfactory to each party.

(ii) Other Changes to the Initial Public Funds Amount.

(A) The Initial Base Case Financial Model will be updated to reflect mutually agreed changes in the expected TIFIA Credit Assistance and the Initial Base Case Financial Model will be updated in accordance with the Financial Close Adjustment Protocol to account for the such changes and used to calculate the Initial Public Funds Amount such that the Equity IRR is equal to the Initial Equity IRR.

(B) The Initial Base Case Financial Model will be updated to reflect mutually agreed changes to the Design-Build Contract price, TTMS price, and SPV fixed costs (all as set forth in the Financial Close Adjustment Protocol) and the Initial Base Case Financial Model will be updated in accordance with the Financial Close Adjustment Protocol to account for the such changes and used to calculate the Initial Public Funds Amount such that the Equity IRR is equal to the Initial Equity IRR.

(iii) VDOT E-ZPass Fees. The Department will bear the risk of increased operating costs with an equivalent impact of $1 million per annum (expressed in 2010 dollars), escalated from 2010 at the CPI assumption contained in the Initial Base Case Financial Model. The Initial Base Case Financial Model will be updated in accordance with the Financial Close Adjustment Protocol set forth in Exhibit BB to account for the revised operating costs and used to calculate the Initial Public Funds Amount such that the Equity IRR is equal to the Initial Equity IRR.

(iv) PABs Interest Rate Protection.

(A) (1) The Department will bear the risk and have the benefit of the first 25bps of change in PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate and (2) the Department and the Concessionaire will equally share the risk and the benefit in any change between 25bps and 100bps in the PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate to the actual PABs Interest Rate applicable to the PABs issued as of the Financial Close Date, and (3) the Concessionaire will bear the risk and have the benefit of any change in excess of 100 bps in PABs Interest Rate (either positive or negative) from the Benchmark PABs Interest Rate.
(B) If the PABs Interest Rate as of the Financial Close Date has changed from the Benchmark PABs Interest Rate, the Initial Base Case Financial Model will be updated in accordance with the Financial Close Adjustment Protocol set forth in Exhibit BB to reflect the PABs Interest Rate and to reflect the risk and benefit allocated to the Department (ignoring for this calculation any change in the Benchmark PABs Interest Rate the risk and benefit of which has been allocated to the Concessionaire) and used to adjust the Initial Public Funds Amount in accordance with the Financial Close Adjustment Protocol such that the Equity IRR is equal to the Initial Equity IRR.

(v) Leverage Ratio. The Department and the Concessionaire acknowledge and agree that, if the Leverage Ratio as of the Financial Close Date is greater than 65%, then the Department and the Concessionaire will share equally in the benefit of such greater Leverage Ratio.

(vi) Other Changes to the Initial Base Case Financial Model. On the Financial Close Date, the Concessionaire will update the Initial Base Case Financial Model to reflect the terms and conditions included in the Initial Project Financing Agreements and Financing Assignments as of the Financial Close Date. For the avoidance of doubt, the Public Funds Amount will not be adjusted upwards or downwards except in accordance with the provisions of Section 7.03(b) and the Initial Base Case Financial Model, as updated, will be the Adjusted Financial Model and the resulting Equity IRR will be the Adjusted Equity IRR.

(vii) TIFIA Credit Assistance Availability. The Department and Concessionaire will bear the risk of TIFIA Credit Assistance not being available at Financial Close. If the TIFIA Credit Assistance is not available at Financial Close, the Adjusted Financial Model will be updated in accordance with the Financial Close Adjustment Protocol to reflect the risk of such change allocated to the Department (while maintaining the quantum of PABs constant) and used to adjust the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the resulting Equity IRR is equal to the Adjusted Equity IRR and the Adjusted Financial Model, as so updated, will be the Base Case Financial Model and the resulting Equity IRR will be the Base Case Equity IRR.

(c) Financial Close Deadline. In the event Financial Close is not achieved by the Financial Close Deadline, either party may terminate this Agreement pursuant to Section 20.04.

(d) Payments at Financial Close.

(i) On the Financial Close Date, the Concessionaire will receive amounts agreed to by the parties, from sources identified in the Base Case Financial Model, for the costs related to project development that have not previously been reimbursed under the terms of the Interim Agreement. Such costs will be specifically itemized and identified in a schedule submitted to the Department at least 7 Days prior to the scheduled Financial Close Date. Such schedule of costs will be updated for approval as a condition precedent to Financial Close. The parties also agree that if the costs related to project development
costs in the Initial Base Case Financial Model ($52,441,000) are in excess of the amounts approved by the Department at Financial Close, such excess amounts will be used to fund all, or a portion of mutually agreed costs in relation to scope improvements to the east-west HOT movement in the Springfield Interchange, closing costs incurred in obtaining TIFIA Credit Assistance, and security improvements at the Express Operations Center, relative to the designation of the Express Operations Center as critical infrastructure. If as of the Substantial Completion Date there is any remaining balance of the excess amount, the Concessionaire will cause this balance to be transferred to the Department in a reasonable period of time. The Concessionaire will identify the excess amount within 14 days of the Financial Close Date and will provide updates to the Department of the status of any excess amounts remaining throughout the Construction Period. Such updates will be provided in accordance with the monthly reporting addressed in Section 1.4.3 of the Technical Requirements.

(ii) On the Financial Close Date, the Concessionaire will reimburse the Department for any payments made prior to the Financial Close Date (not to exceed $42,300,000 in the aggregate) for Early Work performed pursuant to the Second Amendment to the Interim Agreement dated as of March 23, 2012, or pursuant to this Agreement.

(e) Closing Transcript. The Concessionaire agrees to provide the Department a complete transcript of all documents executed and delivered in connection with the execution of this Agreement and the Financial Close promptly following the Financial Close Date.

(f) Reasonable Commercial Efforts; Cooperation. Subject to the termination rights of each party pursuant to Section 20.04, the Department and the Concessionaire each agree to: (i) use reasonable commercial efforts to satisfy the conditions within their control to reach Financial Close on or prior to the Financial Close Deadline; and (ii) use reasonable commercial efforts to cooperate and assist the other party to reach Financial Close by the Financial Close Deadline.

Section 7.04 Project Financing Agreements; Department’s Rights and Protections

(a) From time to time during the Term, the Concessionaire has the right, at its sole cost and expense, to pledge, hypothecate or assign the Gross Revenues and the Concessionaire’s Interest as security for any Concessionaire Debt, such debt to be issued on such terms and conditions as may be acceptable to any Lender and the Concessionaire, subject to the following terms and conditions (such pledge, hypothecation, assignment, or other security instrument, including the Initial Project Financing Agreements, being referred to in this Agreement as a “Financing Assignment”):

(i) no Person other than an Institutional Lender (other than with respect to indemnification and similar provisions provided for the benefit of the Collateral Agent and the agents, officers, representatives and/or employees of an Institutional Lender or the Collateral Agent) is entitled to the benefits and protections afforded by a Financing Assignment, except that Lenders of Concessionaire Debt may be Persons other than Institutional Lenders so long as any Financing Assignment securing such Concessionaire
Debt made by such Person is held by an Institutional Lender acting as Collateral Agent, and PABs may be issued, acquired and held by parties other than Institutional Lenders so long as an Institutional Lender acts as indenture trustee for the PABs;

(ii) no Financing Assignment will encumber less than the entire Concessionaire’s Interest; provided, that the foregoing does not preclude subordinate Financing Assignments;

(iii) the Concessionaire is strictly prohibited from pledging or encumbering the Concessionaire’s Interest, or any portion thereof, to secure any indebtedness, and no Financing Assignment will secure any indebtedness, (A) that is issued by any Person other than the Concessionaire, any special purpose company that directly or indirectly owns the Concessionaire and has no assets except as are directly related to the Project, or any special purpose subsidiary wholly owned by such company, or the PABs Issuer or (B) the proceeds of which are used in whole or in part for any purpose other than the Project Purposes or any other purpose permitted in Section 7.04(a)(xiv);

(iv) no Financing Assignment or other instrument purporting to mortgage, pledge, encumber, or create a Lien on or against the Concessionaire’s Interest will extend to or affect the Department’s fee simple title to or other property interest and estate in and to the Project, the Project Right of Way or any interest of the Department hereunder or any part thereof;

(v) any number of permitted Financing Assignments may be outstanding at any one time, and any Financing Assignment permitted hereunder may secure two or more separate loans from two or more separate Lenders; provided, that each such loan and the Financing Assignment securing the same complies with the provisions of this Article 7;

(vi) the Department will not have any obligation to any Lender or Collateral Agent pursuant hereto, except as expressly set forth in this Article 7 or in any other instrument or agreement signed by the Department in favor of such Lender or Collateral Agent and unless the Concessionaire and/or the Collateral Agent have notified the Department of the existence of such Financing Assignment;

(vii) each Financing Assignment will require that if the Concessionaire is in default under the Concessionaire Debt secured by the Financing Assignment or under the Financing Assignment and the Lender or Collateral Agent gives notice of such default to the Concessionaire, then the Collateral Agent will also give concurrent notice of such default to the Department. Each Financing Assignment also will require that the Collateral Agent deliver to the Department, concurrently with delivery to the Concessionaire or any other Person, every notice of election to sell, notice of sale or other notice required by Law or by the Financing Assignment in connection with the exercise of remedies under the Financing Assignment;
(viii) no Financing Assignment will grant to a Lender any right to apply funds deposited with the Depositary in accordance with Section 17.07, except for the express purposes for which the reserve or deposit is established;

(ix) each Financing Assignment will provide that the Concessionaire may, without condition or qualification, issue additional Concessionaire Debt, secured by the Concessionaire’s Interest, for the limited purpose of funding Safety Compliance Orders provided, that (A) the Lenders may limit such additional Concessionaire Debt if other funds are then available to the Concessionaire for the purpose of funding any such Safety Compliance Orders, and (B) the Lenders may impose reasonable, customary requirements as to performance and supervision of the work related to such Safety Compliance Order;

(x) each Financing Assignment will expressly state that the Collateral Agent and the Lenders will not name or join any State Party or any officer thereof in any legal proceeding seeking collection of the related debt or other obligations secured thereby or the foreclosure or other enforcement of the Financing Assignment except to the extent (A) joining the Department as a necessary party is required to give the court jurisdiction over the dispute with the Concessionaire and to enforce any Lender’s remedies against the Concessionaire and (B) the complaint against the Department states no Claim against the Department for a Lien or security interest on, or to foreclose against, the Department’s fee simple title to or other property interest and estate in and to the Project, the Project Right of Way or any interest of the Department hereunder, or any part thereof, or for any liability of the Department;

(xi) each Financing Assignment will expressly state that neither the Lenders nor the Collateral Agent will seek any damages or other amounts from the Department due to the Department’s breach of this Agreement, whether for Concessionaire Debt or any other amount, except damages for a violation by the Department of its express obligations to Lenders set forth in this Article 7; provided, that the foregoing will not affect any rights or claims of a Lender as a successor to the Concessionaire’s Interest by foreclosure or transfer in lieu of foreclosure;

(xii) each Financing Assignment will expressly state that the Lenders and the Collateral Agent will respond to any request from the Department or the Concessionaire for consent to a modification or amendment of this Agreement within a reasonable period of time;

(xiii) no Financing Assignment may secure Concessionaire Debt that prohibits prepayment or defeasance; provided, that the foregoing does not preclude imposition of Breakage Costs in order to prepay or defease or any requirement that a prepayment or defeasance be made on the next succeeding payment date; and

(xiv) each Financing Assignment may only secure Concessionaire Debt that satisfies the requirements set forth in Section 7.01 and the proceeds of which are used exclusively for the purpose of (A) developing, designing, permitting, constructing,
financing, maintaining, repairing, rehabilitating, renewing or operating the Project or any Project Enhancements or establishing or maintaining reserves in connection therewith, (B) paying reasonable fees, development costs and expenses incurred by the Concessionaire in connection with the execution of this Agreement and the Initial Project Financing Agreements and not otherwise paid, (C) making Distributions, but only from the proceeds of any Refinancing permitted pursuant to Section 7.05, and (D) any Refinancing of pre-existing Concessionaire Debt that conforms to the provisions of this Section 7.04(a), including use of proceeds to pay the reasonable costs of closing the Refinancing (including Lender’s fees, but excluding any amounts paid to Affiliates).

(b) The Department will have no obligation to join in, execute or guarantee any Financing Assignment.

(c) Notwithstanding the enforcement of any security interest created by a Financing Assignment, the Concessionaire will remain liable to the Department for the payment of all sums owing to the Department pursuant to this Agreement and the performance and observance of all of the Concessionaire’s covenants and obligations pursuant to this Agreement.

(d) No Lender or Collateral Agent will, by virtue of its Financing Assignment, acquire any greater rights to or interest in the Project or Gross Revenues than the Concessionaire has at any applicable time pursuant to this Agreement, other than the provisions set forth in this Article 7 for the specific protection of the Lenders and the Collateral Agent.

(e) All rights acquired by the Lenders or the Collateral Agent under any Financing Assignment will be subject to the provisions of this Agreement and any Development Contract and to the rights of the Department hereunder and thereunder.

(f) No Financing Assignment will be binding upon the Department in the enforcement of its rights and remedies as provided herein and by Law, unless and until the Department has received a copy (certified as true and correct by the Collateral Agent or by the administrative agent identified in the Initial Project Financing Agreements) of the original thereof and a copy of a specimen bond, promissory note or other evidence of indebtedness (certified as true and correct by the Collateral Agent or by the administrative agent identified in the Initial Project Financing Agreements) secured by such Financing Assignment, together with written notice of the address of the Collateral Agent to which notices may be sent. If applicable, after the recordation or filing thereof, the Collateral Agent will provide to the Department a copy of the Financing Assignment bearing the date and instrument number or book and page of such recordation or filing. In the event of an assignment of any such Financing Assignment by the Collateral Agent, such assignment will not be binding upon the Department unless and until the Department has received a certified copy thereof, together with written notice of the assignee thereof to which notices may be sent (and the assignee will, if such assignment is required to be recorded, after such recordation deliver to the Department a copy thereof bearing the date and instrument number or book and page of such recordation).

(g) No Financing Assignment, including relating to any Refinancing, will be valid or effective, and no Lender will be entitled to the rights, benefits and protections of this Article 7.
unless the Financing Assignment complies with this Section 7.04. If the Department has actual knowledge that any Financing Assignment or amendment thereto has been entered into and does not comply with this Section 7.04, then the Department will deliver a notice to the Collateral Agent, with a copy to the Concessionaire. Unless and until such non-compliance is remedied, the Financing Assignment will be neither valid nor effective, and the Lenders thereunder will be entitled to none of the rights, benefits and protections of this Article 7.

(h) Each Financing Assignment will make the Department a third-party beneficiary to any provision thereof that creates or protects the rights and priorities of the Department to receive payments thereunder as provided for in this Agreement, including Section 5.06.

(i) The Concessionaire will cause all Project Financing Agreements to provide that amounts described in clauses (a), (c) and (d) of the definition of “Gross Revenues” must be deposited in one or more accounts held by the Collateral Agent or its agent under an account control or similar agreement pending disbursement; provided, that such funds may be invested in investments permitted by the Project Financing Agreements pending disbursement; and provided further that the Concessionaire is not precluded from transferring such amounts to a separate account to pay Operating Costs as permitted in the Project Financing Agreements.

Section 7.05 Refinancing Requirements

(a) Notice of Refinancing. The Concessionaire will provide the Department written notice of a Refinancing 75 Days before the date of such Refinancing (or, if such advance notice is not reasonably possible under the circumstances, such notice as is possible and in any event with reasonable time for the Department to review and, if applicable, provide its consent for such Refinancing as contemplated below). At the Department’s request, the Concessionaire will provide to the Department available details of the proposed Refinancing, including (i) details of the changes, if any, proposed to the Financial Model Formulas, (ii) the proposed Base Case Financial Model Update, (iii) any material changes in the Concessionaire’s obligations (including contingent obligations) to the Project Lenders, (iv) an outline detailing the changes and/or replacements, as the case may be, to the Project Financing Agreements then in effect and the Financing Assignments contemplated by the Refinancing, (v) a calculation of the anticipated Permit Fee, if any, generated from such Refinancing, in each case together with any supporting documentation, and (vi) any other details concerning the Refinancing that the Department may reasonably require to determine whether the Refinancing would, or could reasonably be expected to, have a material adverse effect on the Department, the Project or the ability of the Concessionaire to perform its obligations pursuant to this Agreement or any other Project Agreement, provided that, with respect to any refinancing meeting the requirements of clauses (i), (ii) or (iii) of Section 7.05(c), the Concessionaire will provide to the Department details to the extent reasonably required to establish that such proposed Refinancing satisfies the requirements of clauses (i), (ii) or (iii) of Section 7.05(c).

(b) Project Financing Agreements Related to Refinancings.

(i) The Concessionaire will deliver to the Department for access and review, initial and subsequent drafts of all proposed Project Financing Agreements
contemporaneously with the distribution of such drafts by and between the Concessionaire and the Lenders. The Department’s consent, when applicable, will be given not less than 15 Business Days prior to the proposed date of the Refinancing, provided, however, that there are no material changes in the terms of the relevant Project Financing Agreements provided to the Department and that the Department has been given reasonable time to provide its review and/or approval in the event that written notice was not provided to Department 75 Days before the date of the Refinancing.

(ii) The Concessionaire will deliver, not later than 15 Days after close of the Refinancing, to the Department executed copies of all Project Financing Agreements in connection with the Refinancing.

(c) Department’s Right to Approve Refinancing. Any Refinancing of Concessionaire Debt will be subject to the Department’s prior approval, which approval will not be unreasonably withheld or delayed; provided, that no such approval will be required if the Concessionaire first demonstrates to the Department that:

(i) the proposed Refinancing refinances existing Concessionaire Debt and does not increase the Concessionaire Debt then outstanding other than by an amount equal to reasonable costs of closing the Refinancing, including lender fees, arranger fees and advisor fees, and the amount of any required reserves; or

(ii) the proposed Refinancing has been assigned a rating (which may include a non-public rating) by a Rating Agency (without regard to bond insurance, if any) which is no lower than BBB minus or Baa3 or equivalent rating; or

(iii) no portion of the proceeds of the Refinancing will be used to make Distributions or to pay non-capital costs and expenses (other than related costs of issuance and any required reserves).

With respect to any proposed Refinancing for which the Department’s approval is required, the Department shall not unreasonably withhold or delay its consent. Without limiting other reasonable grounds for withholding consent, the Department may withhold consent if it reasonably determines that:

(1) the information disclosed to it is not a true and complete disclosure of all relevant aspects of the Refinancing;

(2) any change or series of changes in the obligations of the Concessionaire due to the Refinancing would or reasonably could be expected to result in a material increase in the Department’s liabilities, obligations or risks under this Agreement and the other Project Agreements;

(3) the Refinancing would have a material adverse effect on the ability or commitment of the Concessionaire to perform its obligations under this Agreement and the other Project Agreements; or
(4) the proposed Refinancing would or reasonably could be expected to have a material adverse effect on the Concessionaire’s incentives and disincentives to fully comply with the standards and requirements applicable to the development, construction, operations and maintenance of the Project for which the Concessionaire is responsible pursuant to this Agreement and the other Project Agreements.

Section 7.07(e) sets forth additional restrictions on Refinancings and on the incurrence of Concessionaire Debt.

(d) Payment of Department Expenses.

(i) In connection with any Refinancing, the Concessionaire will pay the Department for the Department’s Allocable Costs incurred related to the Refinancing at the time of the closing of the Refinancing. The Department will provide the Concessionaire with an estimate of its expected costs related to such Refinancing; if there is a change in circumstances relating to the Refinancing following the submission of the Department’s initial estimate that is expected to result in higher expenses, then the Department will provide a revised estimate. For any Refinancings that do not close, the Department will be paid for its documented expenses for such Refinancings from and at the time of (or, at the Concessionaire’s option, at any time prior to) any subsequent successful Refinancings, and will be entitled to payment of interest on such expenses based on the Bank Rate calculated from the date on which such expenses were due and payable according to the first invoice issued by the Department for such expenses until paid by the Concessionaire.

(ii) The Department will provide the Concessionaire with an estimate of the expenses to be incurred by the Department related to the Refinancing, no later than 30 Days after the Department has provided its consent to such Refinancing pursuant to Section 7.05(b)(i), and a final estimate not less than five Days prior to the proposed date of the Refinancing.

(e) Other Requirements.

(i) Every Refinancing will be subject to the provisions of Section 7.01 and Section 7.03 and the other provisions of this Agreement pertaining to Concessionaire Debt and Financing Assignments.

(ii) Any reimbursement agreement and related documents that the Concessionaire enters into in connection with obtaining a letter of credit will, if they encumber the Concessionaire’s Interest, constitute a Financing Assignment and be treated as a Refinancing for all purposes pursuant to this Agreement. No such reimbursement agreement and related documents will encumber less than the entire Concessionaire’s Interest.

(iii) In connection with the consummation of any proposed Refinancing, the Department will, promptly upon the reasonable request of the Concessionaire or the
Collateral Agent or any Lender and such requesting party’s agreement to cover any costs incurred by the Department in connection with the requested action, review the Concessionaire’s written analysis of whether the Department is required to approve such Refinancing pursuant to Section 7.05(c) and confirm whether the Department believes its approval is required for such Refinancing.

(iv) In connection with the Initial Project Financing or any Refinancing, the Department will, promptly upon the request of the Concessionaire or the Collateral Agent, execute, acknowledge and deliver to the Concessionaire, or any of the parties specified by the Concessionaire, standard consents or certificates with respect to the Agreement, which may be qualified by materiality and/or to the best of the knowledge and belief of a designated representative of the Department; provided, however, that such consents or certificates do not limit, restrict or prejudice the Department’s rights under this Agreement or any other Project Agreement.

Section 7.06 Collateral Agent’s Rights

The Collateral Agent’s rights are set forth in the Direct Agreement.

Section 7.07 TIFIA Credit Assistance Protection

(a) Concessionaire Obligation to Execute and Deliver TIFIA Loan Documentation.

(i) The Concessionaire agrees to (A) exercise commercially reasonable efforts to reach financial close on any TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)), and (B) execute and deliver any TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) that the Concessionaire receives on or prior to March 31, 2013 within 45 days following its receipt thereof together with confirmation from the TIFIA Lender that it is ready to execute and deliver the TIFIA Loan Documentation. If the Concessionaire fails to execute and deliver, prior to March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)) (x) any TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) or (y) any TIFIA Loan Documentation containing terms consistent with the terms described in Exhibit H, but containing other terms and conditions that are inconsistent with the terms and conditions contained in TIFIA loan agreements and intercreditor agreements for Relevant Precedent, which inconsistent terms and conditions are reasonably expected to have a material adverse effect on the Concessionaire’s financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile, and the Department has agreed to perform or cause to be performed such term or condition or otherwise resolve such inconsistent terms or conditions to the mutual satisfaction of the Concessionaire and the Department, each acting reasonably, in each case, within 45 days following its receipt by the Concessionaire, then such failure shall constitute a failure by the Concessionaire to comply with a material obligation of this
Agreement and shall entitle the Department to exercise its rights and remedies hereunder relating thereto; provided, that in the event the Department exercises its right to terminate this Agreement, notwithstanding anything to the contrary set forth in Section 20.05(c) or any other provision of this Agreement, the Department will pay to the Concessionaire, subject to Section 25.19, an amount equal to the aggregate of the following: (i) 100% of Concessionaire Debt then outstanding, plus (ii) all Demobilization Costs, less (iii) Credit Balances.

(ii) If the Concessionaire fails to execute and deliver, prior to March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)) (A) any TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(b)) or (B) any TIFIA Loan Documentation containing terms consistent with the terms described in Exhibit H, but containing other terms and conditions that are inconsistent with the terms and conditions contained in the TIFIA loan agreements and intercreditor agreements for Relevant Precedent, which inconsistent terms and conditions are reasonably expected to have a material adverse effect on the Concessionaire’s financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile, and the Department has not agreed to perform or cause to be performed such term or condition or otherwise resolve such inconsistent terms or conditions to the mutual satisfaction of the Concessionaire and the Department, each acting reasonably, then in each case, the Department TIFIA Protection Amount will be decreased by an amount equal to $30,000,000 and the Concessionaire TIFIA Protection Amount will be increased by $30,000,000. For the avoidance of doubt, the Concessionaire may choose to execute and deliver the TIFIA Loan Documentation described in clause (B), in which case no adjustment to the Department TIFIA Protection Amount or the Concessionaire TIFIA Protection Amount will be made. The failure of the Concessionaire to enter into the TIFIA Loan Documentation pursuant to this Section 7.07(a)(ii)(B) will not be a Concessionaire Default and the Department will have no right to terminate this Agreement or exercise any other rights or remedies that may be available to the Department hereunder as a result thereof (other than as specifically provided in this Section 7.07(a)(ii)).

(iii) If the Concessionaire executes and delivers the TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(a) and Section 7.07(b)) on or before November 30, 2012, the Department TIFIA Protection Amount will be increased by an amount equal to $15,000,000 and the Concessionaire TIFIA Protection Amount will be decreased by $15,000,000; provided, however that any adjustments pursuant to this subsection (iii) shall occur only after adjustments are made pursuant to Section 7.07(b), if any.

(iv) If the Concessionaire executes and delivers the TIFIA Loan Documentation containing TIFIA Commercial Terms (with any changes thereto for which adjustments are made pursuant to Section 7.07(a) and Section 7.07(b)) after
November 30, 2012 and on or before March 31, 2013, the Department TIFIA Protection Amount will be increased by an amount equal to $5,000,000 and the Concessionaire TIFIA Protection Amount will be decreased by $5,000,000; provided, however that any adjustments pursuant to this subsection (iv) shall occur only after adjustments are made pursuant to Section 7.07(b), if any.

(v) Notwithstanding the Concessionaire’s obligation to execute and deliver the TIFIA Loan Documentation containing TIFIA Commercial Terms within 45 Days following its receipt pursuant to Section 7.07(a)(i), if the TIFIA Loan Documentation containing TIFIA Commercial Terms has not been made available to the Concessionaire on or before March 31, 2013, the Concessionaire will have no further obligation to seek TIFIA Credit Assistance.

(b) Funding Adjustments at TIFIA Closing Date. If the Concessionaire enters into the TIFIA Loan Documentation on or before March 31, 2013, the Adjusted Financial Model will be updated to calculate a further change, positive or negative, in the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount using the following protocol (ignoring for these calculations any adjustments to the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount pursuant to Section 7.07(a)):

(i) first, if any change necessary to ensure compliance with the PABs Issuer’s terms to entering into the TIFIA Credit Assistance set forth in Section 6.30(d)(2) of the Senior Loan Agreement, resulted in a need to reduce the principal amount of the TIFIA Credit Assistance, the Adjusted Financial Model will be adjusted by updating for the amount of such reduction (and ignoring for this calculation the adjustments to any further reduction in the TIFIA Credit Assistance) and calculating an adjustment to each of the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the Second Funding Closing Amount is $300,000,000 and the Equity IRR is equal to the Adjusted Equity IRR;

(ii) then, if the TIFIA Credit Assistance requires a change to:

(A) the amortization profile (whether mandatory or scheduled);

(B) the revenue sharing / prepayment clauses; or

(C) the funding of the Debt Service Reserve Account or the Ramp-up Reserve Account, or the use or release requirements or required balance requirements thereof,

in each case, from the terms described in Exhibit H, and the cumulative effect of such changes is less favorable to the Concessionaire, the Adjusted Financial Model will be adjusted by updating for the actual TIFIA Credit Assistance repayment terms and calculating a further adjustment to each of the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the Second Funding Closing Amount is $300,000,000 and the Equity IRR is equal to the Adjusted Equity IRR;
(iii) then, the Adjusted Financial Model will be adjusted by updating for the actual TIFIA Interest Rate and calculating a further adjustment to each of the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the Second Funding Closing Amount is equal to $300,000,000 and the resulting Base Case Equity IRR is equal to the Adjusted Equity IRR; and

(iv) then, if the amount of the TIFIA Credit Assistance is less than the Benchmark TIFIA Credit Assistance Amount, the Adjusted Financial Model will be further adjusted by calculating adjustments to each of the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount such that the Second Funding Closing Amount is $300,000,000 and the Equity IRR is equal to the Adjusted Equity IRR and will become the Adjusted Financial Model Update in accordance with Section 6.04.

(c) Department Participation and Assistance. The Concessionaire acknowledges that the Department will actively participate in negotiating the terms of the TIFIA Loan Documentation that would reasonably be expected to contain terms and conditions that are inconsistent with the terms described in Exhibit H and other terms and conditions contained in the TIFIA Loan Documentation that are materially inconsistent with Relevant Precedent, or such inconsistent terms and conditions could be reasonably expected to have a material adverse effect on the Department’s financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile. The Concessionaire will use reasonable commercial efforts to coordinate documentation development and meetings regarding the terms of the TIFIA Credit Assistance with the Department in a manner that allows the Department to be aware of and actively involved in the content and commercial terms of the TIFIA Loan Documentation. The Department acknowledges that such involvement will not cause a delay of the Second Funding Closing Date. The Department also acknowledges that on occasion, impromptu and/or “one-on-one” discussions between the Concessionaire and the TIFIA Lender may be required to advance the negotiation of the TIFIA Credit Assistance in a timely manner, and the Concessionaire acknowledges that the outcome of any such discussions will be promptly relayed to the Department. The Concessionaire will deliver copies of all documents and materials it receives from, and sends to, the TIFIA Lender in connection with the negotiation, execution and delivery of any TIFIA Loan Documentation promptly after the receipt or transmission thereof by the Concessionaire. If the TIFIA Lender proposes terms and conditions for the TIFIA Credit Assistance that are more burdensome than corresponding terms and conditions described in Exhibit H that could be reasonably expected to have a material adverse effect on the Concessionaire’s financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile, the Department will use reasonable commercial efforts to assist the Concessionaire’s efforts to improve such terms and conditions.

(d) TIFIA Protection Amount Funding.

(i) The Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount, as adjusted in accordance with the foregoing terms, will become non-contingent and unconditionally payable upon the earlier to occur of (A) the closing date for the TIFIA Loan and (B) March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)) (the “Second Funding Closing Date”).
Subject to the following sentence, the Department TIFIA Protection Amount shall be deposited in immediately available funds to the VDOT Funding Account as soon as practicable on or after the Second Funding Closing Date, but in no event later than 90 days following the Second Funding Closing Date, and the Concessionaire TIFIA Protection Amount will be paid by the Equity Sponsors pursuant to the Equity Funding Agreements effective as of the Second Funding Closing Date, and the parties will provide prompt written notice to the Trustee of such increase. If the Department TIFIA Protection Amount is not deposited to the VDOT Funding Account on the Second Funding Closing Date, the Department will deposit additional amounts necessary to reimburse the Concessionaire for all costs incurred with respect to the Project as a result of the delay in funding.

(ii) If the Department TIFIA Protection Amount is a negative amount (the “Department Credit Amount”) as a result of the adjustments pursuant to this Section 7.07, the Department will not be required to make the Department TIFIA Protection Amount, the Public Funds Amount will be decreased by an amount equal to the Department Credit Amount, and the parties will provide written notice to the GARVEE Trustee or the Trustee, as relevant, to transfer an amount equal to the Department Credit Amount to or to the order of the Department within 10 days after the later of (A) the giving of such notice to the GARVEE Trustee or the Trustee, as relevant, or (B) the Second Funding Closing Date. If the Concessionaire TIFIA Protection Amount is a negative amount as a result of the adjustments pursuant to this Section 7.07, the Concessionaire TIFIA Protection Amount will be zero, the Equity Contribution Amount payable by the Equity Sponsors under the Equity Funding Agreements will be automatically reduced by such amount effective as of the Second Funding Closing Date, and the parties will provide prompt written notice to the Trustee of such reduction.

(e) Restriction on Refinancing. In the event that the Concessionaire fails to enter into the TIFIA Loan Documentation on or before March 31, 2013 (or any later date ending on the last day of the 45-day period described in Section 7.07(a)(i)), during the period ending on the tenth (10th) anniversary of the Financial Close Date, the Concessionaire will not incur any Concessionaire Debt or refinance, replace or refund all or any part of the outstanding PABs, that results in an increase to the principal amount of Concessionaire Debt then outstanding without the Department’s prior approval, such approval to be given in the Department’s sole discretion; provided that such restriction shall not apply to (A) purchase money obligations incurred to finance discrete items of equipment used in connection with the Project that are not integral to the Project, (B) current accounts payable arising, and accrued expenses incurred, in the ordinary course of business which are payable in accordance with customary practices that are not overdue by more than ninety (90) days (unless subject to a good faith contest), and (C) the incurrence of Concessionaire Debt for the purposes described in clauses (i) through (iii) of Section 6.30(b)(1) of the Senior Loan Agreement, or for the purposes described in clause (iv) of Section 6.30(b)(1) of the Senior Loan Agreement so long as such incurrence does not result in the Concessionaire Debt in an amount greater than the principal amount of the then existing Concessionaire Debt (net of any deposits required to satisfy any increased reserve requirements with respect to the Concessionaire Debt being incurred, any payments to the Department required
under this Agreement, and costs of issuance not to exceed 3% of the principal amount of such indebtedness).

ARTICLE 8.

DESIGN AND CONSTRUCTION OF THE PROJECT

Section 8.01 General Obligations of the Concessionaire

(a) The Concessionaire will furnish all design, construction and other services, provide all materials, equipment and labor to perform the Work reasonably inferable from this Agreement and perform the Work in accordance with this Agreement.

(b) Except as otherwise expressly provided in this Agreement, the Department makes no warranties or representations as to any surveys, data, reports or other information provided by the Department or other Persons, including the data and other information set forth in Exhibit S (Known Geotechnical Conditions) and Exhibit T (Known Pre-Existing Hazardous Substances), concerning surface or subsurface conditions, the existing condition of the roadway and other Assets, drainage, the presence of Utilities, Hazardous Substances, contaminated ground water, archeological, paleontological and cultural resources, and endangered and threatened species, affecting the Project Right of Way or surrounding locations. The Concessionaire acknowledges that such information is for the Concessionaire’s reference only and has not been verified by the Department, and that the Concessionaire will be responsible for conducting all surveys, studies and assessments as it deems appropriate for the Project; provided, that the foregoing will not limit the Concessionaire’s rights with respect to Compensation Events and Delay Events.

(c) Except as otherwise expressly provided in this Agreement, the Concessionaire will bear the risk of all conditions occurring on, under or about the Project Right of Way on which the Work is performed, including:

(i) physical conditions of an unusual nature that differ materially from those ordinarily encountered in the area;

(ii) changes in surface topography;

(iii) variations in subsurface moisture content;

(iv) Utility facilities;

(v) Hazardous Substances, including contaminated groundwater;

(vi) any archeological, paleontological or cultural resources; and

(vii) any species listed as threatened or endangered under Federal or State endangered species Law;
provided, that the foregoing will not limit the Concessionaire’s rights with respect to Compensation Events and Delay Events.

(d) The Concessionaire will be responsible for coordinating and scheduling the Work with other separate contractors working in the Project Right of Way in accordance with the Technical Requirements. Except in the case of a Department-Caused Delay, the Department will not be liable for any delays, disruptions or damages caused by such contractors.

(e) The Concessionaire Representative and the Department Representative will be reasonably available to each other and will have the necessary authority, expertise and experience required to oversee and communicate with respect to the Work.

(f) Prior to and during the construction, the Concessionaire will provide information to the public concerning the Project, any Project Enhancements or any other construction activities in accordance with the Technical Requirements.

(g) The Concessionaire will prepare and submit to the Department for its review and approval the Project Development Plans in accordance with the requirements and times set forth in the Technical Requirements

(h) The Concessionaire will not enter into any agreement with any Governmental Authority with jurisdiction over any Governmental Approval, Utility Owner, railroad, property owner or other third party having regulatory jurisdiction over any aspect of the Project or the Work or having any property interest affected by the Project or the Work that in any way purports to obligate the Department, or states or implies that the Department has an obligation, to the third party to carry out any activity during or after the end of the Term, unless the Department otherwise approves the same in writing in its sole discretion. Except in the case of an agreement approved by the Department pursuant to the preceding sentence, the Concessionaire has no power or authority to enter into any such agreement with a third party in the name or on behalf of the Department and the parties agree that any purported agreement to that effect will be null and void.

(i) The Concessionaire will be responsible for performing and completing all Work that the Concessionaire is obligated to perform for or on behalf of third parties relating to the Project in accordance with its agreement with such third parties and subject to any dispute resolution with such third parties and without prejudicing the Concessionaire’s rights under any such agreements.

Section 8.02 Limited Notices to Proceed to Perform Certain Work

(a) The Concessionaire may request that the Department issue one or more Limited Notices to Proceed (“LNTP”) authorizing the Concessionaire to commence certain portions of the Work as set forth in this Section 8.02. Prior to issuance of a LNTP, the parties will agree upon the conditions to the issuance of such LNTP, as well as the scope, schedule and payment terms (if applicable) for such portion of the Work.
(b) The Concessionaire will deliver notice to the Department upon the satisfaction of the agreed conditions to the issuance of any LNTP and request that the Department issue such LNTP for the applicable portion of the Work. The Department will endeavor to respond to such request, within 21 Days following receipt of such request by the Department, by delivery to the Concessionaire of the applicable LNTP or notice of the conditions that the Department believes, in its reasonable discretion, to have not been satisfied. The Concessionaire will have a reasonable opportunity to address those deficiencies and re-submit a notice to the Department or, if the Concessionaire does not agree with the Department’s assessment, to refer the matter to the dispute resolution procedures pursuant to Article 21. If the Concessionaire has not received a response within such 21-Day period, such failure by the Department to respond will be deemed approval, but will not be deemed a waiver of the Department’s other rights or the Concessionaire’s other obligations, including compliance with Good Industry Practice, the Technical Requirements, Governmental Approvals and Law.

(c) To the extent any elements of the Early Work or payment therefor have not been completed or paid in full by the Department prior to the Agreement Date, the Concessionaire is authorized to complete such Early Work in accordance with this Agreement and payment therefor will be made under this Agreement (including for any such Early Work performed by the Concessionaire but not paid by the Department prior to the Agreement Date). Any Early Work performed and/or approved prior to the Agreement Date shall, upon execution of this Agreement, be deemed to have been performed by the Concessionaire and/or approved pursuant to, and subject to the terms and conditions of, this Agreement.

Section 8.03 Conditions Precedent for Notices to Proceed

(a) Notice to Proceed with Design Work. Except with respect to Early Work approved and undertaken pursuant to Section 8.02(c) and except as may be authorized in a LNTP, the Concessionaire will not commence any design Work unless and until the following conditions have been satisfied (or the Department has advised that it will waive such conditions) and the Department has delivered notice to that effect to the Concessionaire (such notice being referred to as the “Design Work Notice to Proceed”):

(i) the Concessionaire will have delivered to the Department and obtained its approval of the schedule of submissions described in Section 8.04(b);

(ii) the Department has approved the following Project Development Plans: (A) Concessionaire Management Plan; (B) Document Management Plan; (C) Quality Management System Plan; (D) Design Quality Management Plan; (E) Public Information and Communications Plan; and (F) DBE/SWaM Plan;

(iii) there exists no court order which restrains, enjoins or delays performance of the Work;

(iv) the Concessionaire certifies to the Department that all representations and warranties of the Concessionaire set forth in Section 23.02 remain true in all material respects;
(v) the Concessionaire certifies to the Department that all insurance policies required under Section 17.01(a) specified in the Design Work Notice to Proceed for the Work, except with respect to the builder’s risk insurance, have been obtained and will be in full force and effect, and in the case of Project-specific policies, the Concessionaire has delivered to the Department duplicate originals or copies thereof certified by the Concessionaire’s insurance broker to be true and correct copies of the originals; and

(vi) there exists no Concessionaire Default for which the Concessionaire has received notice from the Department, and the Concessionaire certifies to the Department that, to the best of its knowledge after diligent inquiry, there exists no condition, which with the lapse of time or delivery of notice to the Concessionaire, or both, would constitute a Concessionaire Default.

The delivery of the Design Work Notice to Proceed will not constitute authorization to commence construction activities.

(b) Notice to Proceed for Construction. In addition to the conditions set forth in Section 8.03(a), the Concessionaire will not commence construction of the Project Assets unless and until the following conditions have been satisfied (or the Department, in its discretion, waives such conditions) and the Department has delivered notice to that effect to the Concessionaire (such notice being referred to as the “Construction Notice to Proceed”):

(i) the Concessionaire has delivered to the Department correct and complete copies of all Design Public Hearing Documentation and Construction Documentation required for the commencement of construction in accordance with this Agreement and the Technical Requirements, and the Concessionaire has received from the Department any prior written approvals thereof required by this Agreement and Federal Requirements;

(ii) all Governmental Approvals (including any applicable Department approvals and Federal approvals and agreements) necessary for the commencement of construction have been acquired (and copies provided to the Department), and the Concessionaire has satisfied all applicable pre-construction requirements of the Governmental Approvals;

(iii) all rights of access or other property rights necessary for the commencement of construction have been obtained;

(iv) the Department has approved the following: (A) Baseline Schedule (B) Construction Quality Management Plan; (C) Maintenance of Traffic Plan; (D) Environmental Management Plan; (E) ROW Acquisition and Relocation Plan; (F) Health, Safety and Security Plan; and (G) Utilities Plan; and

(v) the builder’s risk insurance policy required under Section 17.01(a) has been obtained and will be in full force and effect, and the Concessionaire has delivered to
the Department a duplicate original or copy thereof certified by the Concessionaire’s insurance broker to be a true and correct copy of the original.

(c) The Concessionaire will deliver notice to the Department upon the satisfaction of the applicable conditions set forth in this Section 8.03 and request that the Department issue a Design Work Notice to Proceed or a Construction Notice to Proceed. The parties will comply with the submittal and review procedures set forth in Section 10.05 for the issuance of a Design Work Notice to Proceed or a Construction Notice to Proceed; provided that the deemed approval provisions of Section 10.05(c) will not apply to the issuance of a Design Work Notice to Proceed or a Construction Notice to Proceed.

(d) The Department may waive any condition precedent set forth in Section 8.03(a) and Section 8.03(b); provided, that no person or entity will be entitled to assume that the Department will waive or refuse to waive any condition precedent in the absence of strict compliance therewith. Unless the Department waives in writing (as distinguished from a deemed waiver) a condition precedent that requires action by the Concessionaire to be satisfied, the Concessionaire will remain bound to use diligent efforts to satisfy the condition precedent.

Section 8.04 Design Work

(a) Except as provided in Section 8.02(c) with respect to the Early Work, the Concessionaire will submit to the Department accurate and complete copies of all Design Documentation and Construction Documentation relating to the Work, which is required to be submitted, within three Days after such documentation is delivered to the Concessionaire by the Design-Build Contractor under the Design-Build Contract. Each submittal will comply with the applicable requirements of the Technical Requirements. The Department’s review of any submittal shall comply with the submittal and review procedures set forth in Section 10.05.

(b) The Concessionaire will provide the Department with a schedule of its proposed submittals of Design Documentation and Construction Documentation (which schedule will be updated periodically as necessary) so as to facilitate the Department’s coordination and review of such documents, and will complete quality control and quality assurance reviews of all Design Documentation and Construction Documentation to ensure that they are accurate and complete and comply with the requirements of this Agreement and the Technical Requirements prior to any submission to the Department.

(c) On or about the time of the scheduled submissions that require the Department’s review, comment or approval, the Concessionaire will meet with the Department and will identify during such meetings, among other things, the evolution of the design and any Deviations or other changes from any of the Technical Requirements, or, if applicable, previous design submissions. Minutes of the meetings will be maintained by the Concessionaire and provided to all attendees for review.

(d) Construction Documentation will set forth in detail drawings and specifications describing the requirements for construction of the Work, in full compliance with the Technical Requirements, Law and Governmental Approvals. The Construction Documentation will be
consistent with the latest set of interim design submissions; as such submissions may have been modified in writing in a design review meeting or as otherwise agreed upon in writing, and will be submitted after Concessionaire has obtained all requisite Governmental Approvals associated with the Work contained in such documents.

(c) The Department’s review, comment and/or approval of interim design submissions and the Construction Documentation are for the purpose of evaluating the Concessionaire’s compliance with the requirements of this Agreement and will be performed in accordance with the terms of this Agreement.

(f) Following the Department’s initial approval pursuant to this Section 8.04, the Concessionaire will have the right to amend, supplement or otherwise modify the Design Public Hearing Documentation, Design Documentation or the Construction Documentation or any part thereof, without the further approval of the Department; provided, that the Department’s approval will be required with respect to amendments, supplements or modifications that (i) constitute a material change in the scope of the Work or Deviations from any of the Technical Requirements, (ii) result in increases in the time to achieve Substantial Completion beyond the Guaranteed Substantial Completion Date, or (iii) except to the extent directly attributable to a Compensation Event, impose on the Department any new or increased costs, liabilities or obligations; provided, further, that the Concessionaire will provide the Department notice of all such proposed amendments, supplements and modifications regardless of whether the Department’s consent is required and will pay the Department, upon demand, for all the Allocable Costs it incurs to review and consider such proposed amendments, supplements or modifications that are subject to the Department’s approval.

(g) In the event the Concessionaire’s design differs from the schematic upon which the NEPA Documents were based, as between the Department and the Concessionaire, the Concessionaire will be fully responsible for all necessary actions, and will bear all risk of delay (except to the extent resulting from Delay Events) and all risk of increased cost (except to the extent resulting from Compensation Events), resulting from or arising out of any associated change in the Project Assets location and design, including (i) conducting all necessary environmental studies and preparing all necessary environmental documents in compliance with applicable Environmental Laws, (ii) obtaining and complying with all necessary new Governmental Approvals (including any modifications, renewals and extensions of the NEPA Documents and other existing Governmental Approvals) or third party approvals or agreements, and (iii) bearing all risk and cost of litigation. The Department and FHWA will independently evaluate all environmental studies and documents and fulfill the other responsibilities assigned to them by 23 CFR Part 771; provided, that the Concessionaire will fully pay the Department for the Allocable Costs it incurs to conduct further or supplemental environmental studies and to fulfill any other responsibilities assigned to it pursuant to 23 CFR Part 771.

(h) The design and construction of the Project Assets will accommodate certain improvements, projects and plans, all as set forth in the Technical Requirements.
Section 8.05 Acquisition of Project Right of Way; Utility Relocations; Railroad Easements

(a) Right of Way Acquisition Obligations. The Concessionaire will perform all Project ROW Acquisition Work necessary for the construction of the Project Assets including but not limited to all appraisals, appraisal reviews, negotiations with landowners and Utility Owners, relocation assistance and advisory services, and legal services. The Concessionaire will carry out such Work as follows:

(i) the Concessionaire will carry out the Work specified herein, in each case in accordance with the Technical Requirements and all applicable Laws;

(ii) the Concessionaire will acquire all Project Right of Way in accordance with the Technical Requirements and Law, including but not limited to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (the “Uniform Act”) and Titles 25.1 and 33.1 of the Code of Virginia;

(iii) the Concessionaire will submit a ROW Acquisition and Relocation Plan to the Department for its approval. Unless otherwise permitted in the Technical Requirements, the ROW Acquisition and Relocation Plan will not include parcels considered to be solely for the convenience of the Concessionaire, including those necessary to accommodate laydown, staging, temporary drainage and other construction methods in connection with the construction of the Project Assets. The ROW Acquisition and Relocation Plan will identify a schedule of right of way activities including the specific parcels to be acquired and all relocations. The ROW Acquisition and Relocation Plan will allow for the orderly relocation of displaced persons based on time frames not less than those provided by the Uniform Act. The parties will comply with the submittal and review procedures set forth in Section 10.05 with regards to the Department’s approval of the ROW Acquisition and Relocation Plan; provided that the deemed approval provisions of Section 10.05(e) will not apply to the approval of the ROW Acquisition and Relocation Plan. The ROW Acquisition and Relocation Plan will be updated as necessary during the Term;

(iv) the Concessionaire will exercise due diligence and use reasonable care in determining whether property to be acquired may contain wastes or other materials or hazards requiring remedial action or treatment to the extent the Concessionaire has access to such property and will otherwise comply with the Technical Requirements, including the undertaking of studies, assessments and tests required by the Technical Requirements;

(v) the Concessionaire will make direct payments of benefits to property owners for negotiated settlements, relocation benefits, and payments to be deposited with the court; and

(vi) the Concessionaire will prepare, obtain execution of, and record documents conveying title of the Project Right of Way to the State and deliver all executed and recorded general warranty deeds to the Department. For all property
purchased in conjunction with the Project, title will be acquired in fee simple except as may be specifically agreed to by the Department.

(b) Condemnation. The Concessionaire will use its best efforts (as such term is defined for this purpose in the Technical Requirements) (i) to acquire the Project Right of Way and any other real property or real property rights outside the Project Right of Way necessary for the construction and operation of the Project that are set forth in the ROW Acquisition and Relocation Plan by making *bona fide* efforts to purchase the Project Right of Way or such other real property or real property rights from the owners of such real property or real property rights for amounts not to exceed just compensation therefore and (ii) to settle claims with landowners amicably, each in accordance with Law. If, despite the Concessionaire’s best efforts, it is unable to reach a settlement with landowners within 30 Days, the Department will handle any necessary condemnation proceedings in accordance with the provisions of the Technical Requirements. Prior to the Department filing a condemnation proceeding, the Concessionaire will prepare all necessary paperwork and supporting documentation required for the proceeding and it will deliver that documentation to the Department. The Department then will file the condemnation proceeding(s) and handle such proceeding(s) in accordance with the Technical Requirements.

(c) Certain Property Outside the Project Right of Way. The Concessionaire will be responsible, at its own cost and expense, for the acquisition of, or for causing the acquisition of, any property, temporary easements or other property rights not included in the ROW Acquisition and Relocation Plan, including those necessary to accommodate laydown, staging, temporary drainage and other construction methods in connection with the construction of the Project Assets.

(d) ROW Costs. 

   (i) Except as provided in this Agreement, the Concessionaire will be responsible for performing all activities and services necessary for the acquisition of all Project Right of Way at its sole cost and expense as set forth in Exhibit CC.

   (ii) If the aggregate ROW Costs exceed $275,000, the Concessionaire will pay the first $150,000 of such excess. If the aggregate ROW Costs exceed $425,000, the Department will pay any such excess. If the aggregate ROW Costs are less than $275,000, the Concessionaire will deposit an amount equal to the difference between such amount and the aggregate ROW Costs into the Project Enhancement Account.

(e) Utility Relocations.

   (i) The Concessionaire, at its sole cost and expense, will perform all activities and services necessary for all Utility Relocations necessary to accommodate construction of the Project Assets.

   (ii) The Concessionaire will perform Utility Relocations in accordance with the Technical Requirements. Subject to Law, the Department will provide to the Concessionaire the benefit of any provisions in recorded Utility or other easements.
affecting the Project which require the easement holders to relocate at their expense and the Department will reasonably assist Concessionaire in obtaining the benefit of all rights the Department has under any Utility easement, permit, or other right relating to Utility Relocations, it being understood that such assistance will not entail the initiation of or participation in legal actions or proceedings.

(f) Acquisition of Railroad Easements. The Department will obtain, at the Department’s sole cost and expense, any easements and other property rights necessary for the Work located on property owned by Norfolk Southern Corporation, and facilitate the negotiation of a construction agreement between the Concessionaire and Norfolk Southern Corporation (the “Railroad Easement”). Notwithstanding the foregoing, (i) the Concessionaire will pay the Department for Allocable Costs incurred by the Department in the Department’s efforts to obtain the Railroad Easement, to the extent such Allocable Costs are incurred by the Department as a result of any Concessionaire Party’s misconduct, negligence or other culpable act, error or omission and (ii) the Concessionaire will pay the costs of any Work performed on the Railroad Easement and reimburse Norfolk Southern Corporation any of its costs in connection therewith, all as provided in the Technical Requirements.

Section 8.06 Governmental Approvals

(a) The Concessionaire, at its sole cost and expense (except as otherwise provided herein), will obtain and maintain in full force and effect and comply with all Governmental Approvals necessary for the Work. Responsibility for and cost of obtaining Governmental Approvals necessitated by a Department Change or a Department Project Enhancement will be as agreed to and specified in the accompanying Change Order.

(b) The Department will provide reasonable assistance and cooperation to the Concessionaire, as requested by the Concessionaire, in obtaining Governmental Approvals relating to the Project and any revisions, modifications, amendments, supplements, renewals, reevaluations and extensions of Governmental Approvals.

(c) Except as otherwise provided in this Agreement, the Department will not unreasonably withhold or delay any Governmental Approval for which it is the issuing Governmental Authority with respect to the design, construction, operation or maintenance of the Project or any Project Enhancement. For the avoidance of doubt, the provisions of this Section 8.06(c) are not intended to supersede any provision of this Agreement or any other Project Agreement providing for the conditions to or time of approval of any such Governmental Approval, or any express right of the Department to withhold consent in its sole discretion.

(d) The Concessionaire will at all times and at its sole cost and expense comply with the NEPA Documents, including, without limitation, compliance necessitated by a change in the base design of the Project. If supplements to the NEPA Documents or additional NEPA Documents are needed following the Agreement Date, the Department will prepare the necessary documentation using data and other information provided by the Concessionaire, and the Concessionaire will pay the Department for its Allocable Costs incurred in the preparation of such documentation; provided, that the Department will pay for supplements to the existing
NEPA Documents or additional NEPA Documents necessitated by a Compensation Event or Department Project and for the Allocable Costs incurred by the Concessionaire in providing data and information relating to such supplements.

Section 8.07 Construction Work and Project Schedule

(a) The Initial Baseline Schedule will be the basis for monitoring the Concessionaire’s performance of the Work until such time as a Baseline Schedule has been approved by the Department in accordance with the Technical Requirements.

(b) The Concessionaire and the Department will conduct monthly progress meetings in accordance with the Technical Requirements. As part of, and in conjunction with, such meetings, the Concessionaire will provide the Department with any proposed update of the Baseline Schedule in accordance with the Technical Requirements. The parties further agree to abide by the terms and procedures set forth in the Technical Requirements pertaining to project management and coordination matters.

(c) Except as provided otherwise in this Agreement, the Concessionaire will be financially responsible for all damage to the Project Assets resulting from the Work. The Department will not be responsible for any construction means and methods of the Concessionaire or liability ensuing therefrom, unless such means and methods were directed by the Department pursuant to a Department Change or a Department Project Enhancement.

(d) Whenever required by the Department, the Concessionaire will provide in writing a general description of the arrangements and methods that the Concessionaire proposes to adopt for the execution of the Work. The Concessionaire will not significantly alter the Baseline Schedule, or such arrangements and methods, without informing the Department, and the Concessionaire will coordinate any such alterations to take into account the Department’s resources and the work to be carried out by the Department’s separate contractors, if any. The Concessionaire will not alter the Baseline Schedule except as permitted in the Technical Requirements.

(e) If any alteration (i) affects the Critical Path, (ii) adversely and materially affects the Department’s oversight resources or the Department’s separate contractors, or (iii) deviates from the Technical Requirements, the Concessionaire will not make such alteration without the prior approval of the Department.

(f) If the progress of the Work does not conform to the Baseline Schedule, as updated herein, the Concessionaire will submit a recovery schedule as required by the Technical Requirements, and will reasonably consider revisions to the Baseline Schedule proposed by the Department to achieve completion within the timeframe set forth in this Agreement.

Section 8.08 Substantial Completion

(a) The Concessionaire will achieve Substantial Completion on or before the Guaranteed Substantial Completion Date, subject to adjustment in accordance with this
Agreement; provided that failure to achieve Substantial Completion by the Guaranteed Substantial Completion Date, in and of itself, will not result in a default under Section 19.01, except as set forth in Section 19.01(e).

(b) The Department will issue a written certificate of Substantial Completion at such time as Substantial Completion occurs. If the Department approves the issuance of a Substantial Completion Certificate, the Department will provide with its Substantial Completion Certificate a Punch List of items to be completed to achieve Final Acceptance.

(c) Substantial Completion will have been achieved when each of the following conditions have occurred for the entire Project Assets:

(i) all lanes of traffic (including ramps, interchanges, overpasses, underpasses, and other crossings) set forth in the Construction Documentation are in their final configuration and available for normal and safe use and operation;

(ii) all major safety features are installed and functional, including, as required, shoulders, guard rails, striping and delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences, safety end treatments, terminal anchor sections and crash attenuators;

(iii) all required illumination for normal and safe use and operation is installed and functional in accordance with the Technical Requirements;

(iv) all required signs and signals for normal and safe use and operation are installed and functional in accordance with the Technical Requirements;

(v) the need for temporary traffic controls or for lane closures at any time has ceased (except for any then required for routine maintenance, and except for temporary lane closures in accordance with and as permitted by a Department-approved traffic management plan solely in order to complete Punch List items);

(vi) the Concessionaire has completed the toll commissioning process described in the Technical Requirements, and the ETTM System is completed, has passed all demonstration and performance testing in accordance with the Construction Documentation and the Technical Requirements, including demonstration of interoperability with E-ZPass or any successor to E-ZPass then utilized on State Highways, and is ready for normal operation unless the foregoing conditions have been previously satisfied under Section 9.02(a)(viii);

(vii) the TMS (if any) and safety features for TMS components are installed and functional; and

(viii) the Concessionaire has otherwise completed the Work in accordance with this Agreement, including the Technical Requirements, and with the Construction Documentation, such that the Project Assets are in a physical condition that it can be used
for normal and safe vehicular travel in all lanes and at all points of entry and exit, subject only to Punch List items.

(d) The parties will disregard the status of the landscaping and aesthetic features included in the Construction Documentation in determining whether Substantial Completion has occurred, except to the extent that its later completion will affect public safety or satisfaction of the criterion in Section 8.08(c).

(e) The Concessionaire will provide the Department with written notice of anticipated Substantial Completion at least 21 Days prior to the anticipated Substantial Completion Date. The parties will comply with the submittal and review procedures set forth in Section 10.05 in the determination of whether Substantial Completion has been achieved; provided that the deemed approval provisions of Section 10.05(e) will not apply to the determination of whether Substantial Completion has been achieved. During such 21-Day period, the Concessionaire and the Department will meet, confer and exchange information on a regular basis with the goal being the Department’s orderly, timely inspection of the Project Assets and review of the final Construction Documentation and the Department’s issuance of a Substantial Completion Certificate. In addition, the Department will conduct an inspection of the Project Assets and review of the final Construction Documentation, and such other matters as may be necessary to determine whether Substantial Completion is achieved and, not later than the expiration of such 21-Day period, will deliver a written report of findings and recommendations to the Concessionaire. The Department will provide the Concessionaire with a determination of whether or not Substantial Completion has been achieved (and if not, an explanation with reasonable specificity as to the reasons therefor) within such 21-Day period.

(f) If the Department has not notified the Concessionaire of such approval or disapproval within 21 Days after such Concessionaire notice (or 10 Days with respect to any resubmittal of the notice), and if the delay is not a result of a Concessionaire Party action or inaction, then such delay will constitute a Delay Event and a Compensation Event, and the Concessionaire will be entitled to Concessionaire Damages, if any, pursuant to Section 14.01.

Section 8.09 Final Acceptance

(a) The Concessionaire will achieve Final Acceptance of the Project on or before the Final Acceptance Deadline, subject to adjustment in accordance with this Agreement.

(b) The Concessionaire will provide the Department with written notification when it has determined that the following conditions to Final Acceptance of the Project have been satisfied:

(i) Substantial Completion has occurred;

(ii) other than the Permitted Encumbrances (not including clause (c) of the definition thereof), the Project is free and clear of all Liens, claims, security interests or encumbrances arising out of or in connection with the performance of the Work during the Construction Period;
(iii) all Punch List items have been completed and delivered to the reasonable satisfaction of the Department;

(iv) all Project Documentation, including as built drawings of the Project Assets, to be submitted on or before Final Acceptance have been submitted and approved (to the extent approval is required) by the Department;

(v) the Concessionaire has paid for all Design-Build Work and other Work required to achieve Final Acceptance by third parties that the Concessionaire is obligated to pay (other than disputed amounts and amounts that are not yet due and payable);

(vi) the Concessionaire has delivered all required certifications from the engineer of record and architect of record to all necessary Governmental Authorities and to the Department;

(vii) the Concessionaire has made all deliveries of Work Product to the Department that are required to be made pursuant to this Agreement; and

(viii) the Concessionaire has delivered to the Department a list of each Asset of the type described in the Performance Requirements Baseline Table.

(c) The parties will comply with the submittal and review procedures set forth in Section 10.05 in the determination of whether Final Acceptance has been achieved provided that the deemed approval provisions of Section 10.05(e) will not apply to the determination of whether Final Acceptance has been achieved. During the 21-Day period following delivery of the Concessionaire’s written notification, the Concessionaire and the Department will meet, confer and exchange information with the goal being the Department’s orderly, timely inspection of the Project Assets and the Department’s issuance of a Final Acceptance Certificate, and the Department will conduct an inspection of the Punch List items, a review of the final drawings and such other investigation as may be necessary to evaluate whether the conditions to Final Acceptance have been satisfied. The Department will provide the Concessionaire with a determination of whether or not Final Acceptance has been achieved (and if not, an explanation with reasonable specificity as to the reasons therefor) within such 21-Day period.

(d) If the Department has not notified the Concessionaire of such approval or disapproval within 21 Days after such Concessionaire notice (or 10 Days with respect to any resubmittal of the notice), and if the delay is not a result of a Concessionaire Party action or inaction, then such delay will constitute a Delay Event and a Compensation Event, and the Concessionaire will be entitled to Concessionaire Damages, if any, pursuant to Section 14.01.

Section 8.10 Liquidated Damages for Delayed Completion

(a) Liquidated Damages Related to Substantial Completion. If the Concessionaire does not achieve Substantial Completion by the Guaranteed Substantial Completion Date, the Department will be entitled to assess $14,000 as liquidated damages for each Day that Substantial Completion of the Project remains to be achieved beyond the Guaranteed Substantial
Completion Date. The Concessionaire will cause any related liquidated damages payable by the Design-Build Contractor under the Design-Build Contract to be paid to the Department; provided that the Concessionaire’s overall liability for liquidated damages relating to this Section 8.10 shall in no event exceed $5,110,000.

(b) **Liquidated Damages Related to Final Acceptance.** If the Concessionaire does not achieve Final Acceptance by the Final Acceptance Deadline, the Department will be entitled to assess $5,000 as liquidated damages for each Day that Final Acceptance of the Project remains to be achieved following the expiration of the Final Acceptance Deadline, and the Concessionaire will cause any related liquidated damages payable by the Design-Build Contractor under the Design-Build Contract.

(c) **Additional Provisions.** The parties acknowledge, recognize and agree on the following:

(i) that because of the unique nature of the Project, it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by the Department as a result of the Concessionaire’s failure to timely complete the Work;

(ii) that any sums assessed under this Section 8.10 and Section 8.14 are in the nature of liquidated damages, and not a penalty, and are fair and reasonable and such payment represents a reasonable estimate of fair compensation for the additional Oversight Services that may reasonably be anticipated from such failure;

(iii) that any sums assessed under this Section 8.10 and Section 8.14 will be in lieu of all liability of the Concessionaire and its Contractors for any and all Losses, whether direct, special or consequential, and of any nature whatsoever incurred by the Department, which are caused by the Concessionaire’s failure to timely complete the construction Work, including failure to achieve Substantial Completion and Final Acceptance by the applicable deadlines and its actions causing Non-Permitted Lane Closures as described in Section 8.14;

(iv) that any sums assessed under this Section 8.10 and Section 8.14 will be due and owing to the Department upon assessment of such damages, subject to the dispute resolution procedures of Article 21; and

(v) notwithstanding the above, liquidated damages are not intended to excuse Concessionaire or any of its Contractors from liability for any other breach of its obligations under the Project Agreements, or limit the Department’s recourse to other remedies hereunder such as termination pursuant to Article 19 and Article 20; provided, that no Concessionaire Default will occur solely as a result of a delay in achieving Substantial Completion by the Guaranteed Substantial Completion Date, except as set forth in Section 19.01(e).
(d) Payment of Liquidated Damages. The Concessionaire will pay all undisputed liquidated damages under this Section 8.10 monthly in arrears not later than 30 Days after the end of each calendar month, and in accordance with the requirements set forth in Section 5.06(b).

Section 8.11 Warranties; Defective Design and Construction

(a) Warranties.

(i) The Concessionaire will require the Design-Build Contractor to warrant that (A) the Design-Build Work is complete and conforms to Good Industry Practice; and (B) the Design-Build Work, including all materials and equipment furnished as part of the Design-Build Work, is new unless otherwise specified in the Technical Requirements or elsewhere in this Agreement, of good quality, free of defects in materials and workmanship.

(ii) The warranties in Section 8.11(a) are exclusive and are in lieu of all other warranties by contract. No implied or statutory warranties will apply. Subject to Section 8.11(a)(iii) below and to such limitations on coverage including aggregate caps specified in the Design-Build Contract, the foregoing warranties for Work relating to the Project Assets will be effective for a period of, with respect to the Design-Build Work, 60 months beginning on the date on which substantial completion of the Design-Build Work is achieved as such date is defined in the Design-Build Contract (the “Warranty Period”). Such warranties will survive termination of this Agreement for Work that was in place prior to termination.

(iii) With respect to the warranty furnished by the Design-Build Contractor pursuant to Section 8.11(a)(i) and if and to the extent the Concessionaire obtains general or limited warranties from any Contractor in favor of the Concessionaire with respect to design, materials, workmanship, construction, equipment, tools, supplies, software or services, the Concessionaire will cause such warranties to be expressly extended to the Department; provided, that the foregoing requirement will not apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products (including software products), equipment or supplies where the warranty cannot be extended to the Department using commercially reasonable efforts. The Department will only have the right to exercise remedies under any such warranty so long as the Concessionaire or a Lender is not pursuing remedies thereunder. To the extent that any Contractor warranty would be voided by reason of the Concessionaire’s negligence or failure to properly incorporate material or equipment into the Work, the Concessionaire will be responsible for correcting such defect.

(iv) Contractor warranties are in addition to all rights and remedies available pursuant to this Agreement or Law or in equity, including Claims against the Performance Security, and will not limit the Concessionaire’s liability or responsibility imposed by this Agreement or Law or in equity with respect to the Work, including liability for Non-Conforming Work, design defects, patent and latent construction defects, strict liability, breach, negligence, willful misconduct or fraud.
(b) Non-Conforming Work. In the event of the occurrence of a Defect in the design or construction Work, including in any materials and equipment furnished as part of the construction, and including any Non-Conforming Work, the Department will be entitled, in addition to any other remedies:

(i) to demand that the Concessionaire rectify, or require the Contractor to rectify, such Defect at its sole expense, it being understood that, in such event, the Concessionaire will be permitted to draw on the Performance Security provided by the Contractor liable for such Work if the Contractor fails to perform such Work, to the extent of the cost of any work performed by the Concessionaire;

(ii) to suspend any affected portion of the Work of design and construction, by delivery of a written order to the Concessionaire, which order the Department will lift after the Concessionaire fully cures or corrects such Defects;

(iii) to rectify such Defects itself and to obtain payment of its Allocable Costs from the Concessionaire or, where the Contractor providing such Performance Security is liable for such Work from a draw on any Performance Security furnished pursuant to this Agreement (and the Concessionaire agrees to make such drawing upon the request of the Department); provided, that (A) the Department will not rectify such Defects itself or seek payment from the Concessionaire or such Performance Security unless it has requested rectification of, and the Concessionaire and the Contractor have failed to promptly rectify the Defects and (B) the Concessionaire will be permitted to draw on the Performance Security provided by any Contractor liable for such Work to the extent of any amounts paid by the Concessionaire; or

(iv) to seek performance or payment pursuant to any applicable guaranty.

(c) The issuance of a suspension order pursuant to Section 8.11(b)(ii) will not affect the Concessionaire’s rights to cure or correct any Non-Conforming Work giving rise to the issuance of the suspension order.

Section 8.12 Transportation Management Plan.

(a) The Department will develop, fund and implement a transportation management plan for the Project (“Transportation Management Plan” or “TMP”), which will be undertaken in coordination with the Concessionaire’s Maintenance of Traffic Plan and Sequence of Construction Plan. The Department will provide the Concessionaire with a reasonable opportunity to comment on the TMP. The TMP will set forth the program for traffic management and related activities to ensure safety and mobility for the travelling public throughout the I-95 Corridor for the duration of the Construction Period. The Concessionaire’s Maintenance of Traffic Plan (as described further in the Technical Requirements) will be consistent with, and included as part of, the TMP for the Construction Period.

(b) In connection with the TMP, the Concessionaire, at its sole cost and expense, will (i) develop and implement the Concessionaire’s Maintenance of Traffic Plan, (ii) be responsible
Section 8.13 Substantial Completion of Segments of the Project. In the Department’s sole discretion, it may issue a Substantial Completion Certificate and an authorization to commence Service Commencement with respect to certain Segments of the Project to be identified by the Concessionaire and approved by the Department, prior to issuing a Substantial Completion Certificate and authorization to commence Service Commencement for the balance of the Project. In such case, solely for the purpose of processing such early acceptance, the Department and the Concessionaire will develop a set of requirements that must be satisfied and other conforming changes to this Agreement, so that such Segments of the Project may be accepted early by the Department, in its sole discretion, pursuant to this Section 8.13.

Section 8.14 Lane Closure Damages. In its performance of the Work during the Construction Period, the Concessionaire may temporarily close existing lanes on the Project Right of Way only in accordance with the Technical Requirements. Any such closure that exceeds the time period permitted therefor in the Technical Requirements is a “Non-Permitted Closure”. If a Non-Permitted Closure occurs, the Department will notify the Concessionaire thereof and of the associated Lane Closure Damages, in writing, within 48 hours. The Concessionaire will pay to the Department the liquidated damages set forth below (the “Lane Closure Damages”) at the time and in the manner set forth in the Technical Requirements. The Lane Closure Damages for any Non-Permitted Closure will not exceed $200,000 per incident.

<table>
<thead>
<tr>
<th>Elapsed Time (min)</th>
<th>I-95, I-395, I-495 and all ramps</th>
<th>Major Arterials</th>
<th>All other roads</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-5, or any portion thereof</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
</tr>
<tr>
<td>Every additional minute or portion thereof after the initial five minutes stated above.</td>
<td>$1,000 plus $2,500 per each additional minute</td>
<td>$1,000 plus $1,500 per each additional minute</td>
<td>$500 plus $500 per each additional minute</td>
</tr>
</tbody>
</table>

Section 8.15 Failure to Achieve Substantial Completion by Long Stop Date; Substantial Completion Recovery Plan

(a) The Concessionaire will achieve Substantial Completion of the Project by the Long Stop Date.

(b) The Long Stop Date will be extended one time if (i) the Concessionaire submits to the Department for the Department’s review and approval a written recovery plan (the “Substantial Completion Recovery Plan”) not later than 90 Days prior to the Long Stop Date; (ii)
the Substantial Completion Recovery Plan outlines the actions the Concessionaire proposes to take in order to cause Substantial Completion to occur as promptly as reasonably possible, which plan may include increasing work hours to the extent permitted under applicable Law and utilizing additional labor and equipment and other appropriate acceleration techniques to improve schedule progress and will set forth a proposed new Long Stop Date; (iii) such Substantial Completion Recovery Plan and new Long Stop Date is approved by the Department within 30 Days in its reasonable discretion, and (iv) the Concessionaire diligently implements the Substantial Completion Recovery Plan. In addition, the Department may, in its sole discretion, consent to a second Substantial Completion Recovery Plan upon such terms and conditions as it may establish in its sole discretion.

Section 8.16 Department Allowances and Commercial Commitments for Design-Build Work.

(a) The Parties acknowledge that the contract price for the Design-Build Work in the Design-Build Contract includes certain agreed quantities set forth in the Technical Requirements (the “Baseline Quantities”) and associated unit prices and markups for concrete sign foundations, electric service panel feeds, and undercut excavation (the “Allowance Items”) as set forth in the Technical Requirements. If the actual quantities of the Allowance Items in the Design-Build Work exceed the Baseline Quantities, the Design-Build Contractor will be entitled to payment by the Concessionaire of an amount equal to the agreed unit price and markup multiplied by the actual quantities which exceed the Baseline Quantities; provided however, that such payment by the Concessionaire to the Design-Build Contractor will not exceed $15,000,000. The Department will pay the Concessionaire for any such amount that the Concessionaire pays to the Design-Build Contractor; provided however, that the maximum such amount payable by the Department to the Concessionaire pursuant to this Section 8.16(a) will not exceed $15,000,000.

(b) The Concessionaire will perform landscaping work only if and to the extent directed or approved by the Department, and all such landscaping work performed by the Concessionaire will be treated as a Department Change, as more fully set forth in the Technical Requirements; provided however, that the maximum amount of landscaping Work to be performed by the Concessionaire will not exceed $2,000,000, unless otherwise directed by the Department.

(c) The Department will pay the Concessionaire for any amounts paid by the Concessionaire to the Design-Build Contractor for fuel price adjustments and asphalt price adjustments for paving operations as set forth in the Technical Requirements.

(d) The Department will pay for the acquisition of stream and wetland credits in accordance with the Technical Requirements. The Concessionaire will perform stream restoration construction activities in accordance with the Technical Requirements.
ARTICLE 9.

PROJECT MANAGEMENT; OPERATIONS AND MAINTENANCE

Section 9.01 Transition of Operations and Maintenance to Concessionaire

(a) Care, Custody and Control.

(i) Except as otherwise specifically provided for in a LNTP, after the Financial Close Date and prior to the Substantial Completion Date, the Concessionaire will (A) have care, custody and control of the Design Build Right of Way for the Project Assets and (B) be responsible for the security and protection of active construction areas on the Project Assets and the Project Right of Way and (1) all materials, equipment, supplies and any other property of any Concessionaire Party and (2) all materials, equipment, supplies and any other property of the Department being held in a secure location at or on the Project Assets or otherwise being used or procured in connection with the Work, whether or not on the Project Right of Way. Notwithstanding the foregoing, during the Construction Period, the Department will (x) except as otherwise provided herein, operate and maintain the existing HOV Lanes and access ramps at its own cost and expense to the extent they are not actively under construction as provided in Section 9.07 (the “HOV Assets”); (y) have care, custody and control of the HOV Assets; and (z) be responsible for the security and protection of the HOV Assets and all materials, equipment, supplies and any other property of the Department at or on the HOV Assets, in all cases except as otherwise provided in Section 9.02.

(ii) Through the coordination process described in Section 8.07, the Concessionaire and the Department will determine from time to time which portions of the existing HOV Lanes will be open for traffic or under construction.

(iii) On and after the Substantial Completion Date to the end of the Term, the Concessionaire will have care, custody and control of the Project Assets (other than the Department Shared Assets).

(b) Turnover Process. The Concessionaire will implement and comply with the Turnover Plan to ensure the timely and orderly transition of operations and maintenance of the Project from the Department to the Concessionaire. The parties will cooperate and coordinate with each other with respect to activities undertaken pursuant to the Turnover Plan attached as Exhibit V.

Section 9.02 Conditions Precedent to Service Commencement of the Project

(a) The Concessionaire will not initiate Service Commencement until the following conditions have been satisfied (or the Department, in its sole discretion, waives any such condition) and the Department has delivered notice to that effect to the Concessionaire (the “Service Commencement Notice to Proceed”):
(i) the Department has issued the Substantial Completion Certificate, or it has been determined pursuant to the dispute resolution procedures set forth herein that the Department should have issued such certificate;

(ii) the Department has approved the Operations and Maintenance Plan, the updated Performance Requirements Baseline Tables, all other Project Documentation and all other Project Development Plans required by the Technical Requirements to be submitted on or before the Service Commencement Date;

(iii) the Concessionaire has received and delivered to the Department copies of all Governmental Approvals necessary to operate the Project and has satisfied all conditions and requirements thereof which must be satisfied before the Project can be lawfully opened for regular public use, all such Governmental Approvals remain in full force and effect, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval;

(iv) all insurance policies required under Section 17.01 for the Operating Period have been obtained and will be in full force and effect, and the Concessionaire has delivered to the Department duplicate originals or copies thereof (or endorsements reasonably acceptable to the Department extending coverage to the Project), certified by the Concessionaire’s insurance broker to be true and correct copies of the originals;

(v) there exists no Concessionaire Default for which the Concessionaire has received notice from the Department, except as to any Concessionaire Default that has been cured or for which Service Commencement will effect its cure, and there exists no event or condition that, with notice or lapse of time, would constitute a Concessionaire Default;

(vi) all Operations and Maintenance Agreements and agreements relating to toll collection and violation enforcement on the HOT Lanes are in full force and effect;

(vii) the Concessionaire has implemented the Maintenance Management System in accordance with the Technical Requirements;

(viii) to the extent not previously completed pursuant to Section 8.08, the Concessionaire has completed the toll commissioning process described in the Technical Requirements, and the ETTM System is completed, has passed all demonstration and performance testing in accordance with the Construction Documentation and the Technical Requirements, including demonstration of interoperability with E-ZPass or any successor to E-ZPass then utilized on State Highways, and is ready for normal operation unless previously completed pursuant to Section 8.08;

(ix) the Concessionaire has deposited the Source Code Documentation with the Escrow Agent in accordance with Section 18.06;

(x) all Project Agreements are in full force and effect;
(xi) the Concessionaire has paid or caused to be paid to the Department all amounts due and payable from the Concessionaire to the Department, including, but not limited to, Lane Closure Damages, in connection with this Agreement, including any applicable interest thereon (except such amounts subject to dispute in accordance with the dispute resolution procedures);

(xii) the Concessionaire has provided to the Department the training required to have been provided prior to Service Commencement by the Technical Requirements;

(xiii) the Concessionaire has submitted to the Department an Annual Budget for the remainder of the Agreement Year in which the Substantial Completion Date occurs (or, if the remainder of such year is shorter than 90 Days, an Annual Budget that conforms with the requirements specified in Section 9.08, for the remainder of such Agreement Year and for the following Agreement Year); and

(xiv) the Concessionaire has certified to the Department in writing that the conditions set forth in this subsection (a) have been satisfied as of the date of such certification.

(b) The parties will comply with the submittal and review procedures set forth in Section 10.05 in the Department’s determination of whether the Concessionaire has satisfied the conditions precedent for achieving Service Commencement.

(c) The Department’s issuance (or deemed issuance) of the Service Commencement Notice to Proceed will not constitute a waiver by the Department of any then-existing breach of this Agreement by the Concessionaire.

Section 9.03 Concessionaire Obligation to Manage and Operate

(a) At all times following the Service Commencement Date, the Concessionaire, at its sole cost and expense (except as otherwise provided herein), will cause the Project to be managed, maintained and operated in accordance with Law, all Governmental Approvals, the terms, conditions and standards set forth in this Agreement, including the requirements set forth in the Technical Requirements, and in accordance with Good Industry Practice. Without limiting the foregoing, the Concessionaire agrees to be responsible for the following, at its sole cost and expense at all times following the Service Commencement Date for the Project:

(i) the management and control of traffic on the Project Assets, including, but not limited to, incident response services and temporary partial or full closures of the Project Assets, subject to the Department’s rights to assume control as expressly provided in this Agreement;

(ii) the maintenance and repair of the Project Assets and all systems and components thereof, including the ETTM System, which the Concessionaire may upgrade, modify, change and replace, as applicable, in accordance with this Agreement and the requirements set forth in the Technical Requirements;
(iii) the operation of the Project Assets and the ETTM System, and otherwise carrying out the collection and enforcement of tolls and other incidental charges in accordance with Article 5 respecting the Project Assets;

(iv) the maintenance, compliance with and renewal of Governmental Approvals necessary and incidental to the foregoing activities;

(v) traffic management, and maintenance and repair responsibilities under Section 9.04(a) in accordance with the Technical Requirements; and

(vi) except as otherwise specifically provided herein (including the right of the Concessionaire to close all or a portion of the HOT Lanes in accordance with the provisions hereof), at all times during the Term, causing the Project Assets to be continuously open and operational for use by all members of the public travelling in Permitted Vehicles 24 hours a day, 365 Days a year.

(b) Snow and Ice Removal.

(i) Prior to the Service Commencement Date, the Department will, at its own cost, remove snow and ice from the HOV Lanes that are open to traffic.

(ii) Subject to Section 9.03(b)(iv), the Department will provide snow and ice removal services on the HOT Lanes at a comparable level of service to that it provides on the GP Lanes. The Concessionaire will provide access to the HOT Lanes to the Department or its contractors to provide snow and ice removal services. If the Concessionaire does not provide access to the HOT Lanes to the Department or its contractors, then the Department will not be required to provide snow and ice removal services on the applicable HOT Lanes during the pendency of such denial of access.

(iii) Other than as provided in Section 9.03(b)(iv), the Department will have no liability to the Concessionaire arising out of its snow and ice removal services. If the Department’s contractors for snow and ice removal damage the Project Assets, the Department will provide to the Concessionaire any amounts that the Department has received in respect of such damage from such contractor or its insurer. Subject to Section 9.03(b)(i) and Section 9.03(b)(ii), the Department will have full discretion to establish priorities for its contractors regarding timing and location of services, materials and equipment, without liability to the Concessionaire, other than as provided in clause (iv) below.

(iv) The Concessionaire may notify the Department if the Department fails at any time to provide snow and ice removal to the HOT Lanes at a level of service comparable to that it provides on the GP Lanes. Such notice will be given verbally, to be immediately followed up in writing, to the Department’s District Administrator and Assistant District Administrator for Maintenance or its designee (i.e. Duty Officer) for the Northern Virginia District and the Fredericksburg District for the applicable section of the HOT Lanes. If the Department fails to respond affirmatively within two hours of
the written notice from the Concessionaire or if the Department does not begin snow and ice removal services within four hours of such written notice, except if the Concessionaire does not provide access to the HOT Lanes to the Department, then the Concessionaire may arrange for other contractors to provide such service and the Department will pay the Concessionaire for such contractors’ reasonable documented cost of snow and ice removal services; provided that such contractors will not in any way hinder the removal of snow and ice from the GP Lanes.

(v) The Concessionaire may arrange for a contractor to provide snow and ice removal services to the HOT Lanes, at the Concessionaire’s sole cost and expense, even if the Department is providing such services at a level of service comparable to that it provides on the GP Lanes, with prior written notice to the Department; provided that any such contractor will not in any way hinder the removal of snow and ice from the GP Lanes. Such notice will be given verbally, to be immediately followed up in writing, to the Department’s District Administrator and Assistant District Administrator for Maintenance or its designee (i.e. Duty Officer) for the Northern Virginia District and the Fredericksburg District for the applicable section of the HOT Lanes.

(c) Drainage. The Concessionaire will be responsible, at its own cost and expense, for the maintenance, repair and replacement of the existing drainage system located within and outside of the Project Right of Way in accordance with the Technical Requirements, except to the extent such responsibility is allocated to the Department in accordance with the Technical Requirements.

Section 9.04 Procedures Relating to Maintenance Work

(a) General. The Concessionaire will perform all maintenance obligations with respect to the Project in accordance with this Agreement and the Technical Requirements.

(b) Life Cycle Maintenance Plan. No later than 90 Days before the beginning of each calendar year after the Service Commencement Date, the Concessionaire will prepare and deliver to the Department a full five-year period maintenance plan on a rolling basis that describes life cycle asset maintenance for the Project (each, a “Life Cycle Maintenance Plan”) in accordance with the Technical Requirements. The Life Cycle Maintenance Plan will include a description of all Major Maintenance to be undertaken during such five-year period, by component, item or discrete project (each, a “Task”), the estimated costs and timing relating to each Task, the underlying assumptions used to develop such plan, including assumptions arising from the re-evaluations of the physical condition of the Assets conducted pursuant to Section 9.04(d); and such other information as may be reasonably requested by the Department.

(c) Review and Approval of Life Cycle Maintenance Plan.

(i) The Department will review and approve the Life Cycle Maintenance Plan and components thereof, including, but not limited to, the proposed scope of work, timing and estimated costs for the Major Maintenance. The Department will deliver its comments, approval or disapproval to the Concessionaire within 45 Days after the
Concessionaire has delivered each proposed Life Cycle Maintenance Plan to the Department in accordance with Section 9.04(b).

(ii) The Concessionaire will reasonably consider any changes or additions proposed by the Department to the proposed Life Cycle Maintenance Plan and will modify the Life Cycle Maintenance Plan to reflect those changes and additions which are consistent with the standards and requirements of this Agreement.

(iii) In the event of any Dispute relating to a Life Cycle Maintenance Plan, the Department and the Concessionaire will endeavor in good faith to resolve any such Dispute within 60 Days after it is provided to the Department. Any Disputes raised by the Department with respect to the Life Cycle Maintenance Plan must be based on whether it and the underlying assumptions are reasonable, realistic and consistent with Good Industry Practice, the Technical Requirements and Law. If no agreement is reached within such 60-Day period as to any such matter, either party may submit the Dispute to the dispute resolution procedures set forth in Article 21. Until resolution of any Dispute relating to a Life Cycle Maintenance Plan, the treatment of the disputed Tasks in the most recently-approved Life Cycle Maintenance Plan will remain in effect and govern the requirements relating to such Tasks. If there is no approved Life Cycle Maintenance Plan then in effect, the Concessionaire will proceed as directed by the Department until resolution of such Dispute.

(d) Inspection and Implementation.

(i) After the Service Commencement Date, the Concessionaire will conduct inspections of the physical condition of the Project Assets pursuant to the Technical Requirements. Every five years after the Service Commencement Date, the Concessionaire will conduct an assessment of the physical condition of the Project Assets pursuant to the Technical Requirements, and will prepare a comparative analysis of such conditions to the conditions as previously reported (or, with respect to any Project Enhancements, their condition upon completion thereof), such analysis to take into account any changes in Federal Requirements and changes to safety standards. The condition of each Asset will be assessed using the Department’s Maintenance Rating Program in accordance with the Technical Requirements. If any Asset is determined by the Concessionaire or the Department to fall below the applicable level or rating specified in the Technical Requirements for such Asset, the Concessionaire will, within 90 Days of such assessment, develop and submit to the Department a plan to restore such Asset to a condition that will enable the Asset to meet all applicable Performance Requirements, and such plan will also include a budget, timeline and identification of the funding sources (if known at the time) that will be utilized to restore such Asset.

(ii) The Department will be responsible at its sole cost and expense for inspection of bridges and structures on the Project Right of Way in accordance with the Technical Requirements. The Concessionaire will cooperate with the Department in its conduct of inspections and will use reasonable efforts to minimize any disruption to the Department’s conduct of such inspections. The Department and the Concessionaire will
use reasonable efforts to minimize any disruption to or impairment of the Work, the Project and the Department’s inspection activities.

(iii) If the Concessionaire fails to complete any of the Tasks in accordance with this Agreement and the applicable Life Cycle Maintenance Plan, the Department may demand by notice in writing that such Tasks be completed by the Concessionaire. If the Concessionaire has failed to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers such notice, the Department may, at its option, but is not obligated to, either (A) carry out such Task or correct such defective work using Department personnel, materials and equipment or (B) procure the services for such Task or corrective work by one or more contractors. If the Concessionaire fails to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers notice pursuant to this Section 9.04(d)(iii) and the Department elects to pursue its rights pursuant to Section 9.04(d)(iii)(A) or (B), then the Concessionaire will pay the Department’s Allocable Costs it incurs to complete such Task or corrective work, and its third-party costs to procure such contract(s).

(iv) Notwithstanding anything to the contrary in Section 9.04(d)(iii), the Concessionaire may, by written notice delivered to the Department within 30 Days of receipt of the Department’s notice of demand described in Section 9.04(d)(iii), object to any such demand by the Department on the basis that the Concessionaire has completed the Task(s) specified in the Department’s demand in accordance with this Agreement and the applicable Life Cycle Maintenance Plan or that such Task(s) are not then required in accordance with this Agreement or the applicable Life Cycle Maintenance Plan, which notice will give details of the grounds for such objection. Upon the giving of any such notice, the parties will endeavor to reach agreement as to any matters referred to in the notice. If no agreement is reached as to any such matter within 30 Days after the giving of such notice, either party may refer the Dispute to the dispute resolution procedures set forth in Article 21. Notwithstanding the foregoing, the Concessionaire will perform the Task as directed by the Department and the Department will be entitled to exercise its remedies for the Concessionaire’s failure to comply with such directive in accordance with this Agreement. If it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then such directive and any additional Work required by the Department will be treated as a Department Change pursuant to Section 14.02.

Section 9.05 Major Maintenance Reserve Fund

The Concessionaire will fund the Major Maintenance Reserve Fund in such amounts and in accordance with the terms as may be required by the Lenders.

Section 9.06 Police and Enforcement Services

(a) The Department will coordinate with the Virginia State Police to provide policing services, and to provide emergency services (fire and rescue), including traffic patrol and traffic law enforcement services, to be provided on the Project at a level of service equivalent to that
provided on comparable State Highways from time to time. All such foregoing services will be provided without any charge to the Concessionaire or the Project. For the avoidance of doubt, such services will not include any enforcement of HOV compliance. In addition, if reasonably requested by the Concessionaire, the Department will assist the Concessionaire in obtaining enhanced levels of police services for the control of traffic for construction or maintenance activities or as otherwise needed (and in each case, at the Concessionaire’s sole cost and expense). Notwithstanding such assistance, the Concessionaire will be solely responsible for obtaining such enhanced services and the Department does not guarantee that such services can be obtained.

(b) The Concessionaire may, at its sole cost and expense, engage the Virginia State Police to provide toll enforcement and HOV enforcement services (including the identification and apprehension of toll violators), and the Department will assist the Concessionaire in obtaining such services if so requested by the Concessionaire. The Concessionaire will not engage or permit the engagement of private security services to provide traffic patrol or traffic law enforcement services on the Project; provided, that the foregoing does not preclude the Concessionaire from engaging private security firms or employing other appropriate security devices, vehicle occupancy detection equipment or other automated technology to protect, collect and enforce the payment of Toll Revenues and to identify toll and/or HOV violators, subject to Law, and to enforce any private rights and civil remedies available to it respecting toll and/or HOV violations.

(c) Notwithstanding the foregoing, the Concessionaire will not permit any private security firm to stop vehicles, apprehend road users, or engage in any other direct enforcement activity on the Project Right of Way.

(d) The Department will not have any responsibility or liability to the Concessionaire resulting from or otherwise relating to the failure of the Virginia State Police or any other public agencies to provide policing services contemplated by this Section 9.06 or any of the acts or omissions of the Virginia State Police or such agencies with respect to such services.

(e) The parties further understand and agree that, as the Project Assets will constitute part of the State Highway system, the Virginia State Police and other public agencies will have access to the Project Assets and jurisdiction to enforce the laws and regulations of the State as they apply to the Project Assets.

Section 9.07 Maintenance by the Department.

(a) Except as otherwise provided herein, the Department will maintain, repair and, subject to and in accordance with the Department’s normal course of operations and activities as in effect from time to time, cause to be open and operational, in a manner consistent with access to State Highways, so as to permit access to the HOT Lanes by Permitted Vehicles, the ramps, bridges and roadways directly connecting to the HOT Lanes over which the Department has sole control. The foregoing does not restrict the Department’s right to operate existing or new facilities, to modify existing facilities, to construct new facilities, including Project Enhancements, and, subject to Section 12.02(d)(i) through (iii), to perform planned and
emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project.

(b) Except as set forth in the Technical Requirements, the Department will maintain and repair the Department Shared Assets, subject to and in accordance with the Technical Requirements and the Department’s normal course of operations and activities as in effect from time to time. Except as set forth in the Technical Requirements, the cost for maintenance and repair of the Department Shared Assets will be paid by the Department.

(c) The Department will be responsible, at its own cost and expense, for the maintenance, repair and replacement of the existing drainage system located within and outside of the Project Right of Way in accordance with the Technical Requirements, except to the extent such responsibility is allocated to the Concessionaire in accordance with the Technical Requirements.

(d) Activities undertaken by the Department pursuant to this Section 9.07 will not constitute a Compensation Event, unless they meet the criteria as provided in this Agreement.

Section 9.08 Annual Budget

(a) For each Agreement Year and partial Agreement Year from and after the Service Commencement Date, the Concessionaire will file with the Department an annual budget for the Project for such full or partial Agreement Year at least 60 Days prior to the start thereof (an “Annual Budget”). Each Annual Budget will be in a form reasonably acceptable to the Department and show in reasonable detail in respect of such full or partial Agreement Year:

(i) projected Gross Revenues;

(ii) projected Operating Costs, including all amounts payable to the Department;

(iii) projected maintenance expenses, including the costs of Major Maintenance activities to be performed pursuant to the Life Cycle Maintenance Plan;

(iv) projected debt service and other amounts payable with respect to Concessionaire Debt, including deposits to reserve funds held for benefit of the Project Lenders;

(v) projected Distributions; and

(vi) for each Agreement Year after the Concessionaire has achieved the Initial IRR to the Agreement Year in which the Concessionaire achieves the Highest Revenue Share IRR, the date on which the Concessionaire expects to achieve the Highest Revenue Share IRR.
(b) The Concessionaire will provide such other information as the Department may reasonably require in connection with its review of the Annual Budget, including: (i) any amendments to operating budgets pursuant to the O&M Agreement; and (ii) any budgets related to the Shared Facilities Agreement.

Section 9.09 Signage.

(a) The Concessionaire will submit a Signage Plan to the Department for its review and approval pursuant to the Technical Requirements. The Concessionaire will limit its signage to the Project Right of Way and any other real property or real property rights as set forth in Section 8.05.

(b) The Concessionaire agrees that it shall, at its sole cost, install, operate and maintain on connecting State Highways such signs solely notifying motorists of the access to the HOT Lanes, the amount of tolls and fines for toll violations, the applicable High Occupancy Requirement, and other relevant information, in accordance with applicable Law and the Technical Requirements.

(c) The Department will remain responsible, at its cost, for general directional signs on State Highways informing the public of the direction and distance to the HOT Lanes and other State Highways. During the Term, the Department will also cooperate with, and use its commercially reasonable efforts to cause other public agencies or entities to cooperate with, the Concessionaire to install, at the Concessionaire’s cost, additional signs along State Highways notifying motorists of the access to the HOT Lanes and any other communications relating to the HOT Lanes as are reasonably requested by the Concessionaire, subject to any obligation to obtain any necessary authorizations of any other Governmental Authority and in accordance with applicable Law. In connection with any such request, the Concessionaire will submit the proposed layout, location, type, size, color and content of all such traffic signs or other signs.

ARTICLE 10.

CONCESSIONAIRE PROJECT AND QUALITY MANAGEMENT; DEPARTMENT OVERSIGHT AND OTHER SERVICES

Section 10.01 Project and Quality Management

The Concessionaire will provide oversight and management of the Project to control the scope, quality, cost, and on-time delivery of the Work. If the Concessionaire is required to rectify any Non-Conforming Work in accordance with Section 8.11(b), the parties will review the Quality Management System Plan to assess and determine whether changes, including increased management and oversight efforts by the Concessionaire, to such plan are necessary to prevent such further Non-Conforming Work.
Section 10.02 Right to Oversee Work

(a) The Department will have the right at all times during the Term to carry out Oversight Services with respect to all aspects of the design, permitting, financing, acquisition, construction, installation, equipping, maintenance, repair, preservation, modification, operation, management and administration of the Project. The Department’s Oversight Services will not impact its right to rely on the Concessionaire to perform its obligations pursuant to this Agreement.

(b) The Concessionaire will fully cooperate with the Department to facilitate its conduct of Oversight Services. In the course of performing Oversight Services, the Department will use reasonable efforts to minimize the effect and duration of any disruption to or impairment of the Work or the Project.

Section 10.03 Department Access and Inspection

The Department, the FHWA, and their respective authorized agents will have unrestricted access at all times to enter upon, inspect, sample, measure and physically test any part of the Project Assets or the Project Right of Way, as well as any materials, supplies, machinery and equipment to be incorporated into or used in construction, operation or maintenance of the Project. The Department will also have the right, upon reasonable advance written notice (except as provided in Section 18.07(b)) to the Concessionaire, to inspect financial or other records relating to the Project. Upon the Concessionaire’s request, the Department will provide the Concessionaire with the results of any such test or inspections subject to any protections from disclosure under applicable Law.

Section 10.04 Compensation for Oversight Services

(a) Except as otherwise expressly provided in this Agreement, including, without limitation, Section 10.04(b), Section 10.04(c), Section 10.05(h), Section 11.05(a) and Section 24.03, the Department will not be compensated for its Oversight Services, whether in respect of the design, inspection or permitting for the Project, any Project Enhancement or any Safety Compliance Orders.

(b) Notwithstanding Section 10.04(a), if at any time the Concessionaire has failed to perform any of its construction, operating or maintenance obligations in any material respect then, in addition to other remedies available pursuant to this Agreement and the other Project Agreements, the Department, with written notice to the Concessionaire given concurrently with the increase in the Department’s monitoring or as soon as practicable thereafter, is entitled to adequately and appropriately increase the level of its monitoring of the Project and the Concessionaire’s compliance with its construction, operation and maintenance obligations pursuant to this Agreement, until such time as the Concessionaire has demonstrated to the Department’s reasonable satisfaction that it will perform and is capable of performing its construction, operation and maintenance obligations pursuant to this Agreement. The Concessionaire will compensate the Department for all Allocable Costs incurred by the Department as a result of such increased level of monitoring from and after the date on which
such increased level of monitoring begins, provided, that if the increased monitoring is due to a delay in achieving Substantial Completion, Service Commencement or Final Acceptance, the Concessionaire will compensate the Department for such increased monitoring solely by payment of liquidated damages pursuant to Section 8.10. The Concessionaire’s total liability to the Department during the Construction Period in connection with any increased monitoring will not exceed $2,000,000 in the aggregate.

(c) If the Department increases its monitoring or oversight as permitted in this Agreement during the Operating Period, then the Department will give notice of such increased level of monitoring as provided in Section 10.04(b). Within 10 Days following the day on which increased monitoring activities begin, the Department will provide the Concessionaire with a budget for its increased oversight and/or monitoring activities which sets out its total proposed costs in reasonable detail. If there is a change in circumstances in the oversight activities or the events which precipitated them occurs following the submission of the Department’s initial budget, then the Department will provide a revised budget, which budget will detail any increased costs.

(d) The Concessionaire may submit a cure plan describing specific actions the Concessionaire will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject. Notwithstanding Section 10.04(c), if the Department accepts a cure plan, the Department shall not increase its monitoring or other Oversight Services unless the Concessionaire fails to diligently pursue such cure plan.

Section 10.05 Department Approvals

(a) This Section 10.05 sets forth procedures governing certain submittals or requests by the Concessionaire (or the Design-Build Contractor or the O&M Contractor) to the Department (including, but not limited to, plans, schedules, designs, Design Documentation and Construction Documentation) which require an approval, review, comment, consent, notification, determination, decision or other response (collectively, a “Response”) from the Department pursuant to this Agreement. All submittals or requests to the Department will be made in the form required by, and otherwise in conformity with, the requirements set forth in the Technical Requirements. Except as otherwise provided in this Agreement, the procedures set forth in this Section 10.05 will apply to any submittal or request by the Concessionaire relating to, or any required approval or disapproval by the Department of, the following: any proposed OSPS Improvement Plan pursuant to Section 5.08(b); the issuance of a Design Work Notice to Proceed pursuant to Section 8.03(a) or a Construction Notice to Proceed pursuant to Section 8.03(b); any submittal of Design Documentation and Construction Documentation relating to the Work pursuant to Section 8.04(a); the approval of the ROW Acquisition and Relocation Plan pursuant to Section 8.05(a); the determination of whether Substantial Completion has been achieved pursuant to Section 8.08(e); the determination of whether Final Acceptance has been achieved pursuant to Section 8.09(c); the determination of whether the conditions precedent for achieving Service Commencement have been achieved pursuant to Section 9.02(b); any Signage Plan pursuant to Section 9.09(a); data, reports and any proposed Remedial Action Plan pursuant to Section 16.01(b); insurance submittals pursuant to Section 17.02(e); and a Disbursement Request pursuant to the Public Funds Amount Payment Terms attached as Exhibit N.
(b) Except as otherwise set forth herein, any submittal, resubmittal or request to the Department will be deemed complete at 5:30 p.m. Eastern time on the seventh Day following its receipt by the Department unless, the Department notifies the Concessionaire in writing prior to 5:30 p.m. Eastern time on such seventh Day that such submittal, resubmittal or request is incomplete according to the standards set forth in the Technical Requirements and sets forth in reasonable detail the incomplete elements of the submittal, resubmittal or request.

(c) In any case in which a submittal or request is or has been deemed to be complete under Section 10.05(b), the Department will review and respond to such submittal or request as promptly as reasonably possible, and no later than 21 Days after the date on which the Concessionaire (or the Design-Build Contractor or the O&M Contractor) has delivered such submittal or request to the Department. The Department will respond within such 21-Day period by (i) approving, certifying or taking other appropriate action with respect to, the submittal or request, as applicable or (ii) disapproving such submittal or request and providing written notice to the Concessionaire specifying in reasonable detail the reasons for which it has disapproved the submittal or request. If the Department objects or disapproves any submittal or request in accordance with clause (ii) of the preceding sentence, the Concessionaire will resubmit the submittal or request as promptly as reasonably possible, and the Department will resume its review and respond to such submittal or request by approving or disapproving the submittal or request (provided that such submittal or request is complete or has been deemed to be complete under Section 10.05(b)) within 10 Days following its receipt of a resubmittal or request. The Department’s review of a resubmittal or request will be limited to the issue, condition or deficiency which gave rise to the Department’s disapproval and will not extend to other aspects for which a notice of disapproval was not previously provided to the Concessionaire unless the issue, condition or deficiency which gave rise to the Department’s disapproval reasonably relates to the Department’s disapproval for which notice was previously provided. The Concessionaire is in no way obligated to incorporate the Department’s comments unless necessary to comply with a specific requirement of this Agreement.

(d) The time periods specified in Section 10.05(c) will be extended for the duration of a Force Majeure Event that prevents the Department or the Concessionaire, as applicable, from performing under this Section 10.05.

(e) Unless otherwise provided in this Agreement, if the Department fails to respond to a complete submittal or request which has been timely submitted or resubmitted, as the case may be within the applicable time periods, as provided in this Section 10.05, the Department will be deemed to have approved, certified or taken other similar action with respect to, such submittal or request; provided that such deemed approval will not be deemed a waiver of the Department’s other rights or the Concessionaire’s other obligations pursuant to this Agreement, including compliance with the Technical Requirements, Governmental Approvals, Good Industry Practice and applicable Law. Notwithstanding the foregoing, the deemed approval provisions of this Section 10.05(e) will not apply to the issuance of a Design Work Notice to Proceed pursuant to Section 8.03(a) or a Construction Notice to Proceed pursuant to Section 8.03(b), the approval of the ROW Acquisition and Relocation Plan pursuant to Section 8.05(a), the determination of whether Substantial Completion has been achieved pursuant to Section
8.08(e); the determination of whether Final Acceptance has been achieved pursuant to Section 8.09(c); the submission of any data, reports and any proposed Remedial Action Plan pursuant to Section 16.01(b); or a Disbursement Request pursuant to the Public Funds Amount Payment Terms attached as Exhibit N.

(f) Unless otherwise agreed by the parties, the Concessionaire is entitled to resolve any disapproval by the Department of a resubmittal in accordance with the dispute resolution procedures set forth in Article 21. If the Department reasonably believes that all or a portion of a resubmittal fails to comply with this Agreement, the Department may, in accordance with this Agreement, direct the Concessionaire to perform the Work in accordance with the Department’s instructions. In such event, the Concessionaire will diligently proceed with the Work in accordance with such directive, and may (i) dispute the Department’s directive in accordance with this Agreement and (ii) if it chooses, proceed with the dispute resolution procedures set forth in Article 21. If it is finally determined in accordance with such dispute resolution procedures that the Concessionaire’s submittal or resubmittal complied with this Agreement, the Work required under the Department’s directive will be treated as a Department Change.

(g) In all cases where Responses are required to be provided hereunder, such Responses will not be withheld or delayed unreasonably and such determinations will be made reasonably except in cases where a different standard is specified. In cases where sole discretion is specified with respect to a Response by the Department, the Response will not be subject to the dispute resolution procedures set forth in Article 21. Any failure of the Department to respond to a matter which is determined in the Department’s sole discretion (by way of example, Deviations pursuant to Section 14.03) within 21 Days after delivery of the Concessionaire’s request to the Department will be deemed disapproval by the Department. The Department will provide within ten days after a request by the Concessionaire its rationale, in reasonable detail, for any disapproval or deemed disapproval of any matter where the Department has sole discretion to approve or disapprove.

(h) Subject to Section 10.04, if the Concessionaire must submit a submittal or request to the Department for review and Response more than twice due to the Concessionaire’s failure to comply with the requirements of this Agreement, the Concessionaire will pay the Department for the Department’s Allocable Costs incurred thereafter in reviewing any portions of such submittal or request. If the Concessionaire must submit a submittal or request more than twice due to the Department’s failure to comply with the requirements of this Agreement, the Department will pay the Concessionaire for the Concessionaire’s Allocable Costs incurred thereafter in preparing or submitting any portions of such submittal or request.

Section 10.06 Limitations on the Concessionaire’s Right to Rely

(a) The Concessionaire expressly acknowledges and agrees that the Department’s rights, if any, under the Project Agreements:

(i) to review, comment on, approve, disapprove and/or accept designs, plans, specifications, work plans, construction, equipment, installation, plans for maintenance,
traffic management, policing and/or Project management, books, records, reports or statements, or documents pertaining to Concessionaire Debt and Financing Assignments,

(ii) to review, comment on and approve or disapprove qualifications and performance of, and to communicate with, Contractors, and

(iii) to perform Oversight Services,

exist solely for the benefit and protection of the Department, do not create or impose upon the Department any standard or duty of care toward any Concessionaire Party, all of which are hereby disclaimed, may not be relied upon, nor may the Department’s exercise or failure to exercise any such rights be relied upon, by the Concessionaire in determining whether the Concessionaire has satisfied the standards and requirements set forth in this Agreement and may not be asserted, nor may the Department’s exercise or failure to exercise any such rights be asserted, against the Department by the Concessionaire as a defense, legal or equitable, to the Concessionaire’s obligation to fulfill such standards and requirements; provided, that the foregoing will not limit the Department’s liabilities or obligations pursuant to this Agreement.

(b) To the maximum extent permitted by Law, and subject to the provisions of this Agreement, the Concessionaire hereby releases and discharges the Department from any and all duty and obligation to cause permitting, Project Right of Way acquisition, Utility Relocation, construction, equipping, operations, maintenance, policing, renewal, replacement, traffic management or other management of or for the Project or the Project Right of Way, by the Department, to satisfy the standards and requirements set forth in the Project Agreements; provided, that the foregoing will not limit the Department’s liability or obligations under this Agreement. The Department will be entitled to remedies for Non-Conforming Work pursuant to Section 8.11(b).

(c) No rights of the Department described in Section 10.06(a), no exercise or failure to exercise such rights, no failure of the Department to meet any particular standard of care in the exercise of such rights, no issuance of permits or certificates of completion or acceptance and no Final Acceptance of the Project or any Project Enhancement will:

(i) relieve the Concessionaire from performance of the Work or of its responsibility for the selection and the competent performance of its Contractors;

(ii) relieve the Concessionaire of any of its obligations or liabilities under the Project Agreements;

(iii) be deemed or construed to waive any of the Department’s rights and remedies under the Project Agreements; or

(iv) be deemed or construed as any kind of representation or warranty, express or implied, by the Department.
(d) Notwithstanding Section 10.06(a), (b) and (c) above: (i) any Notices to Proceed and certificates or notices of Substantial Completion, Service Commencement and Final Acceptance will be binding on the Department and the Concessionaire will be entitled to rely thereon; provided however, that the delivery of such notices and certificates will not constitute a waiver by the Department of any breach of this Agreement by the Concessionaire or relieve the Concessionaire of any of its obligations hereunder; (ii) the Concessionaire will be entitled to rely on specific approved written Deviations and interpretative engineering decisions the Department gives pursuant to this Agreement in accordance with the Technical Requirements, the Design-Build Contract or any Development Contract, and any Law; (iii) the Department is not relieved from any liability arising out of a knowing, intentional material misrepresentation under any written statement the Department delivers; and (iv) the Department is not relieved from its obligations under this Agreement or any Development Contract.

Section 10.07 Suspension of the Work

(a) The Department will have the right and authority, without liability to the Concessionaire, to suspend any affected portion of the Work by written order to the Concessionaire to comply with any court order or judgment, to protect against a risk to the public health, safety or welfare (as more particularly set forth in Section 24.04(b)), including to workers, other personnel or the general public from unsafe or dangerous conditions, or upon the occurrence of any of the following by the Concessionaire:

(i) with respect to Non-Conforming Work, as provided in Section 8.11(b)(i);

(ii) failure to comply with any Law or Governmental Approval (including failure to handle, preserve and protect archeological, paleontological or cultural resources, or failure to handle Hazardous Substances, in accordance with applicable Laws and Governmental Approvals);

(iii) failure to provide proof of required insurance coverage or to provide or maintain the required Performance Security;

(iv) failure to carry out and comply with Directive Letters; and

(v) failure to satisfy any conditions to commencing performance of the applicable portion of the Work set forth in Article 8 or Section 9.01.

(b) The Department will lift the suspension order promptly after it is permitted by the terms of the court order or judgment, after the dangerous or unsafe condition is rectified, or after the Concessionaire fully cures and corrects the applicable breach or failure to perform.

(c) The Concessionaire will have the right to dispute the Department’s suspension order by written notice to the Department, which notice will provide supporting information for the Concessionaire’s position. Unless directed otherwise by the Department after receipt of such notice, the Concessionaire will carry out the Work required by the Department. If it is determined in accordance with the dispute resolution procedures in Article 21 that the
Concessionaire was in compliance with its obligations under this Agreement, then the suspension order and any additional Work required by the Department will be treated as a Department Change pursuant to Section 14.02.

(d) The issuance of a suspension order will not affect the Concessionaire’s rights to cure or correct any such incidents giving rise to the issuance of the suspension order in accordance with this Agreement.

ARTICLE 11.

NON-COMPLIANCE POINTS SYSTEM

Section 11.01 Non-Compliance Points System

(a) Exhibit W to this Agreement sets forth a table for the identification of certain Concessionaire breaches or failures to perform its obligations under this Agreement that may result in the assessment by the Department of Non-Compliance Points. The Non-Compliance Points system is used by the Department to measure the Concessionaire’s performance levels and the accumulation of Non-Compliance Points by the Concessionaire may trigger the remedies set forth or referenced in this Article 11. This Article 11 shall apply only during the Operating Period. The inclusion in Exhibit W of a breach or failure to perform shall not determine whether such breach or failure is material.

(b) The Department may exercise any of its remedies under this Article 11 without prejudice to any other rights or remedies it has under this Agreement.

(c) If the Department determines any breach or failure described in Exhibit W has occurred, the Department shall within five Days of its determination deliver to the Concessionaire written notice thereof describing the breach or failure in reasonable detail. Within five Days of receipt of the Department’s notice, the Concessionaire shall investigate the Department’s claim and provide a written report as to whether the breach or failure in performance has in fact occurred and describing any mitigating factors. Within 10 Days after receiving the Concessionaire’s report, the Department shall deliver to the Concessionaire a written determination setting forth the number of Non-Compliance Points, if any, the Department, in its sole discretion, has assessed to the Concessionaire.

Section 11.02 Assessment of Non-Compliance Points and Cure Periods

The Department may assess Non-Compliance Points as described in Section 11.03 and Section 11.04 subject to the following terms and conditions.

(a) The Non-Compliance Points system will apply commencing on the later of (i) the Service Commencement Date and (ii) the fifth anniversary of the “Service Commencement Date” as such term is defined in the Capital Beltway Comprehensive Agreement. In addition, there will be a phased introduction of the Non-Compliance Points system, and for the initial year that the Non-Compliance Points system is applicable, the thresholds for “Total Cumulative
Number of Uncured Points” specified on page 1 of Exhibit W will be increased by 50% for the first year, and over the period of the next five years such threshold will be reduced 10% per year such that the thresholds in Exhibit W apply.

(b) The Department will not assess points for the first instance of each breach or failure provided that the breach or failure is cured within the cure period stated in Exhibit W. However, the Department will provide notice to the Concessionaire that a breach or failure has occurred. Any subsequent instances of each breach or failure may be subject to the assessment of Non-Compliance Points.

c) Exhibit W sets forth the maximum number of Non-Compliance Points the Department may assess for each breach or failure. The Department may, in its sole discretion, assess fewer Non-Compliance Points for a particular breach or failure based on the merits of the individual breach or failure.

d) Where a single act or omission gives rise to more than one breach or failure as described in Exhibit W, the Department may assess Non-Compliance Points for only one breach or failure. In such circumstances, the Department may, in its sole discretion, assess Non-Compliance Points for the breach or failure with the highest maximum number of Non-Compliance Points shall apply.

e) For breaches or failures classified as category A in Exhibit W, Non-Compliance Points shall be assessed only at the end of the applicable cure period if the Concessionaire has failed to cure within that time. Additional Non-Compliance Points may be assessed again at the end of each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Non-Compliance Points equals or exceeds the level described in Section 11.05(c).

f) For breaches or failures classified as category B in Exhibit W, the Non-Compliance Points shall be assessed on the date of the written determination from the Department to the Concessionaire. Provided that the breach or failure is not then cured within the applicable cure period, Non-Compliance Points shall be assessed again at the end of the first and each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Non-Compliance Points equals or exceeds the level described in Section 11.05(c).

g) For breaches or failures identified as category C in Exhibit W (no applicable cure period), the Non-Compliance Points shall be assessed on the date of the written determination from the Department to the Concessionaire.

h) Any cure period specified in Exhibit W shall be extended day-for-day for any Delay Event that prevents performance of Work to cure a breach or failure.

i) At every 10 year anniversary of the Agreement Date, or upon significant revision of the Technical Requirements, either party, by written notice to the other party at least 90 Days prior to such anniversary reserves the right to request a review of the Non-Compliance Points.
system. Upon receiving the notice, both parties must review the existing Non-Compliance Point system in place and agree in writing to any revisions required to the system.

Section 11.03 Notification of Cure

When the Concessionaire determines it has cured any breach or failure for which the Department has assessed Non-Compliance Points, the Concessionaire shall deliver written notice to the Department. The Concessionaire’s written notice shall identify the breach or failure at issue and describe what steps were undertaken to cure it. The Department or its designee shall then promptly verify the cure through inspection or other means and provide to the Department a written certification of cure. The Department retains the right to verify independently that the breach or failure in performance has in fact been cured.

Section 11.04 Accumulation of Non-Compliance Points

(a) The total of uncured Non-Compliance Points assessed by the Department shall be monitored by the Department or its designee on an ongoing basis for the duration of the Operating Period.

(b) The cumulative total of cured and uncured Non-Compliance Points assessed by the Department shall be monitored in rolling 365 Day cycles from the time the breach has been cured for those breaches classified in categories A and B, and from the time the breach has occurred for those breaches classified in category C. At the end of each 365 Day cycle, the Non-Compliance Points assessed for that specific breach will be subtracted for the cumulative total number of Non-Compliance Points the Concessionaire has been assessed.

Section 11.05 Impact of Non-Compliance Points

(a) Increased Monitoring. If the Concessionaire is assessed 135 or more Non-Compliance Points during any 365 Day cycle or maintains 30 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.05, the Department may increase the level of monitoring of the Project in accordance with Section 10.04. The Concessionaire shall compensate the Department for its Allocable Costs incurred as a result of such increased level of monitoring. The Concessionaire may submit a cure plan describing specific actions the Concessionaire will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject.

(b) The Remedial Plan.

(i) If the Concessionaire is assessed 200 or more Non-Compliance Points during any 365 Day cycle or maintains 45 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.04, the Department may require the Concessionaire to prepare and submit a remedial plan for the Department’s approval. The remedial plan shall be delivered to the Department within 45 Days of its request. The remedial plan shall set forth a schedule
and describe specific actions the Concessionaire will undertake to improve its performance as demonstrated by its incurring no additional Non-Compliance Points and by reducing the total number of uncured Non-Compliance Points it has accumulated to date. Such actions may include but are not limited to improvements to Concessionaire’s quality management practices, plans and procedures; changes in its organizational and management structures; increased monitoring and inspections; changes in key personnel; and the replacement of subcontractors.

(ii) If, after 180 Days following the implementation of the remedial plan, the Concessionaire can demonstrate that: (1) the remedial plan has reduced the number and frequency of Non-Compliance Points assessed as compared to the period prior to the implementation of the remedial plan; (2) the Concessionaire is complying in all material respects with the course of action described in the remedial plan; and (3) the Concessionaire has no uncured Non-Compliance Points, then the total number of Non-Compliance Points assessed over the course of the 180 Day period shall be reduced by 50%. If the rolling 365 Day cycle described in Section 11.04(b) ends at any time during the 180 Day period described herein, the total number of Non-Compliance Points the Concessionaire has cured during that 365 Day cycle shall carry over to the next 365 Day cycle. However, if the total number of Non-Compliance Points assessed over the course of the 180 Day period is reduced by 50% as described above, the total number of previously cured Non-Compliance Points that were carried over also shall be subtracted from the Concessionaire’s cumulative total number of assessed Non-Compliance Points.

(c) **Default.** If the Concessionaire: (1) fails to deliver to the Department the remedial plan within 45 Days of the Department’s request; or (2) fails to comply with the course of action set forth in the remedial plan and incurs a total of 245 Non-Compliance Points during any 365 Day cycle or maintains 68 (or any higher applicable number during the phase-in period) or more uncured Non-Compliance Points at any time as described in Section 11.04(a), the Department may notify the Concessionaire in writing that such failure is a breach of a material obligation hereunder, in which event such failure shall become a Concessionaire Default under Section 19.01(b) unless cured following such notice within the time period specified in Section 19.01(b).

**Section 11.06 Disputes Regarding the Assessment of Non-Compliance Points**

(a) The Concessionaire may object to the assessment of Non-Compliance Points or the amount of Non-Compliance Points assessed by delivering to the Department written notice of its objection within 10 Days of receipt of the Department’s written determination assessing the Non-Compliance Points at issue. Such notice shall set forth with specificity the grounds for the Concessionaire’s objection.

(b) The Department will reasonably consider the Concessionaire’s objections and Representatives of the Department and the Concessionaire will meet to discuss the matter within 30 Days after the Concessionaire has provided its written objection. If, at the conclusion of this 30 Day period, the Concessionaire still objects to the Department’s decision, it may pursue dispute resolution under Article 21.
(c) If for any reason the Concessionaire fails to deliver its written notice of objection within the time period specified in Section 11.06(a), the Concessionaire shall have waived its right to challenge the Department’s assessment of Non-Compliance Points.

ARTICLE 12.

PROJECT ENHANCEMENTS AND SAFETY COMPLIANCE ORDERS

Section 12.01 Project Enhancements by the Concessionaire

The Concessionaire will have the right, at its sole cost and expense, at any time after the Service Commencement Date, to design, develop, construct, operate and maintain Concessionaire Project Enhancements within the Project Right of Way, including any fundamental change in the dimensions, character, quality, location or position of all or any part of the Project; provided, that the Concessionaire will not undertake any such Project Enhancements unless all aspects thereof are approved in writing by the Department in its sole discretion, and the Concessionaire has entered into a Development Contract with the Department with respect to such Concessionaire Project Enhancement.

Section 12.02 Project Enhancements by the Department

(a) The Department will have the right from time to time after the Service Commencement Date, at its sole cost and expense, to design, develop, construct, operate and maintain Department Project Enhancements. The Department will have the right to design, develop, construct, operate and maintain Department Project Enhancements through one or more of the following mechanisms, as the Department selects from time to time in its sole discretion:

(i) use by the Department of its own personnel, materials and equipment;

(ii) contracting with third parties through requests for proposals, competitive bids, negotiations or any other lawful procurement process; and

(iii) authorizing and directing the Concessionaire, at the Department’s sole cost and expense, to undertake the Department Project Enhancements, through contracting for necessary traffic and revenue studies and all necessary planning, design, engineering, permitting, financial, right-of-way acquisition services, Utility Relocation, construction, installation, project management, operation, maintenance, repair and other work and services;

provided, that the Department will give the Concessionaire at least 60 Days’ written notice prior to initiating any procurement process referred to in clause (ii) above, during which time the Concessionaire will have the right, but not the obligation, to agree in writing to undertake the Department Project Enhancement on such terms and conditions as the Department and the Concessionaire will mutually agree upon; provided further, that if the Department and the Concessionaire fail to agree upon such terms and conditions within such 60 Day period, the Department will be entitled to proceed with any of the mechanisms set forth in clauses (i), (ii)
and (iii) of this Section 12.02(a) and will have no further liability or obligation to the Concessionaire except as otherwise expressly provided in this Agreement.

(b) If the Department authorizes and directs the Concessionaire to undertake a Department Project Enhancement pursuant to Section 12.02(a)(iii), then, in cooperation with the Department, as applicable, and subject to (i) the review and written approval by the Department in its sole discretion and (ii) without limiting the Concessionaire’s right to claim additional Concessionaire Damages, the Department making available to the Concessionaire sufficient funds, through monthly progress payments for work performed and costs incurred (plus an amount not to exceed 10% of such costs to pay the Concessionaire for reasonable and documented costs actually incurred to administer the work), including without limitation the costs of obtaining any Governmental Approvals necessitated by such Department Project Enhancement, in order to perform the work required to design, construct, operate and maintain such Department Project Enhancement, the Concessionaire will implement such Project Enhancement in accordance with the terms and provisions of this Agreement, and the Project Enhancement will be deemed a part of the Project and will become subject to all the terms and provisions of this Agreement as of the date the Concessionaire is required to assume such responsibility pursuant to this Section 12.02(b).

(c) The Department will have the right to enter upon the Project and the relevant rights of way for any purpose relating to Department Project Enhancements under this Section 12.02 to the extent reasonably necessary.

(d) The Department will have the right at any time (and without liability to the Concessionaire for any damages it may suffer, except as otherwise expressly provided in this Agreement) to perform planned and emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project; provided that

(i) the Department shall use reasonable commercial efforts to keep the Concessionaire informed of planned maintenance, renewal and replacement and repair activities which can reasonably be foreseen to impact activities on the Project;

(ii) the Department shall provide to the Concessionaire copies of and other information concerning the Department’s then current maintenance, renewal and replacement and repair program, upon the Concessionaire’s reasonable request; and

(iii) to the extent it relates to Department Project Enhancements, the provisions of Section 12.02 shall govern the Department’s liability to the Concessionaire therefor.

Section 12.03 Safety Compliance Orders

(a) The Department may, but is not obligated to, issue Safety Compliance Orders to the Concessionaire at any time after the Substantial Completion Date; provided, that no Safety Compliance Order may in any event order or direct the Concessionaire to do any act in violation of any Law. Compliance with a Safety Compliance Order by the Concessionaire will not be
deemed a default by the Concessionaire under the provisions of this Agreement or any other VDOT Project Agreement.

(b) The Department will use good faith efforts to inform the Concessionaire at the earliest practicable time of any circumstance or information relating to the Project which in the Department’s reasonable judgment is likely to result in a Safety Compliance Order. Except in the case of an Emergency, the Department will consult with the Concessionaire, prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts and the availability of Concessionaire resources to fund the Safety Compliance Work. The Department may, in its discretion, monitor and inspect the Project Assets at any time and from time to time for the purposes of determining whether any circumstances exist that warrant issuance of a Safety Compliance Order and giving the Department and the Concessionaire reports and recommendations related to such matters.

(c) If the Department issues a Safety Compliance Order, the Concessionaire will proceed, at its sole cost and expense, with the necessary environmental, design and construction Work to carry out the Safety Compliance Order as follows:

(i) if the Safety Compliance Order is of the type described in clause (a) of the definition of that term, the Concessionaire will proceed expeditiously; and

(ii) if the Safety Compliance Order is of the type described in clause (b) of the definition of that term, the Concessionaire will carry it out in accordance with the procedures adopted by the Department for carrying out similar work on similar portions of the State Highways.

(d) The Concessionaire will have the right to dispute a Safety Compliance Order by providing written notice to the Department within 21 Days of the issuance of the Safety Compliance Order setting forth the Concessionaire’s Claim that no condition exists to justify the disputed Safety Compliance Order and the Concessionaire’s estimate of impact costs, Gross Revenues and the construction schedule, if applicable. The Concessionaire will nevertheless implement the Safety Compliance Order, but if it is finally determined in accordance with the dispute resolution procedures in Article 21 that conditions warranting the Safety Compliance Order did not exist, then the Safety Compliance Order will be treated as a Department Change pursuant to Section 14.02.

Section 12.04 Development of Other Facilities

(a) Except for the right of the Concessionaire to receive compensation set forth in Section 12.02, Section 12.04(d) (with respect to disruptions to the construction of the Project) Section 12.05 and Section 12.06(e) (with respect to disruptions to the construction of the Project), the State Parties will have the unlimited right, each in its sole discretion, at any time and without liability, to finance, develop, approve, construct, expand, improve, modify, upgrade, add capacity to, reconstruct, rehabilitate, restore, renew and replace any existing and new transportation or other facilities other than the Project (including, without limitation, free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, HOT/HOV lanes,
light rail, heavy rail, high-speed rail, freight rail and bus lanes) and exercise all of its authority to advise and recommend on transportation planning, development and funding, and to otherwise improve the GP Lanes and other roadways and structures within or adjacent to the I-95 Corridor (collectively, the “Department Projects”) outside the HOT Lanes, and whether nearby or otherwise located as to affect the Project, its operation and maintenance (including the costs and expenses thereof), its vehicular traffic and/or its revenues, provided, that:

(i) the Department will use diligent efforts to keep the Concessionaire informed of planned maintenance, renewal and replacement and repair activities of the Department Projects, which can reasonably be foreseen to impact the Work or traffic on the HOT Lanes; and

(ii) the Department will provide to the Concessionaire copies of and other information concerning the Department’s then current maintenance, renewal and replacement and repair program of the Department Projects, upon the Concessionaire’s reasonable request.

(b) The Department Projects include those facilities (i) owned or operated by the State Parties, including those owned or operated by a private entity pursuant to a contract with a State Party; (ii) owned or operated by a joint powers authority or similar entity to which a State Party is a member; (iii) owned or operated by any other Governmental Authority pursuant to a contract with a State Party, including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities and (iv) owned or operated by any other Governmental Authority (including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities) with respect to which a State Party has contributed funds, in-kind contributions or other financial or administrative support. The foregoing rights include the ability to institute, increase or decrease tolls or other fees and charges on such facilities or modify, change or institute new or different operation and maintenance procedures.

(c) The State Parties will have the right, without liability, to make discretionary and non-discretionary distributions of Federal and other funds for any transportation projects, programs and planning, and to exercise all of its authority to advise and recommend on transportation planning, development and funding on any project of its choosing.

(d) In no event will the taking of any action described in this Section 12.04 by a State Party (i) constitute a default by the Department pursuant to this Agreement or (ii) entitle the Concessionaire to Concessionaire Damages or other relief, except to the extent provided in (A) Section 12.02 with respect to any such existing and new transportation or other facilities that constitute Department Project Enhancements and (B) Section 12.05 with respect to Alternative Facilities; provided however, that if the construction activities associated with a Department Project directly cause a material disruption to the construction of the Project, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement; provided further however, that the Concessionaire will not be entitled to Concessionaire Damages or other relief if such material disruption is caused by a Concessionaire Party.
Section 12.05 Alternative Facilities.

(a) Additional Lanes.

(i) If the Department determines that Additional Lanes are in the State’s best interests, the Department will consult with the Concessionaire as to an appropriate strategy to implement such Additional Lanes. Prior to undertaking construction of Additional Lanes, the Department will give the Concessionaire the first right to submit a proposal to construct such Additional Lanes as new HOT Lanes and HOV Lanes at the Concessionaire’s sole cost as a Concessionaire Project Enhancement, so long as the Concessionaire demonstrates that (A) it has or can obtain sufficient funding (whether debt, equity, other sources of funds or combination thereof) for such Concessionaire Project Enhancement, and (B) it has or can obtain (with appropriate assistance from the Department) all required Governmental Approvals for such Concessionaire Project Enhancement.

(ii) The Concessionaire’s proposal to construct Additional Lanes as new HOT Lanes pursuant to a Concessionaire Project Enhancement will contain the information specified by the Department in writing and delivered to the Concessionaire. The Concessionaire’s failure to submit such a proposal within 120 Days of its receipt of the Department’s specifications as to the contents of the Concessionaire’s proposal will constitute a waiver of the Concessionaire’s right to submit a proposal pursuant to this Section 12.05. If a valid proposal is submitted by the Concessionaire, the Department will evaluate the Concessionaire’s proposal in accordance with the Department’s specifications within 90 Days of its submission. If the Concessionaire determines not to pursue the construction of such Additional Lanes as a Concessionaire Project Enhancement or the Department does not approve such Concessionaire Project Enhancement after review in accordance with the Department’s specifications, the Department may add Additional Lanes as a Department Project; and except as provided in clause (iv), such Additional Lanes will constitute a Compensation Event.

(iii) The Department will coordinate the activities described in Section 12.05(a) with the Concessionaire so as to minimize to the extent reasonably feasible the disruption to the Concessionaire’s construction, operation and maintenance of the Project and the generation of Toll Revenues.

(iv) Without limiting the applicability of clause (ii) above, the construction of Additional Lanes by or on behalf of the Department will not constitute a Compensation Event if the Highest Revenue Share IRR has been reached as of the date on which Commencement of Use of the Additional Lanes begins.

(b) Route One Improvements. The Route One Improvements will be treated as a Compensation Event unless the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Route One Improvements.
(c) **Occoquan Bridge Improvements.** The Occoquan Bridge Improvements will be treated as a Compensation Event unless the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Occoquan Bridge Improvements.

(d) **Southern HOT Lanes.** The Southern HOT Lanes will be treated as a Compensation Event unless (i) the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Southern HOT Lanes or (ii) the Concessionaire develops and constructs the Southern HOT Lanes as a Concessionaire Project Enhancement.

(e) **Procedures.**

(i) This Section 12.05(e) sets forth the Concessionaire’s sole and exclusive rights and remedies with respect to Alternative Facilities, and supersedes any provisions of this Agreement to the contrary; provided however, that if the construction activities associated with an Alternative Facility directly cause a material disruption to the construction of the Project Assets, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement. Such rights and remedies are subject to Section 12.05(e)(iii).

(ii) The Concessionaire Damages owing from the Department to the Concessionaire on account of an Alternative Facility will be equal to the Concessionaire Damages, if any, attributable to the Alternative Facility, but only to the extent that any such amount of any such reduction has not been previously recognized under Section 14.04. The foregoing Concessionaire Damages will be determined in the same manner, and subject to the same conditions and limitations, as for a Compensation Event under Section 14.01.

(iii) The Concessionaire acknowledges that each of CTB and the Department has a paramount public interest and duty to develop and operate whatever Department Projects it deems to be in the best interests of the State, and that the compensation to which the Concessionaire is entitled on account of Alternative Facilities is a fair and equitable remedy. Accordingly, the Concessionaire will not have, and irrevocably waives and relinquishes, any and all rights to institute, seek or obtain any injunctive relief or pursue any action, order or decree to restrain, preclude, prohibit or interfere with CTB’s or the Department’s rights to plan, finance, develop, operate, maintain, toll or not toll, repair, improve, modify, upgrade, reconstruct, rehabilitate, restore, renew or replace Alternative Facilities; provided, that the foregoing will not preclude the Concessionaire from enforcing its right to submit proposals for Additional Lanes and the Northern HOT Lanes pursuant to Section 12.05(a) and Section 12.06(a), respectively, its rights to compensation under this Section 12.05, or claiming any relief in respect of Compensation Events or Delay Events, if appropriate. The filing of any such action by the Concessionaire seeking to restrain, preclude, prohibit or interfere with CTB’s or the Department’s rights will automatically entitle CTB or the Department, as applicable, to recover all costs and expenses, including attorneys fees, of defending such action and any appeals.
Section 12.06 Northern HOT Lanes

(a) Concessionaire Project Enhancement - Concessionaire's Sole Cost.

(i) If the Department determines to develop the Northern HOT Lanes or if the Concessionaire proposes to develop, construct, operate and maintain Northern HOT Lanes, the Department and the Concessionaire will consult as to an appropriate strategy to implement the Northern HOT Lanes. The Concessionaire will have the first right to submit a proposal to the Department to develop, construct, operate and maintain the Northern HOT Lanes at the Concessionaire’s sole cost as a Concessionaire Project Enhancement, so long as the Concessionaire demonstrates that (i) it has or can obtain sufficient funding (whether debt, equity, or combination thereof) for the development, construction, operation and maintenance of the Northern HOT Lanes, (ii) it has or can obtain (with appropriate assistance from the Department) all required Governmental Approvals for the development, construction, operation and maintenance of the Northern HOT Lanes and (iii) neither the Department nor any other agency of instrumentality of the State will be required to make a contribution of public funds or provide any other sort of financial support or credit in connection with the development, construction, operation and maintenance of the Northern HOT Lanes, other than customary approvals and non-financial support from an issuer of bonds that will be used to finance the Northern HOT Lanes.

(ii) The Concessionaire’s proposal to develop, construct, operate and maintain the Northern HOT Lanes as a Concessionaire Project Enhancement will contain the information specified by the Department in writing and delivered to the Concessionaire. The Concessionaire’s failure to submit such a proposal within 120 Days of its receipt of the Department’s specifications of the contents of the Concessionaire’s proposal will constitute a waiver of the Concessionaire’s first right to submit a proposal pursuant to this Section 12.06. If the Concessionaire submits a valid proposal, the Department will evaluate the Concessionaire’s proposal in accordance with the Department’s specifications within 90 Days of its submission.

(b) Concessionaire Project Enhancement - Department Contribution. If the Concessionaire or the Department determine that the Department (or any other agency or instrumentality of the State) would be required to make a contribution of public funds or provide any other sort of financial support or credit in connection with the development and construction of the Northern HOT Lanes, the Concessionaire shall have the first right to submit a proposal to operate and maintain the Northern HOT Lanes as a Concessionaire Project Enhancement. In such event, the Concessionaire and the Department shall cooperate in the solicitation of proposals to develop and construct the Northern HOT Lanes through competitive processes in accordance with Law. The acceptance of any proposal to develop, construct, operate and maintain the Northern HOT Lanes shall be at the Department’s sole discretion.

(c) Department Project. If the Concessionaire determines not to pursue the development, construction, operation and maintenance of the Northern HOT Lanes as a Concessionaire Project Enhancement or the Department does not approve such Concessionaire
Project Enhancement after review in accordance with the Department’s specifications, the Department may develop, construct, operate and maintain the Northern HOT Lanes as a Department Project.

(d) The development, construction, operation and maintenance of the Northern HOT Lanes will not be a Delay Event or a Compensation Event, and the Concessionaire acknowledges and agrees that the Department may, in its sole discretion, develop additional general purpose lanes or HOV lanes in the area between the intersection of Eads Street and Interstate 395 and the current northern terminus of the I-95 Corridor, which is approximately one mile north of Route 648 (Edsall Road); provided however, that if the construction activities associated with the Northern HOT Lanes directly cause a material disruption to the construction of the Project, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement; provided further however, that the Concessionaire will not be entitled to Concessionaire Damages or other relief if such material disruption is caused by a Concessionaire Party.

ARTICLE 13.

DELAY EVENTS

Section 13.01 Delay Event Notice and Determination

(a) If the Concessionaire is affected by a Delay Event, it will give written notice to the Department within 30 Days following the date on which the Concessionaire first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Delay Event, (provided, that in the case of the same Delay Event being a continuing cause of delay, only one notice will be necessary) (a “Delay Event Notice”). Such Delay Event Notice will include (i) a detailed description of the Delay Event, (ii) details of the circumstances from which the Delay Event arises and (iii) an estimate of the duration of the delay in the performance of obligations pursuant to this Agreement attributable to such Delay Event and information in support thereof, if known at that time. The Concessionaire will also provide such further information relating to the Delay Event as the Department may reasonably require. The Concessionaire will bear the burden of proving the occurrence of a Delay Event and the resulting impacts.

(b) If for any reason the Concessionaire fails to deliver a Delay Event Notice within such 30-Day period, the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or right to time extensions or any other relief with respect to such Delay Event pursuant to this Agreement or any Project Agreement.

(c) Upon the occurrence of a Delay Event, the Concessionaire will promptly undertake efforts to mitigate the effects of such Delay Event, including all steps that would generally be taken in accordance with Good Industry Practice. The Concessionaire will promptly deliver to the Department an explanation of the measures being undertaken to mitigate the delay and other consequences of the Delay Event. The Concessionaire will notify the
Department within 30 Days following the date on which it first became aware (or should have become aware, using all reasonable due diligence) that such a Delay Event has ceased.

(d) Notwithstanding the occurrence of a Delay Event, the Concessionaire will continue its performance and observance pursuant to this Agreement of all of its obligations and covenants to be performed to the extent that it is reasonably able to do so and will use its reasonable efforts to minimize the effect and duration of the Delay Event. Without limiting the foregoing, the occurrence of a Delay Event will not excuse the Concessionaire from timely payment of monetary obligations pursuant to this Agreement, from compliance with Law, or from compliance with the Technical Requirements, except temporary inability to comply with the Technical Requirements as a direct result of the Delay Event.

(e) Subject to the Concessionaire giving the notice required in Section 13.01(a), a Delay Event will excuse the Concessionaire from whatever performance is prevented or delayed by the Delay Event referred to in such notice to the extent set forth in Section 13.02 and Section 13.03.

Section 13.02 Delay Events During the Construction Period

A Delay Event occurring during the Construction Period will excuse the Concessionaire from performance of its obligations to perform the Work pursuant to this Agreement but only to the extent that such obligations are directly affected by such Delay Event. In addition, during the Construction Period, extensions of milestones and/or activities identified on the Baseline Schedule for Delay Events affecting the Work will be made based on Time Impact Analysis, using the then current Baseline Schedule and taking into account impacts of the Delay Events on Critical Path items, in accordance with the Technical Requirements, and will extend the Guaranteed Substantial Completion Date, the Final Acceptance Deadline and the Long Stop Date. For avoidance of doubt, the Long Stop Date may be extended in accordance with this Agreement by reason of a Delay Event that occurs during the period after the Guaranteed Substantial Completion Date. If the Department and the Concessionaire cannot agree upon the extension, then either party will be entitled to refer the matter to the dispute resolution procedures in Article 21.

Section 13.03 Delay Events After Service Commencement

A Delay Event occurring after Service Commencement will only excuse the Concessionaire from performance of its obligations to perform O&M Work pursuant to this Agreement directly affected by such Delay Event.
ARTICLE 14.

COMPENSATION EVENTS; DEPARTMENT CHANGES; DEVIATIONS; NET COST SAVINGS

Section 14.01 Compensation Events

(a) Compensation Event Notice.

(i) If the Concessionaire is affected by a Compensation Event, it will give written notice to the Department within 30 Days following the date on which the Concessionaire first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Compensation Event (a “Compensation Event Notice”); provided, that, in the case of a Department Project Enhancement, a Compensation Event Notice must be given within 30 days following the Commencement of Use of such Department Project Enhancement. The Compensation Event Notice will set forth (A) the Compensation Event and its date of occurrence in reasonable detail, (B) the amount claimed as Concessionaire Damages and (C) details of the calculation thereof including a written analysis and calculation of the estimated Net Cost Impact, if any, and estimated Net Revenue Impact, if known at that time; provided that, if the amount of Concessionaire Damages and details of the calculation thereof are not available within the 30-Day notice period required herein, the Concessionaire may submit an estimate of the amount, or if known, the actual amount claimed as Concessionaire Damages and details of the calculation thereof no later than 60 Days from submission of the Compensation Event Notice; provided however, the Concessionaire may update the amount of claimed Concessionaire Damages and details thereof every 30 Days.

(ii) If, for any reason, the Concessionaire fails to deliver such written Compensation Event Notice within the foregoing time period, the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or right to Concessionaire Damages or other adverse effects on Gross Revenues or on costs, expenses and liabilities attributable to such Compensation Event.

(iii) After the Concessionaire submits a Compensation Event Notice, the Department may, but is not required to, obtain, at its sole cost, (A) a comprehensive report as to the Concessionaire’s estimate of the Net Cost Impact attributable to the Compensation Event and (B) from a traffic and revenue consultant a traffic and revenue study, prepared in accordance with Good Industry Practice, analyzing and calculating the estimated Net Revenue Impact attributable to the Compensation Event. Within 90 Days after receiving a Compensation Event Notice and the supporting documentation required by Section 14.01(a)(i), the Department will provide to the Concessionaire a copy of such reports as it has elected to obtain. If the Department disagrees with the entitlement to or amount of Concessionaire Damages claimed by the Concessionaire, the Concessionaire and Department will commence good faith negotiations to resolve the Dispute within 120 Days after the delivery of the Compensation Event Notice. If the Dispute cannot be
resolved within such 120 Days, either party may submit the Dispute for resolution pursuant to Article 21.

(b) Concessionaire Damages Determination.

(i) Concessionaire Damages with respect to any Compensation Event will be calculated based on the sum of (A) any adverse Net Cost Impact and (B) any adverse Net Revenue Impact for each year that there is an impact attributable to such Compensation Event; provided, that, subject to Section 14.01(c), any Net Cost Savings and positive Net Revenue Impact attributable to such Compensation Event will be used to decrease the amount of Concessionaire Damages. The calculation of Concessionaire Damages will be based on the difference in the projected cost and revenue related to the Project immediately prior to the occurrence of the Compensation Event and the projected cost and revenue related to the Project after taking into account the impact of the Compensation Event.

(ii) Following the calculations pursuant to Section 14.01(b)(i), the Concessionaire will incorporate such calculations into the proposed Base Case Financial Model Update and will provide such proposed Base Case Financial Model Update to the Department pursuant to Article 6.

(iii) The Concessionaire Damages will be net of all applicable insurance proceeds payable to the Concessionaire or its Contractors associated with the Compensation Event (or that would have been payable to the Concessionaire or its Contractors but for the failure by the Concessionaire or its Contractors to comply with the insurance requirements set forth in Section 14.01(b)(v) and Article 17), except as any payment of such insurance proceeds is affected by the bankruptcy or insolvency of the provider of such insurance, and will include all costs of asserting a Claim for such insurance proceeds and any increased insurance premium resulting from any such Claim; provided, that any increased insurance premium resulting from such Claim is certified in writing by the insurance provider of the Concessionaire or its Contractor, as applicable, prior to payment by the Department.

(iv) The Concessionaire will conduct all discussions and negotiations with the Department to determine any Concessionaire Damages and will share with the Department all data, documents and information pertaining thereto, on an Open Book Basis. As part of such negotiations, the parties will continue to refine and exchange, on an Open Book Basis, plans, drawings, configurations and other information related to the Compensation Event, traffic and revenue data, information, analyses and studies and financial modeling and quantifications of projected Net Cost Impacts, Net Revenue Impacts or Net Cost Savings, if any.

(v) The Concessionaire will take all steps reasonably necessary to mitigate the amount of the Concessionaire Damages attributable to, and other consequences of, any Compensation Event, including all steps that would generally be taken in accordance
with Good Industry Practice, including filing a timely claim for insurance and pursuing such claims.

(vi) If the Concessionaire and the Department are unable to agree upon the amount of the Concessionaire Damages within 120 Days after the delivery of the Compensation Event Notice, then either party, by written notice to the other party, may terminate the negotiations and request the Dispute be resolved in accordance with Article 21; provided, that the Department will proceed to make payment to the Concessionaire of the undisputed portion of the Concessionaire Damages in accordance with Section 14.01(b) without regard to the dispute resolution procedures.

(vii) The Concessionaire will not be entitled to Concessionaire Damages which are de minimis.

c) Compensation Event Payment. Following a determination of the Concessionaire Damages pursuant to Section 14.01(b), the Department will compensate the Concessionaire for such Concessionaire Damages in such manner as agreed upon by the parties in writing or as may be determined through the dispute resolution procedures set forth in Article 21; provided, that:

(i) in the case of any lump sum payment of the Concessionaire Damages or any other payment schedule that differs from the projected timing of the Concessionaire Damages, the net present value of the Concessionaire Damages will be determined using the then appropriate risk adjusted discount rate(s), as agreed between the Department and the Concessionaire;

(ii) in the case of any payment method chosen other than an up-front lump sum payment or a payment that is based on the projected timing and amounts of the Concessionaire Damages, the payment method will yield an amount that will be equal to the present value of a lump sum payment, using appropriate risk adjusted discount rate(s) as agreed by the parties;

(iii) the amount and timing of payment of Concessionaire Damages related to a Compensation Event will take into account the ability of the Concessionaire, first, to obtain funding in relation to such Concessionaire Damages in accordance with Section 14.01(d) and, second, to have funds available in such time and in such amounts as are required to make current payments to third parties in respect of any portion of Net Cost Impact related to such Compensation Event; and

(iv) any Net Cost Savings or positive Net Revenue Impact attributable to such Compensation Event not included in the determination of Concessionaire Damages under the provisions of this Section 14.01 will be included in the Permit Fee calculated pursuant to the Permit Fee calculation, as agreed between the Department and the Concessionaire.

d) Concessionaire Funding of Concessionaire Damages. If requested by the Department, the Concessionaire will use commercially reasonable efforts to obtain funding for a portion or the full amount of Concessionaire Damages; provided, however, that the
Concessionaire will not be obligated to obtain such funding if the Concessionaire, in its reasonable discretion, determines that obtaining such funding will diminish the Project Value, or to the extent such funding, combined with any payments from the Department, will not make funds available in such time and in such amounts as are required to make current payments to third parties as they are due or will become due in respect of any portion of Net Cost Impact included as part of such Concessionaire Damages. If the Concessionaire is able to obtain funding for all or part of the Concessionaire Damages, the Concessionaire will submit a funding proposal for the Department’s review and approval. Such funding proposal will identify the terms and conditions required to secure funding for such Concessionaire Damages, including any proposed payments by the Department. The Department will reject or accept the funding proposal within 30 Days of receipt of the funding proposal. If the funding proposal is accepted by the Department, the Department will issue a Change Order to implement the funding proposal and, to the extent such funding proposal secures financing for less than 100% of the Concessionaire Damages, the Change Order will provide funding for the remainder thereof on terms and conditions mutually agreed by the parties.

(e) Sole Remedy and Release of Claims.

(i) Without limiting the Concessionaire’s rights with respect to non-monetary relief for Delay Events, the Concessionaire Damages as determined according to this Section 14.01 will represent the sole right to compensation and damages for the adverse effects of a Compensation Event.

(ii) As a condition precedent to the Department’s obligation to compensate any portion of the Concessionaire Damages, following a determination of the Concessionaire Damages, the Concessionaire will execute a full, unconditional, irrevocable release, in form reasonably acceptable to the Department, of any Claims, Losses or other rights to compensation or other monetary relief associated with such Compensation Event, except for (A) the Claim and right to the subject Concessionaire Damages, (B) the Concessionaire’s right to non-monetary relief for a Delay Event and (C) the right to terminate this Agreement in accordance with Article 20 and to receive any applicable termination compensation.

(f) Additional Provisions for Certain Compensation Events.

(i) For the Compensation Event described in clause (k) of the definition thereof, the Concessionaire will be entitled to recover the Net Cost Impact for such Compensation Event; provided, however, that:

(A) in no event will the Concessionaire be entitled to submit a Claim if the Net Cost Impact of such Compensation Event does not equal or exceed $10 million per occurrence (“Claim Threshold”);

(B) if such Compensation Event meets the Claim Threshold, the Department will be solely responsible for the Net Cost Impact in excess of $10 million for such Compensation Event; provided, however, that the Concessionaire will be solely
responsible for the Net Cost Impact up to $10 million per occurrence for the first two Compensation Events that meet the Claim Threshold; and

(C) the Department will be responsible for the Net Cost Impact for such Compensation Events after the first two such Compensation Events occur that meet the Claim Threshold.

For the avoidance of doubt, the Concessionaire will be solely responsible for such Compensation Events with a Net Cost Impact under $10 million per occurrence.

(ii) For the Compensation Event described in clause (l) of the definition thereof, the Concessionaire will be entitled to recover the Net Cost Impact for such Compensation Event, provided, however, that:

(A) the Concessionaire will be solely responsible for the Net Cost Impact up to $5 million in the aggregate for such Compensation Event;

(B) the Department will be solely responsible for the Net Cost Impact in excess of $5 million but less than or equal to $10 million for such Compensation Event; and

(C) the parties will share evenly the Net Cost Impact in excess of $10 million for such Compensation Event

The provisions of this Section 14.01(f)(ii) apply to each event and not in the aggregate.

**Section 14.02 Department Changes**

(a) **Department’s Right to Issue Change Orders.** The Department may, at any time and from time to time during the Term, authorize and/or require changes in the Work pursuant to a Change Order or in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work); provided, that the Department has no right to require any change that:

(i) is not in compliance with Law;

(ii) would contravene an existing Governmental Approval and such contravention cannot be corrected by the issuance of a further or revised Governmental Approval;

(iii) would cause an insured risk to become uninsurable; or

(iv) would give rise to a material and adverse health or safety issue.
(b) Request for Change Proposal.

   (i) If the Department desires to initiate a Department Change, then the
       Department will issue a Request for Change Proposal. The Request for Change Proposal
       will set forth the nature, extent and details of the proposed Department Change.

   (ii) Within 21 Days following Concessionaire’s receipt of the Request for
       Change Proposal, the Concessionaire will provide the Department with a preliminary
       written response, and within a reasonable time thereafter (not to exceed 30 Days or such
       other timeframe agreed upon between the Concessionaire and the Department), with a
       definitive written response (a “Change Proposal”), as to whether, in the Concessionaire’s
       opinion, the Department Change constitutes a Compensation Event, and if so, (A) a
detailed assessment of the Net Revenue Impacts and Net Cost Impacts, to the extent
known at that time, (B) the effect of the proposed Department Change on the
Concessionaire’s performance of its obligations pursuant to this Agreement, to the extent
known at the time, (C) the proposed Base Case Financial Model Update and (D) a TIA if
applicable.

   (iii) Within 30 Days following the delivery of the Change Proposal, the
       Concessionaire and the Department will exercise good faith efforts to negotiate a
mutually acceptable Change Order.

   (iv) The Department will pay the Concessionaire’s Allocable Costs for
       preparing a Change Proposal and conducting preliminary work to respond to a Request
       for Change Proposal at the Department’s request. Upon payment of such Allocable
       Costs, the Department will own all Work Product included in the Change Proposal.

(c) Concessionaire Performance of Department Change. The Concessionaire will
perform the work required to implement the Department Change in a timely manner; provided,
that:

   (i) a Change Order setting forth, among other things, the adjusted scope of
       the Work and adjustments to the Baseline Schedule and the Technical Requirements, if
       applicable, will have been mutually agreed upon between the Department and the
       Concessionaire and issued by the Department;

   (ii) the Department and the Concessionaire (if applicable) will have identified
       sufficient funds that may be made available to the Concessionaire to perform the work
       required to implement the Department Change; and

   (iii) all necessary Governmental Approvals to commence the Work required to
       implement the Department Change have been obtained.
(d) Disputed Work.

(i) If the Department and the Concessionaire agree that the Work in question constitutes a Department Change and are unable to reach an agreement on a Change Order, the Department may deliver to the Concessionaire a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question, notwithstanding such disagreement. Such Directive Letter will include any changes to the Technical Requirements, if applicable, necessary to proceed with the Work covered by the Directive Letter.

(ii) If the parties disagree whether the Work in question constitutes a Department Change, the Department will have the right to issue a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question, and the Concessionaire will proceed with such work. Such Directive Letter will include any changes to the Technical Requirements necessary to proceed with the Work covered by the Directive Letter.

(iii) Upon receipt of a Directive Letter under (i) or (ii) above, the Concessionaire will implement and perform the Work in question as directed by the Department and the Department will make payments to the Concessionaire for such Work performed pursuant to Section 14.02(e).

(iv) To the extent there are any Disputes related to any Directive Letter issued under Section 14.02(d), such Disputes will be subject to the dispute resolution procedures set forth in Article 21.

(e) Payments for Directive Letter Work. If the Department issues a Directive Letter to the Concessionaire pursuant to Section 14.02(d), the Department will make payments to the Concessionaire on a monthly basis for the Work in question for the reasonable Allocable Costs of the Work in question, subject to subsequent adjustment through the dispute resolution procedures set forth in Article 21.

(f) Technical Requirements Revisions. Notwithstanding anything to the contrary contained in this Agreement, during the Construction Period, a change in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work) required or authorized by the Department will constitute a Department Change.

Section 14.03 Concessionaire Requests for Deviations

(a) The Concessionaire may request the Department to approve, in the Department’s sole discretion, Deviations by submitting to the Department a written change request in a form approved by the Department. At a minimum, the following information will be submitted with each such change request:

(i) a statement that the request is submitted pursuant to this Section 14.03(a):
(ii) a statement concerning the basis for the request, benefits to the Department or the Project and an itemization of the contract items and requirements affected by the request;

(iii) a detailed estimate of the time and/or cost savings and impacts on Gross Revenues;

(iv) proposed specifications and recommendations as to the manner in which the requested changes are to be accomplished; and

(v) the time by which the request must be approved so as to obtain the maximum cost-effectiveness.

(b) The Department may consider and approve or disapprove, in its sole discretion, any such request, and the Concessionaire will bear the burden of persuading the Department that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice and achieves the Department’s applicable safety standards and criteria. No Deviation will exist or be effective unless and until approval thereof is expressly provided in writing by the Department. Approval of a submission containing a Deviation will not constitute approval of the Deviation unless and until the Department expressly and specifically approves the Deviation in writing pursuant to the terms of this Section 14.03(b). The Department’s decision will not be subject to the dispute resolution procedures of Article 21. If not previously communicated, the Department will provide within 10 Days after a request by the Concessionaire its rationale, in reasonable detail, for any disapproval of a Deviation proposed by the Concessionaire.

(c) Unless otherwise agreed, the Concessionaire will be solely responsible for payment of any increased costs, for any losses of Gross Revenues, for all Allocable Costs and for any schedule delays or other impacts resulting from the implementation of a Deviation requested by the Concessionaire that has been approved by the Department.

Section 14.04 Net Cost Savings or Positive Net Revenue Impact

(a) Whenever it believes a Net Cost Saving or positive Net Revenue Impact exists or will arise from a Compensation Event, a Deviation, or a Department waiver of Non-Conforming Work, the Department at its election may, and the Concessionaire will, deliver to the other party written notice thereof. The notice will set forth (i) the Compensation Event and its date of occurrence in reasonable detail, the proposed or approved Deviation, or the Non-Conforming Work, as the case may be, (ii) a preliminary estimate, if then known, of the amount of the Net Cost Saving or positive Net Revenue Impact and (iii) a brief, preliminary written analysis and calculation thereof. Such notice will be brought within 30 Days after a claim for Concessionaire Damages or, if no claim is brought by the Concessionaire for Concessionaire Damages, within 30 Days after the occurrence of the Compensation Event or, in the case of a Project Enhancement, within 30 Days after the Commencement of Use of the Project Enhancement.
(b) If the Concessionaire gives such a notice to the Department, the parties will follow the terms and procedures set forth in Section 14.01 as if they applied to the determination of the Net Cost Saving or positive Net Revenue Impact.

(c) Following a determination of the Net Cost Saving or positive Net Revenue Impact by mutual agreement or the dispute resolution procedures set forth in Article 21, the Department will decide on the percentage share of each that it desires as compensation, in any event not to exceed 50% of the applicable Net Cost Savings and/or positive Net Revenue Impact. The Concessionaire will compensate the Department in an amount equal to the selected percentage in the manner provided for in Section 14.01(c), provided that when Concessionaire Damages and Net Cost Saving or positive Net Revenue Impact are payable in the same time period, such amounts shall be netted to the extent possible. The parties will select one or any combination of the following methods of compensation:

(i) through monthly payments of the selected percentage of the Net Cost Saving or positive Net Revenue Impact in accordance with a written payment schedule determined by mutual agreement or through the dispute resolution procedures set forth in Article 21;

(ii) by a lump sum payment of the selected percentage, payable as determined by mutual agreement or through the dispute resolution procedures set forth in Article 21; or

(iii) in such other manner as agreed upon by the parties in writing.

ARTICLE 15.

INDEMNIFICATION

Section 15.01 Indemnities of the Concessionaire

In addition to the Concessionaire’s indemnity obligations as set forth elsewhere in this Agreement, the Concessionaire will indemnify, defend, and hold harmless a State Indemnitee from and against any Losses actually suffered or incurred by such State Indemnitee (except to the extent such Losses are solely caused by the misconduct, negligence or other culpable act, error or omission of a State Indemnitee), due to Third-Party Claims that are based upon:

(a) any actual or alleged failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement or a Project Agreement or, any actual or alleged breach by the Concessionaire of its representations or warranties set forth herein or therein;

(b) any actual or alleged misconduct, negligence or other culpable act, error or omission of a Concessionaire Party in connection with the Project;
(c) any actual or alleged patent or copyright infringement or other actual or alleged improper appropriation or use by a Concessionaire Party of trade secrets, patents, proprietary information, know-how, trade marked or service marked materials, equipment, devices or processes, copyright rights or inventions in connection with the Project;

(d) any actual or alleged inverse condemnation, trespass, nuisance or similar taking of or harm to real property committed or caused by a Concessionaire Party in connection with the Project arising from any actual or alleged (i) failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement; (ii) breach by Concessionaire of its representations or warranties set forth in this Agreement or (iii) misconduct, negligence or other culpable act, error or omission of a Concessionaire Party; provided, however, that the Concessionaire will not be required to indemnify, defend or hold harmless a State Indemnitee from and against any Losses actually suffered or incurred by such State Indemnitee due to Third-Party Claims that are based upon any actual inverse condemnation arising from the establishment of the Project Right of Way as identified in the NEPA Documents and any other real property or real property rights outside the Project Right of Way acquired pursuant to Section 8.05(b);

(e) any actual or alleged violation of any Federal or state securities or similar law by any Concessionaire Party, or the Concessionaire’s failure to comply with any requirement necessary to preserve the tax exempt status of interest paid on the PABs;

(f) any actual or alleged Tax attributable to any Transfer of the Concessionaire’s Interest or any part thereof; or

(g) any actual or alleged claim for brokerage commissions, fees or other compensation by any Person who acted on behalf of the Concessionaire, its Affiliates or their respective Representatives in connection with this Agreement or a Project Agreement, any Transfer of the Concessionaire’s Interest or any part thereof.

Section 15.02 Defense and Indemnification Procedures

(a) In the event that any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against the Department, it will as promptly as practicable notify the Concessionaire in writing of such Claim, and such notice will include a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim; provided, that any failure to give such prompt notice will not constitute a waiver of any rights of the Department, except to the extent that the rights of the Concessionaire are actually and materially prejudiced thereby. If any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against a State Indemnitee other than the Department, a failure by such State Indemnitee to give the Concessionaire prompt notice in writing of such Claim together with a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim, will constitute a waiver of any rights of such State Indemnitee to indemnification to the extent, and only to the extent, that the rights of the Concessionaire are actually and materially prejudiced thereby.
(b) The Concessionaire will be entitled and obligated to appoint counsel of its choice at the expense of the Concessionaire to represent a State Indemnitee in any action for which indemnification is sought (in which case the Concessionaire will not thereafter be responsible for the fees and expenses of any separate counsel retained by that State Indemnitee except as set forth below); provided, that such counsel will be satisfactory to such State Indemnitee. Notwithstanding the Concessionaire’s appointment of counsel to represent a State Indemnitee in any action, such State Indemnitee will have the right to employ separate counsel, and the Concessionaire will bear the reasonable fees, costs and expenses of such separate counsel, if:

(i) the use of counsel chosen by the Concessionaire to represent the State Indemnitee would present such counsel with a conflict of interest;

(ii) the actual or potential defendants in, or targets of, any such action include both the State Indemnitee and the Concessionaire and the State Indemnitee will have reasonably concluded that there may be legal defenses available to it and/or other State Indemnitees which are different from or additional to those available to the Concessionaire;

(iii) the Concessionaire will not have employed counsel to represent the State Indemnitee within a reasonable time after notice of the institution of such action; or

(iv) the Concessionaire authorizes the State Indemnitee to employ separate counsel at the Concessionaire’s expense.

(c) The Concessionaire will not be liable for any settlement or compromise by an affected State Indemnitee of a Third Party Claim except with the Concessionaire’s prior written consent, which consent will not be unreasonably withheld or delayed, or except where the settlement or compromise is approved by the court after the Concessionaire receives reasonable notice and the opportunity to be heard and such court approval has become final and non-appealable.

ARTICLE 16.

HAZARDOUS SUBSTANCES

Section 16.01 General Obligations

(a) The Concessionaire will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and/or disposal of any Hazardous Substances the presence of which constitutes a Hazardous Environmental Condition that are discovered on, in or under the Project Right of Way on which the Work is performed, after the earlier to occur of (i) the issuance of an LNTP (but limited to the portion of the Project Right of Way on which the LNTP Work is performed pursuant to such LNTP), (ii) issuance of a Construction Notice to Proceed, or (iii) the Service Commencement of the Project in accordance with this Agreement.
(b) After the earlier to occur of (i) the issuance of an LNTP (but limited to the portion of the Project Right of Way on which the LNTP Work is performed pursuant to such LNTP), (ii) the issuance of the Construction Notice to Proceed, or (iii) the Service Commencement of the Project, if the Concessionaire encounters any Hazardous Environmental Condition that must be managed, treated, handled, stored, monitored, removed, transported or disposed of (collectively, “Remedial Actions”), then the Concessionaire will promptly notify the Department. In the case of Hazardous Environmental Conditions that are attributable to Known Pre-Existing Hazardous Substances, the Concessionaire will thereafter proceed with such Remedial Actions in accordance with the Concessionaire’s Environmental Management Plan. In the case of all other Hazardous Environmental Conditions and to the extent not covered by the Environmental Management Plan, the Concessionaire will develop a Remedial Action Plan setting out the scope of the Remedial Actions that the Concessionaire proposes to take in relation to the relevant Hazardous Environmental Condition, such actions to include, but not be limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Substances and submitting copies of such data and reports to the Department for its review and approval, (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Substances (iii) preparing and obtaining Governmental Approvals for remedial action plans, including Department approval, (iv) carrying out the Remedial Action Plan, including, as necessary, disposal of the Hazardous Substances and (v) timely informing the Department of all such actions.

(c) Before any Remedial Actions are taken that would inhibit the Department’s ability to ascertain the nature and extent of the Hazardous Environmental Condition, the Concessionaire will afford the Department the opportunity to inspect areas and locations that require Remedial Actions; provided, that in the case of a sudden release of any Hazardous Substances, the Concessionaire may take all reasonable actions necessary to stabilize and contain the release without prior notice or inspection, but will promptly notify the Department of the sudden release and its location.

(d) The Concessionaire will obtain all Governmental Approvals relating to Remedial Actions. The Concessionaire will be solely responsible for compliance with such Governmental Approvals and applicable Environmental Laws concerning or relating to Hazardous Substances. In carrying out Remedial Actions that are compensable by the Department pursuant to this Agreement, the Concessionaire will not take any steps or actions which impair the Department’s potential Claims for indemnity and contribution, statutory or otherwise.

(e) Unless directed otherwise by the Department, the Concessionaire will seek to recover costs from any available reimbursement program or from any third party responsible for generating or otherwise creating or contributing to conditions that lead to the need for Remedial Action. Without limiting the preceding sentence, the Concessionaire will seek pre-approval and pursue reimbursement from the Virginia Petroleum Storage Tank Fund (“VPSTF”) for qualifying expenses incurred during the course of investigation, containment, management, mitigation or remediation activities on petroleum storage tank releases. The parties will
cooperate with and notify each other with respect to activities undertaken pursuant to this Section 16.01(e).

(f) Except as provided in Section 16.02, the Concessionaire will bear all costs and expenses of preparing and complying with any Remedial Action Plan, of complying with Law and obtaining and complying with Governmental Approvals pertaining to Hazardous Substances, and otherwise of carrying out Remedial Actions.

Section 16.02 Pre-Existing Hazardous Substances

(a) The Department will pay, to the extent permitted by Law, the Concessionaire for the Concessionaire’s Allocable Costs for Remedial Actions with respect to any Unknown Pre-Existing Hazardous Substances and Third-Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition. To the extent the Concessionaire recovers costs from any available reimbursement program or third parties with respect to Unknown Pre-Existing Hazardous Substances or Third-Party Hazardous Substances, the Concessionaire will pay such costs to the Department, less the Allocable Costs incurred by the Concessionaire in seeking recovery in accordance with Section 16.01(e). The Concessionaire will furnish to the Department documentation supporting the amount recovered from any reimbursement program or third parties and the Allocable Costs incurred by the Concessionaire in pursuing such recovery.

(b) The Department will assume, to the extent permitted by Law, responsibility for third party claims against the Concessionaire or any Concessionaire Party for personal injury, damages or harm to property or business due to any Pre-Existing Hazardous Substances and Third-Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition, and all related penalties, fines and administrative or civil sanctions arising out of or related to such Pre-Existing Hazardous Substances and Third-Party Hazardous Substances; except to the extent such claims are due to the negligence, recklessness, or willful misconduct of a Concessionaire Party.

(c) At all times during the Term, the Concessionaire will provide cost estimates with respect to such Remedial Actions which may be paid by the Department, for the Department’s review and approval prior to proceeding with any such Remedial Actions, provided, that in the case of a sudden release of any Hazardous Substances, the Concessionaire may take all reasonable actions necessary to stabilize and contain the release without prior submission of such cost estimates. If the Department has not responded to a request for such approval pursuant to this Section 16.02(c) within 21 Days after the Department’s acknowledgement of receipt (or in the case of an emergency a reasonably appropriate shorter period), the request will be deemed to be approved, except to the extent matters deviate from applicable Technical Requirements, or Law.

Section 16.03 Concessionaire Indemnifications Regarding Hazardous Substances

(a) The Concessionaire will indemnify, protect, defend and hold harmless and release each State Indemnitee from and against any and all Third Party Claims, including attorney’s fees,
expert witness fees and court costs suffered or incurred by such State Indemnitee, to the extent caused by:

(i) Hazardous Substances introduced to or brought onto the Project Right of Way by a Concessionaire Party;

(ii) failure of any Concessionaire Party to comply with any requirement of this Agreement or any other Project Agreement relating to Hazardous Substances (including any failure to perform any Remedial Action required in accordance with Section 16.01) or to otherwise comply with applicable Environmental Laws and Governmental Approvals; or

(iii) the exacerbation, release, spreading, migration, or toxicity of Hazardous Substances due to the negligence, recklessness, or willful misconduct of a Concessionaire Party.

(b) The Concessionaire will defend such Third-Party Claims in accordance with Section 15.02.

(c) The Concessionaire’s obligations under this Section 16.03 will not apply to Third-Party Claims to the extent caused by the negligence, recklessness, or willful misconduct of any State Indemnitee.

Section 16.04 Generator Status

(a) The Department will be deemed the generator of Pre-Existing Hazardous Substances and Third-Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition, within the Project Right of Way. The Department agrees to be identified as the generator of such Pre-Existing Hazardous Substances in waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Authority.

(b) The Concessionaire will be deemed the generator of Hazardous Substances introduced to the Project Right of Way by a Concessionaire Party, the presence of which constitutes a Hazardous Environmental Condition within the Project Right of Way. The Concessionaire agrees to be identified, or cause the applicable Concessionaire Party to be identified, as the generator of such Hazardous Substances in waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Authority.

ARTICLE 17.

INSURANCE; PERFORMANCE SECURITY

Section 17.01 Insurance Coverage Required

(a) Required Insurance for the Construction Period. The Concessionaire will provide and maintain at its own expense, or cause the Design-Build Contractor to provide and maintain,
Section 17.02 General Requirements Applicable to Insurance

The insurances which the Concessionaire is required to maintain or cause to be maintained under Section 17.01:

(a) will delete any design-build or similar exclusions that could compromise coverages because of the Concessionaire’s use of the design-build delivery method;

(b) except for professional liability insurance, worker’s compensation insurance and employer’s liability insurance, the Department will be named as an additional insured on a primary, non-contributory basis;

(c) will not limit the Concessionaire’s liabilities and obligations pursuant to this Agreement, including the Concessionaire’s indemnification obligations;

(d) will be maintained with insurers that at the time coverage commences are authorized to do business in the State and have a current policyholder’s management and financial size category rating of not less than “A-: VIII” according to A.M. Best’s Financial Strength Rating and Financial Size Category, except as otherwise approved by the Department;

(e) will be on terms specified herein or otherwise approved by the Department (such approval not to be unreasonably withheld);

(f) will contain coverage terms and conditions that reflect the industry standard that the commercial market will provide and support as of the date of such insurance procurement and any subsequent renewals;

(g) without inferring a right of cancellation that would not exist in the absence of these endorsements, will contain a term which requires the insurer to give not less than 30 Days’ prior notice to the Department whenever the insurer gives the Concessionaire a notice of cancellation or any other notice with respect to the policy (except in the case of any non-
premium payment, not less than ten Days’ prior notice, which the insurer will be obligated to give to the Department simultaneously with providing such notice to the Concessionaire);

(h) other than for workers compensation insurance, employer’s liability insurance, automobile liability insurance, property and business interruption insurance, professional liability insurance and contractor pollution liability insurance, will be effected on a severability of interest basis for the purposes of which the insurer accepts the term “insured” as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall policy limit not being increased as a result);

(i) other than for professional liability insurance, worker’s compensation insurance, employer’s liability insurance and property and business interruption insurance, will include cross-liability clauses allowing one insured to bring a claim against another insured party;

(j) will be endorsed so that the insurer agrees to waive all rights of subrogation or action that it may have or acquire against all or any of the Persons comprising the insured;

(k) other than for workers compensation insurance, employer’s liability insurance, automobile liability insurance, professional liability insurance and contractor pollution liability insurance, will contain a provision under which the insurer agrees that the failure of one insured to observe and fulfill the terms of the policy will not prejudice the coverage of the other insureds;

(l) other than for workers compensation insurance, employer’s liability insurance, commercial general liability insurance, excess liability insurance, contractor pollution liability insurance and automobile liability insurance, have each policy endorsed to contain a standard mortgage clause to the effect that the Department and the other insureds will not be prejudiced by an unintended and/or inadvertent error, omission or misdescription of the risk interest in property insured under the policies, incorrect declaration of values, failure to advise insurers of any change of risk interest or property insured or failure to comply with a statutory requirement;

(m) will not include defense costs within the limits of coverage or permit erosion of coverage limits by defense costs, except that defense costs may be included within the limits of coverage of professional and contractor pollution liability policies; and

(n) will provide that the coverage thereof is primary and noncontributory coverage with respect to all named or additional insureds, except for coverage that by its nature cannot be written as primary.

Section 17.03 Proof of Coverage

The Concessionaire will deliver to the Department true and correct copies of policies, material forms, endorsements and premium indications of each insurance policy certified by the Concessionaire’s insurance broker (or as appropriate the Design-Build Contractor’s, the Lead Engineering Contractor’s or the O&M Contractor’s broker) to be true and correct copies of such policies, forms, endorsements and premium indications, as a condition to receiving the applicable notices to proceed set forth in this Agreement, and annually thereafter no later than
ten Days prior to policy renewal or replacement. The Concessionaire will also deliver to the Department duplicate originals or copies of each Project-specific insurance policy and endorsements for the Project coverage of each other insurance policy certified by the Concessionaire’s insurance broker (or as appropriate the Design-Build Contractor’s, the Lead Engineering Contractor’s or the O&M Contractor’s broker) to be true and correct copies of the originals no later than 60 Days after receiving the applicable notices to proceed set forth in this Agreement and annually thereafter no later than 60 Days after policy renewal or replacement, and also whenever reasonably requested by the Department.

Section 17.04 Adjustments in Coverage Amounts

(a) All insurance coverage limits stipulated in Section 17.01(b), as well as deductibles and self-insured retentions, will be reviewed every three years and adjusted as appropriate, in line with such amounts that would be insured by a prudent business similar to, and undertaking similar activities to, the Concessionaire; provided, that no such review or adjustments will be required with respect to insurance coverage required for the Design-Build Work.

(b) In determining increases in limits and adjustments to deductibles or self-insured retentions, the parties will take into account (A) Claims and Loss experience for the Project, provided, that premium increases due to adverse Claims experience will not be a basis for justifying increased deductibles or self-insured retentions; (B) the condition of the Project, (C) the safety compliance and performance record for the Project; (D) then-prevailing Good Industry Practice for insuring comparable transportation projects; and (E) the provisions regarding unavailability of increased coverage set forth in Section 17.05.

(c) In connection with such review, the Concessionaire will deliver to the Department evidence that such insurance is in effect, together with the Concessionaire’s certification that such insurance is in line with amounts that would be insured by such a prudent business.

(d) Any Dispute regarding increases in limits or adjustments to deductibles or self-insured retentions will be resolved according to the dispute resolution procedures under Article 21.

Section 17.05 Unavailability of Insurance

(a) If any insurance required to be maintained pursuant to this Article 17 (including the limits, deductibles or any other terms under policies for such insurance) ceases to be available on a commercially reasonable basis, the Concessionaire will provide written notice to the Department accompanied by a letter from the Concessionaire’s insurance advisor stating that such insurance is unavailable anywhere in the global market on a commercially reasonable basis. Such notice will be given not later than 30 Days prior to the scheduled date for renewal of any such policy. Except to the extent attributable to the Concessionaire, or any Concessionaire Party upon receipt of such notice by the Department, the Concessionaire and the Department will immediately enter into good faith negotiations regarding the matters set forth in Section 17.05(c) and (d) below.
(b) The Concessionaire will not be excused from satisfying the insurance requirements of this Article 17 merely because premiums for such insurance are higher than anticipated. To establish that the required coverages (or required terms of such coverages, including insurance policy limits) are not available on commercially reasonable terms, the Concessionaire will bear the burden of proving either that (i) the same is not available at all in the global insurance and reinsurance markets or (ii) the premiums for the same have so materially increased over those previously paid for the same coverage that a reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are not justified by the risk protection afforded. For the purpose of clause (ii), the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry.

(c) In the event that the Concessionaire and the Department cannot reach a resolution acceptable to both parties within ten Days, the Concessionaire and the Department will make arrangements for the formation of an insurance panel consisting of the Concessionaire’s insurance advisor (or broker), the Department or its insurance advisor (or broker) and an independent insurance expert from a nationally recognized insurance brokerage firm, chosen by the Concessionaire and reasonably acceptable to the Department. Such independent expert will conduct a separate review of the relevant insurance requirements of this Article 17 and the Technical Requirements and the market for such insurance at the time, giving due consideration to the representations of both insurance advisors, and upon conclusion of such review will issue a written report stating whether such insurance is available or unavailable on a commercially reasonable basis.

(d) If the insurance expert concludes that such insurance is not available on a commercially reasonable basis, the insurance expert will provide a written recommendation (which will include the amount and type of insurance which is available upon a commercially reasonable basis) not less than 15 Days before the date for renewal of such insurance. The Concessionaire will, prior to the expiration of the insurance then in effect, obtain the insurance required by this Article 17 as adjusted in accordance with such recommendation.

(e) The Department makes no representation that the limits of liability specified for any insurance policy to be carried pursuant to this Agreement are adequate to protect the Concessionaire against its undertakings pursuant to this Agreement, to the Department, or any third party. No such limits of liability will preclude the Department from taking any actions as are available to it under the Project Agreements or Law.

Section 17.06 Failure to Obtain Insurance Coverage

(a) If in any instance the Concessionaire has not performed its obligations respecting insurance coverage set forth in this Agreement (as may be adjusted in accordance with Section 17.05) or is unable to enforce and collect any such insurance for failure to assert Claims in accordance with the terms of the insurance policies, then for purposes of determining the Concessionaire’s liability and the limits thereon or determining reductions in compensation due from the Department to the Concessionaire on account of available insurance, the Concessionaire will be treated as if it has elected to self-insure up to the full amount of insurance coverage which
would have been available had the Concessionaire performed such obligations and not committed such failure.

(b) Nothing in this Section 17.06 or elsewhere in this Article 17 will be construed to treat the Concessionaire as electing to self-insure where the Concessionaire is unable to collect due to the bankruptcy or insolvency of any insurer which at the time the insurance policy is written meets the rating qualifications approved by the Department.

Section 17.07 Restoration; Insurance Proceeds

(a) If all or any part of any of the Project Assets will be destroyed or damaged during the Term in whole or in part by fire or other casualty of any kind or nature (including any casualty for which insurance was not obtained or obtainable), ordinary or extraordinary, foreseen or unforeseen, the Concessionaire will:

(i) give the Department notice thereof promptly after the Concessionaire receives actual notice of such casualty

(ii) except (A) in the case of destruction or damage caused by a Compensation Event (in which case the provisions of Section 14.01 will apply) or (B) as otherwise provided in Section 20.03, at its sole cost and expense (whether or not insurance proceeds, if any, are equal to the estimated cost of repairs, alterations, restorations, replacement and rebuilding (the “Casualty Cost”)), proceed diligently to restore the Project to its pre-casualty condition;

(iii) deposit all insurance proceeds received by the Concessionaire in connection with any restoration with a Depositary (such insurance proceeds, together with any interest earned thereon, the “Restoration Funds”); provided, that the procedures of this Section 17.07(a)(iii) will only apply to casualty events for which the cost of restoration exceeds $5,000,000, adjusted annually by the percentage increase in CPI.

(b) Subject to Section 17.07(a)(ii), if the Concessionaire (i) fails or neglects to commence the diligent restoration of the Project or the portion thereof so damaged or destroyed, (ii) having so commenced such restoration, fails to diligently complete the same in accordance with the terms of this Agreement or (iii) prior to the completion of any such restoration, this Agreement expires or terminates in accordance with the terms of this Agreement, the Department may, but will not be required to, complete such restoration at the Concessionaire’s expense and will be entitled to be paid out of the Restoration Funds for the relevant restoration costs incurred by the Department. Subject to Section 17.07(a)(ii), in any case where this Agreement will expire or be terminated prior to the completion of the restoration, the Concessionaire will (A) account to the Department for all amounts spent in connection with any restoration which was undertaken, (B) immediately pay over or cause the Depositary to pay over to the Department the remainder, if any, of the Restoration Funds received by the Concessionaire prior to such termination or cancellation and (C) pay over or cause the Depositary to pay over to the Department, within five Business Days after receipt thereof, any Restoration Funds received by the Concessionaire or the
Depositary subsequent to such termination or cancellation. The Concessionaire’s obligations under this Section 17.07(b) will survive the expiration or termination of this Agreement.

(c) Subject to the satisfaction by the Concessionaire of all of the terms and conditions of this Section 17.07, the Concessionaire will cause the Depositary, with prior written notice to the Department, to pay to the Concessionaire from time to time, any Restoration Funds, but not more than the amount actually collected by the Depositary upon the loss, together with any interest earned thereon, to be utilized by the Concessionaire solely for the restoration, such payments to be made as follows:

(i) prior to commencing any restoration, the Concessionaire will furnish to the Department for its approval the estimated cost, estimated schedule and detailed plan for the completion of the restoration, each prepared by an architect or engineer;

(ii) the Restoration Funds will be paid to the Concessionaire in installments as the restoration progresses, subject to Section 17.07(c)(iii), based upon requisitions to be submitted by the Concessionaire to the Depositary, with a copy to the Department, in compliance with Section 17.07(d), showing the cost of labor and materials purchased for incorporation in the restoration, or incorporated therein since the previous requisition, or the amounts payable or paid to the Contractor, as the case may be, and due and payable or paid by the Concessionaire; provided, that if any Lien caused by a Concessionaire Party is filed against the Project or any part thereof in connection with the restoration (other than a Permitted Encumbrances (but not including clause (c) of the definition thereof)), the Concessionaire will not be entitled to receive any further installment until such Lien is satisfied or discharged (by bonding or otherwise); provided further, that notwithstanding the foregoing, but subject to the provisions of Section 17.07(c)(iii), the existence of any such Lien will not preclude the Concessionaire from receiving any installment of Restoration Funds so long as such Lien will be discharged with funds from such installment and at the time the Concessionaire receives such installment the Concessionaire delivers to the Department and the Depositary a release of such Lien executed by the holder of such Lien and in recordable form;

(iii) the amount of each installment to be paid to the Concessionaire will be the aggregate amount of Casualty Costs theretofore incurred by the Concessionaire minus the aggregate amount of Restoration Funds theretofore paid to the Concessionaire in connection therewith; provided, that all disbursements to the Concessionaire will be made based upon an architect’s or engineer’s certificate for payment in accordance with industry standards, and disbursements may be made for advance deposits for materials and Contractors to the extent that such disbursements are customary in the industry and that the unapplied portion of the funds held by the Depositary, together with other funds available to the Concessionaire for such Restoration, as certified by the Concessionaire, are sufficient to complete the restoration; and

(iv) except as provided in Section 17.07(b), upon completion of and payment for the restoration by the Concessionaire, subject to the rights of any Collateral Agent, the Depositary will pay the balance of the Restoration Funds, if any, to the Concessionaire;
provided, that if the insurance proceeds are insufficient to pay for the restoration (or if there will be no insurance proceeds), the Concessionaire will nevertheless be required to make the restoration and provide the deficiency in funds necessary to complete the restoration as provided in Section 17.07(a)(iii).

(d) The following will be conditions precedent to each payment made to the Concessionaire as provided in Section 17.07(c):

(i) the Concessionaire will have furnished the Department with estimates of costs and schedule and a detailed plan for the completion of the restoration, as provided for in Section 17.07(c)(i);

(ii) the Concessionaire will have furnished the Department a certificate stating that the materials and other items which are the subject of the requisition have been delivered to the Project (except with respect to requisitions for advance deposits permitted under Section 17.07(c)(iii)), free and clear of all Liens (other than Permitted Encumbrances), and no unsatisfied or unbonded mechanic’s or other Liens have been claimed, except for any Lien that will be discharged, by bonding or otherwise, with funds to be received pursuant to such requisition (provided, that a release of such Lien is delivered to the Depositary in accordance with Section 17.07(c)(ii));

(iii) the restoration will be carried out under the supervision of the relevant architect or engineer, who is licensed in the State and has met all of the requirements of the Virginia Department of Professional and Occupational Regulation applicable to an architect or engineer and who may be a licensed employee of the Concessionaire or a Contractor, and there will be submitted to the Depositary and the Department the certificate of such architect or engineer stating that:

(A) the sum then requested to be withdrawn either has been paid by the Concessionaire or is due and payable to Contractors, engineers, architects or other Persons (whose names and addresses will be stated), who have rendered or furnished services or materials for the work and giving a brief description of such services and materials and the principal subdivisions or categories thereof and the several amounts so paid or due to each of such Persons in respect thereof, and stating in reasonable detail the progress of the work up to the date of such certificate;

(B) no part of such expenditures has been made the basis, in any previous requisition (whether paid or pending), for the withdrawal of Restoration Funds or has been made out of the Restoration Funds received by the Concessionaire;

(C) the sum then requested does not exceed the value of the services and materials described in the certificate;

(D) other than amounts for disbursements for advance deposits for materials and Contractors, the work relating to such requisition has been performed in accordance with this Agreement;
(E) the balance of the Restoration Funds held by the Depositary or available from other sources will be sufficient upon completion of the restoration to pay for the same in full, and stating in reasonable detail an estimate of the cost of such completion; and

(F) in the case of the final payment to the Concessionaire, the restoration has been completed in accordance with this Agreement.

(e) If the Concessionaire obtains Performance Bonds or performance Letters of Credit related to a restoration (which the Concessionaire may or may not obtain in its discretion), the Concessionaire will name the Department and the Concessionaire and the Collateral Agent, as their interests may appear, as additional obligees or transferee beneficiaries (as applicable), and will deliver copies of any such bonds or letters of credit to the Department promptly upon obtaining them. The Department will only have the right to exercise remedies under any such bonds or letters of credit so long as the Concessionaire or a Lender is not pursuing remedies thereunder.

(f) The requirements of this Section 17.07 are for the benefit only of the Department, and no Contractor or other Person will have or acquire any claim against the Department as a result of any failure of the Department actually to undertake or complete any restoration as provided in this Section 17.07 or to obtain the evidence, certifications and other documentation provided for herein.

(g) Restoration Funds deposited with a Depositary will be invested and reinvested in direct obligations of and obligations fully guaranteed by, the United States of America or any agency or instrumentality of the United States of America, the obligations of which are backed by the full faith and credit of the United States of America, or in other “permitted investments” under the Project Financing Agreements, and all interest earned on such investments will be added to the Restoration Funds.

(h) The Department acknowledges and agrees that any Restoration Funds not applied to a restoration as provided in this Section 17.07 will be subject to the Lien or Liens of any Collateral Agent.

Section 17.08 Performance Security

(a) Performance Security – Equity Funding Guaranties. The Concessionaire will cause each Equity Member to provide an equity funding guaranty from each of the Fluor Guarantor and the Transurban Guarantor (each, an “Equity Funding Guaranty”) which guarantees the funding of capital contributions of the Equity Members in accordance with the terms of the Equity Funding Agreements. Subject to the provisions of the Direct Agreement, the Project Financing Agreements will include a provision granting the Department the right to direct the Collateral Agent to draw upon the applicable Equity Funding Guaranty with respect to any amounts that the relevant Equity Member has failed to fund when due and payable (whether at the scheduled date or upon acceleration upon an event of default under the Project Financing
Agreements), and that the proceeds of such draw will be deposited in a project account as designated by the Collateral Agent in accordance with the Project Financing Agreements.

(b) **Performance Security – Design-Build Letter of Credit.**

(i) The Concessionaire will require the Design-Build Contractor to furnish a Letter of Credit (the “Design-Build Letter of Credit”) in an amount not less than seven and one-half percent (7.5%) of the price of the Design-Build Contract. The Design-Build Letter of Credit will provide that it may be transferred by the Concessionaire to the Department, as beneficiary, with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the Design-Build Contract.

(ii) Upon the Concessionaire’s receipt from the Department of the Substantial Completion Certificate, the Design-Build Letter of Credit may be reduced to an amount not less than three percent (3%) of the price of the Design-Build Contract. If the Punch List has not been completed within 60 Days after the Final Acceptance Deadline, the Concessionaire agrees to draw on the Design-Build Letter of Credit at the written direction of the Department and to use the proceeds of such drawing to provide for the prompt completion of the items on the Punch List.

(c) **Performance Security - Design-Build Work Guarantee.** Concurrently with Financial Close or, if earlier, the commencement of Work under the Design-Build Contract, the Concessionaire will cause to be delivered to the Department, an executed copy of a guaranty agreement of the Fluor Guarantor, in substantially the form set forth in Exhibit F (the “Design-Build Work Guarantee”), in which the Fluor Guarantor guarantees the performance of the Design-Build Contractor’s obligations under the Design-Build Contract. In addition to and notwithstanding the Design-Build Work Guarantee required to be delivered pursuant to the preceding sentence, the Concessionaire will ensure that the Design-Build Contract will include customary provisions limiting the Design-Build Contractor’s liability to not less than 40% of the aggregate dollar value of the Work to be performed thereunder.

(d) **Additional Requirements**

(i) Unless otherwise specified in this Agreement, a draw on any Performance Security will not be conditioned on prior resort to any other security of, or provided for the benefit of, any Concessionaire Party. If the Department receives proceeds of a draw on any Performance Security in excess of the relevant obligation, the Department will promptly refund the excess to the Concessionaire (or to its designee) after all relevant obligations are satisfied in full.

(ii) The Concessionaire will obtain and furnish all Performance Security and replacements thereof at its sole cost and expense, and will pay all charges imposed in connection with the Department’s presentment of sight drafts and drawing against any Performance Security or replacements thereof.
(iii) In the event the Department makes a permitted assignment of its rights and interests under this Agreement, the Concessionaire will cooperate so that concurrently with the effectiveness of such assignment, either replacement Performance Security for, or appropriate amendments to, the outstanding Performance Security will be delivered to the assignee naming the assignee as replacement beneficiary, at no cost to the Concessionaire.

(iv) The obligations of the Concessionaire during the Term to reimburse the issuer for draws under any Performance Security may be secured by a Financing Assignment if it encumbers the entire Concessionaire’s Interest.

(e) Applicability to Project Enhancements and Major Maintenance. The Concessionaire will require its contractors to furnish the Major Maintenance Performance Security with respect to Project Enhancements and Major Maintenance during the Term if and to the extent required by the Project Financing Agreements or, if there are no Project Financing Agreements, as may be reasonably required by the Department. The Major Maintenance Performance Security will name the Department a permitted assignee or transferee beneficiary (as applicable), with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the O&M Contract.

ARTICLE 18.

OWNERSHIP AND ACCESS TO RECORDS

Section 18.01 Maintenance of Records

The Concessionaire will maintain or cause to be maintained proper books, records and accounts in which complete and correct entries will be made of its transactions in accordance with GAAP or any other generally accepted accounting standards which are acceptable to the Department. Such books and records will be maintained at a location situated within the contiguous United States of America as designated by the Concessionaire by delivery of notice of such location to the Department. Further, the Concessionaire will maintain or cause to be maintained such books, records and accounts in accordance with applicable Law, including Laws applicable to the Project as a result of the costs of the Project being financed in part with State funds, federal-aid funds and State bond proceeds.

Section 18.02 Public Records

(a) The Concessionaire acknowledges that any Work Product the Department owns and any document of which the Department obtains a copy that relates to the Project may be considered public records under the Virginia Public Records Act, Sections 42.1-76 through 42.1-91 of the Code of Virginia or official records under the Virginia Freedom of Information Act, Sections 2.2-3700 through 2.2-3714 of the Code of Virginia, and as such may be subject to public disclosure. In the event of a request for disclosure of any such information, the Department will comply with Law. The Department recognizes that certain Work Product the Department owns, and certain documents of which the Department obtains a copy that relate to
the Project, including Escrow Documents obtained under Section 18.05, may contain information exempt from disclosure under Section 2.2-3705.6(11) of the Code of Virginia, may constitute trade secrets as defined in the Uniform Trade Secrets Act, Sections 59.1-336 through 59.1-343 of the Code of Virginia, and may include confidential information which is otherwise subject to protection from misappropriation or disclosure, and the Department will keep such information confidential unless disclosure is required by Law. Should such records become the subject of a request for public disclosure, the Department will promptly notify the Concessionaire of such request and the date by which the Department anticipates responding and will consider the objections received from the Concessionaire in advance of such date.

(b) If the Concessionaire believes that any Work Product or any document subject to transmittal to or review by the Department under the terms of this Agreement or a Project Agreement contains proprietary or confidential information or trade secrets that are exempt or protected from disclosure pursuant to Law, the Concessionaire will use its reasonable efforts to identify such information prior to such transmittal or review and the Concessionaire and the Department will confer on appropriate means of ensuring compliance with such Law prior to transmittal or review. Upon the written request of either party, the Concessionaire and the Department will mutually develop a protocol for the transmittal, review and disclosure of Work Product or other documents produced or obtained by the Concessionaire so as to avoid violations of any Law and to protect, consistent with the requirements of Law, appropriate information from disclosure.

Section 18.03 Ownership of Work Product

(a) All Work Product (including records thereof in software form), including reports, studies, data, information, logs, records and similar terms, which is prepared or procured by or on behalf of the Department or its other contractors, whether before or after the Agreement Date, will be and remain the exclusive property of the Department; provided, that the Department will make available to the Concessionaire, without charge, and without representation or warranty of any kind, any documents in the possession of the Department relating to the planning, design, engineering and permitting of the Project and any Project Enhancement that the Concessionaire elects to or is directed to carry out.

(b) Prior to the expiration or earlier termination of this Agreement, all Work Product prepared by or on behalf of the Concessionaire will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of this Agreement for any reason, including termination by the Concessionaire for a Department Default, (i) the Concessionaire will promptly turn over to the Department a copy of all Work Product the Concessionaire owns and (ii) subject to Section 18.04, all such Work Product will be considered the sole and exclusive property of the Department (other than Proprietary Work Product, with respect to which the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license in connection with the Project), without compensation due the Concessionaire or any other party. The Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any Proprietary Work Product, subject to Section 18.02. The Concessionaire will continue to
Section 18.04 Ownership of Proprietary Intellectual Property

(a) All Proprietary Intellectual Property of the Concessionaire will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of, or any assignment by the Concessionaire of its rights under, this Agreement for any reason whatsoever, the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire solely in connection with the Project. The Department will not at any time sell any such Proprietary Intellectual Property or use or allow any party to use any such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project (except as permitted on other State Highways in accordance with Section 18.04(b)). Subject to Section 18.02, the Department will not disclose any Proprietary Intellectual Property of the Concessionaire (other than to its concessionaires, Contractors, employees, attorneys and agents in connection with the development and operation of the Project who agree to be bound by any confidentiality obligations of the Department relating thereto), and the Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such Proprietary Intellectual Property.

(b) The Department will have the right to purchase from the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire on any other tolled State Highway owned and operated by the Department or other State agency on commercially reasonable terms. The Concessionaire will continue to have the full and complete right to use, sell or license to other Persons any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

(c) With respect to any Proprietary Intellectual Property owned by a Person other than the Concessionaire or the Department, the Concessionaire will obtain from such owner, concurrently with execution of any Contract or purchase order with such owner, both for the Concessionaire and the Department, nonexclusive, nontransferable, irrevocable, fully paid up (other than with respect to ongoing maintenance and support fees) licenses to use such Proprietary Intellectual Property solely in connection with the Project, of at least identical scope, purpose, duration and applicability as the licenses granted by Section 18.04(a); provided, that the foregoing requirement will not apply to standard, pre-specified manufacturer licenses of mass-marketed products (including software products) or equipment where the license cannot be extended to the Department using commercially reasonable efforts or to other licenses of products or equipment where the products or equipment are not reasonably necessary for the operation or maintenance of the Project. The Concessionaire will use commercially reasonable efforts to obtain from such owner a right in favor of the Department to purchase from such owner a nonexclusive, nontransferable, irrevocable, fully paid up license to use such owner’s Proprietary Intellectual Property on any other tolled State Highway owned and operated by the Department or other State agency on commercially reasonable terms. The limitations on sale
and disclosure by the Department set forth in Section 18.04(a) will also apply to the Department’s licenses in such Proprietary Intellectual Property.

(d) The Concessionaire Marks may appear on some of the Project Assets, including supplies, materials, stationery and similar consumable items at the Project on the last Day of the Term. The parties agree that the Concessionaire will remain the owner or licensee, as applicable, of the Concessionaire Marks at the end of the Term, and the Concessionaire may remove, at its expense, the Concessionaire Marks prior to the end of the Term. If the Concessionaire fails to do so, the Department will be entitled to remove the Concessionaire Marks and, in such case, the Department will be entitled to payment of its Allocable Costs in so doing from the Concessionaire. The Department acknowledges and agrees that it will have no right, title, interest or license in the Concessionaire Marks.

(e) On or before the Agreement Date, the Department will grant to the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use any Proprietary Intellectual Property of the Department that has been developed for the Project, solely in connection with the development, construction, operation, maintenance and other incidental activities of the Project. The Concessionaire will not at any time sell such Proprietary Intellectual Property or use or allow any party to use such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project. On or before the Agreement Date, the Department will also assign in favor of the Concessionaire the Department’s rights with respect to any license by the Department’s software suppliers (to the extent permitted by, and subject to the terms of, such license) for the use of any Proprietary Intellectual Property for the Project, together with an assignment of the Department’s rights under any escrow for the Source Code and Source Code Documentation relating to such Proprietary Intellectual Property, which assignments will be reasonably satisfactory to the Concessionaire. The Concessionaire will not disclose any such Proprietary Intellectual Property (other than to its Contractors, employees, attorneys, agents and Affiliates in connection with the Project who agree to be bound by any confidentiality obligations of the Concessionaire relating thereto), and the Concessionaire will enter into a confidentiality agreement reasonably requested by the Department with respect to any such Proprietary Intellectual Property. The Department will continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

Section 18.05 Escrow Documents

(a) General. Prior to the Agreement Date, the Concessionaire, the Department and the Escrow Agent will have executed and delivered the Escrow Agreement to implement the provisions of this Section 18.05. The Concessionaire will submit to the Department for its review and approval the following materials (collectively, the “Escrow Documents”): one copy of all documentary information generated with respect to (i) the expected costs of the Work (which uses the estimating methodology actually used by the Design-Build Contractor) available to the Concessionaire under the Design-Build Contract (the “Construction Escrow Documents”) and (ii) the components of, and formulae for, the Initial Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model, including, without limitation, forecast revenue and expected non-financial costs of the Project during the Term included in the Initial
Base Case Financial Model, the Adjusted Financial Model and the Base Case Financial Model (the “Financing Escrow Documents”). The Concessionaire will deliver the Construction Escrow Documents to the Department within 14 Days following the Agreement Date and will deliver the Financing Escrow Documents not later than the Agreement Date.

(b) Format and Contents.

(i) The Concessionaire may submit Escrow Documents in their usual cost estimating format; provided, that all information is clearly presented and ascertainable and submitted in accordance with the requirements of this Section 18.05. It is not the intention of this Section 18.05 to cause the Concessionaire extra work, but to ensure that the Escrow Documents will be adequate to enable complete understanding and proper interpretation for their intended use.

(ii) The Escrow Documents will be submitted in English and clearly itemize the estimated costs of performing each item of the Project, including financing, administrative and related costs. Cost items will be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review.

(iii) The Construction Escrow Documents will include, to the extent obtained, procured or in the possession of the Concessionaire: estimates for costs of the design professionals and consultants itemized by discipline both for development of the design, all quantity take-offs, crew size and shifts, equipment, calculations of rates of production and progress, copies of quotes from Contractors and suppliers, and memoranda, narratives, drawings and sketches showing site or work area layouts and equipment, add/deduct sheets, geotechnical reviews and consultant reports, all other information used by the Concessionaire to arrive at the estimated prices for the Project, and all information and formulae used by the Concessionaire in developing the Initial Base Case Financial Model. Estimated costs will be broken down into estimate categories for items such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials and subcontract costs as appropriate. Plant and equipment, indirect costs, bond rates and calculations, insurance costs and financing should be detailed. The Concessionaire’s allocation of indirect costs, contingencies, and mark-up will be identified.

(iv) The Construction Escrow Documents will identify all costs. If detailed costs are not available to the Concessionaire, estimated unit costs are acceptable without a detailed cost estimate, provided, that labor, equipment, materials and subcontracts, as applicable, are specified, and provided further, that indirect costs, contingencies, and mark-up, as applicable, are allocated.

(c) Submittal.

(i) The Concessionaire will submit the Escrow Documents in sealed containers, the Construction Escrow Documents in one and the Financing Escrow Documents in another, to the Department, which containers have been clearly marked on
the outside with the Concessionaire’s name, reference to the Project, and the words “I-95 HOV/HOT Lanes Project Construction Escrow Documents” or “I-95 HOV/HOT Lanes Project Financing Escrow Documents” as applicable.

(ii) On or before the Agreement Date, representatives of the Department, assisted by members of the Concessionaire’s staff who are knowledgeable in how the Escrow Documents were prepared, will have examined, organized and inventoried the Escrow Documents. This examination was to ensure that the Escrow Documents are legible and complete. It did not include review of, and does not constitute approval of proposed construction methods, estimating assumptions, or interpretations of any Project Agreements, including the Design-Build Contract. Such examination will not alter any condition or term of any Project Agreement.

(iii) Timely submission of complete Escrow Documents as of the Agreement Date is an essential element of the Concessionaire’s responsibility and a prerequisite to the execution and delivery of this Agreement by the Department.

(iv) To the extent the Concessionaire plans to contract out any part of the Work as of the Agreement Date, the Concessionaire will cause each Contractor whose total Contract price exceeds 5% of the Project costs as set forth in the Design-Build Contract to provide separate similar documentation to be included with those of the Concessionaire. Such documents will be opened and examined in the same manner and at the same time as the examination described above for the Concessionaire to the extent that they are relevant to the issue at hand.

(d) Updating of the Escrow Documents. Upon each update of the Initial Base Case Financial Model, Adjusted Financial Model and Base Case Financial Model Update in accordance with this Agreement (other than any such update that does not change the Financial Formulas or forecast assumptions), such update will be submitted by the Concessionaire to the Escrow Agent promptly and in any event within seven Days after an update has not been disputed or any such dispute has been resolved for inclusion as part of the Financing Escrow Documents. For the avoidance of doubt, previous undisputed versions of the Escrow Documents will remain in escrow with the Escrow Agent.

(e) Storage. The Escrow Documents will be stored at the following address:

SunTrust Bank
919 East Main Street, Floor 7
Richmond, Virginia 23219
Attention: Corporate Agency Services
Telephone: 804-782-5400
Facsimile: 804-782-785

The Concessionaire will bear the cost for storing the Escrow Documents
(f) **Examination.**

(i) Subject to the terms of the Escrow Agreement, the Escrow Documents may be examined by the Department and the Concessionaire at any time deemed necessary by the Department or the Concessionaire and the Department may delegate review of the Escrow Documents to members of its staff or to Consultants; *provided*, that, unless a Consultant is bound by a confidentiality agreement or other obligations to keep the Escrow Documents confidential, each such Consultant will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such examination. No other person will have access to the Escrow Documents. The Department will provide advance notice of any such examination to the Design-Build Contractor, and the Design-Build Contractor will have the right to be present during an examination of the Construction Escrow Documents; *provided*, however, that such right will not in any way limit the Department’s right to review the Construction Escrow Documents if the Design-Build Contractor does not attend such examination. Notwithstanding the foregoing, the Escrow Documents and information contained therein may be used:

(A) to assist in the negotiation of Concessionaire Damages, Net Cost Savings and Change Orders;

(B) in the resolution of any claim or dispute before any entity selected to resolve disputes; and

(C) in any dispute resolution procedure commenced hereunder.

(ii) Access to the documents will take place in the presence of duly designated representatives of both the Department and the Concessionaire, except that, if the Concessionaire refuses to be present or to cooperate in any other way in the review of the documents, the Department may upon notice to the Concessionaire, review such documents without the Concessionaire being present.

(g) **Ownership.** The Escrow Documents are, and will always remain, the property of the Concessionaire, subject to joint review by the Department and the Concessionaire, as provided herein. The Department stipulates and expressly acknowledges that the Escrow Documents constitute trade secrets. This acknowledgement is based on the Department’s express understanding that the information contained in the Escrow Documents is not known outside the Concessionaire’s business, is known only to a limited extent and only by a limited number of employees of the Concessionaire, is safeguarded while in the Concessionaire’s possession, is extremely valuable to the Concessionaire and could be extremely valuable to the Concessionaire’s competitors by virtue of its reflecting Concessionaire’s contemplated techniques of design and construction. The Department further acknowledges that the Concessionaire expended substantial sums of money in developing the information included in the Escrow Documents and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. The Department further acknowledges that the Escrow Documents and the information contained therein are made available to the Department
only because such action is an express prerequisite to the execution and delivery of this Agreement. The Department further acknowledges that the Escrow Documents include a compilation of the information used in the Concessionaire’s business, intended to give the Concessionaire an opportunity to obtain an advantage over competitors who do not know of or use the contents of the documentation.

(h) **Final Disposition and Return of Escrow Documents.** The Construction Escrow Documents will be returned to the Concessionaire upon the earlier to occur of (i) completion of the Design-Build Work, including tender of final payment and resolution of all claims or disputes arising under the Design-Build Contract or (ii) termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement. The remaining Escrow Documents will be returned upon termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement.

**Section 18.06 Source Code Escrow**

(a) The Department and the Concessionaire acknowledge that the Concessionaire and/or the Concessionaire’s Software suppliers may not wish to disclose directly to the Department at the time of installation the Source Code and Source Code Documentation which is Proprietary Intellectual Property of the Concessionaire and/or the Concessionaire’s software suppliers, as public disclosure could deprive the Concessionaire and/or the Concessionaire’s software suppliers of commercial value, but that the Department must be ensured access to such Source Code and Source Code Documentation in either of the following circumstances:

(i) in the case of Source Code and Source Code Documentation that is a Contractor’s Proprietary Intellectual Property, if this Agreement is terminated for Concessionaire Default or upon assignment by Concessionaire of its rights pursuant to this Agreement, the Department assumes the contract or subcontract with such Software supplier, and either (A) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Software supplier occurs or (B) the Software supplier fails or ceases to provide services as necessary to permit continued use of the software by the Department as contemplated by this Agreement; or

(ii) in the case of Source Code and Source Code Documentation that is the Concessionaire’s Proprietary Intellectual Property, (A) this Agreement is terminated for Concessionaire Default, (B) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Concessionaire occurs or (C) the Concessionaire fails or ceases to provide services as necessary to permit continued use of the software by the Department as contemplated by this Agreement.

(b) By no later than the Service Commencement Date, the Department and the Concessionaire will establish one or more escrows (the “Source Code Escrows”) with the Escrow Agent on terms and conditions reasonably acceptable to the Department and to the Concessionaire into which such Source Code and Source Code Documentation will be escrowed, including all relevant commentary, explanations and other documentation, as well as instructions
to compile such Source Code and Source Code Documentation and all modifications, additions or substitutions made to such Source Code and Source Code Documentation.

(c) The escrow provided for herein will survive any termination of this Agreement regardless of the reason.

(d) The Concessionaire will pay the reasonable costs and expenses of the Escrow Agent related to the Source Code Escrows.

Section 18.07 Inspection and Audit Rights

(a) Subject to Section 18.07(c), the Concessionaire will make available to the Department and the FHWA (including their employees, contractors, consultants, agents or designees), and allow each of them access to, such books, records and documents as they may reasonably request in connection with the Project for any purpose related to the Project, this Agreement, including but not limited to monitoring compliance with the terms and conditions of this Agreement. The Department will provide the Concessionaire 48 hours prior written notice prior to exercising its rights to access and audit the Concessionaire’s books, records and documents pursuant to this Section 18.07(a) and Section 18.07(b); provided, however, that the Department may exercise such rights unannounced and without prior notice during a Concessionaire Default or where there is good faith suspicion of fraud.

(b) Subject to Section 18.07(c), the Department and the State, at the Department’s own expense, will have the right to carry out an audit of information relating to (i) the design, construction, operation, maintenance and repair of the Project or (ii) other information required to be maintained or delivered by the Concessionaire pursuant to this Agreement or any other Project Agreement. Such audit may extend, without limitation, to calculations undertaken, and financial or business reports provided, by or on behalf of the Concessionaire pursuant to this Agreement. The Department or its employees, agents, auditors, attorneys and consultants, at the Department’s own expense may examine, copy, take extracts from and audit all the books and records of the Concessionaire related to the Project, including all subcontracts entered into under Section 24.02. In addition, the Department or its agents, auditors, attorneys and consultants, at the Department’s own expense, may conduct a re-audit and observe the business operations of the Concessionaire to confirm the accuracy of books and records. In addition, at FHWA’s request, the Concessionaire will make all its records relating to the Project available to the FHWA for inspection and audit.

(c) The Concessionaire reserves the right to assert exemptions from Persons other than the Department from disclosure for information that would be exempt under Law from discovery or introduction into evidence in legal actions. Unless otherwise required by Law or this Agreement, the Concessionaire may make available copies of books, records and documents containing trade secrets or confidential proprietary information with such information redacted.

(d) In addition, the Concessionaire, at its expense, will cause a reputable independent auditor to annually audit its books and records relating to the Project, according to GAAP or any other generally accepted accounting standards, which are acceptable to the Department. The
Concessionaire will cause the independent auditor to deliver the audit report to the FHWA and the Department promptly after it is completed, but in any event within 120 Days of the end of each of the Concessionaire’s fiscal years.

(e) Nothing contained in this Agreement will in any way limit the constitutional and statutory powers, duties and rights of elected State officials, including the independent rights of the State Auditor of Public Accounts, in carrying out his or her legal authority.

(f) No audit rights will extend to the make-up of any lump sum amount or unit price or rate under the Design-Build Contract once such amount, price or rate has been agreed.

(g) The Concessionaire will cooperate with the Department, the FHWA and the other persons mentioned in this Section 18.07 in the exercise of their rights hereunder. At the request of the Department, the Concessionaire will furnish or cause to be furnished to the Department such information relating to the operation, maintenance and repair of the Project as the Department may reasonably request for any purpose related to the Project or this Agreement and as will be in the possession and control of the Concessionaire, any Concessionaire Party, or any of their Representatives. Subject to Section 18.02, the Department will keep confidential any information obtained from the Concessionaire, any Concessionaire Party or their Representatives that (i) constitutes trade secrets or commercial or financial information (A) where the trade secrets or commercial or financial information are proprietary, privileged or confidential or (B) where disclosure of the trade secrets or commercial or financial information may cause competitive harm and (ii) is designated as such by the Concessionaire, a Concessionaire Party or their Representatives in writing to the Department, and the Department has determined that such information qualifies for exemption from disclosure under Law.

ARTICLE 19.

DEFAULTS AND REMEDIES

Section 19.01 Concessionaire Defaults

The occurrence of any one or more of the following events during the Term will constitute a “Concessionaire Default” pursuant to this Agreement:

(a) any representation or warranty made by the Concessionaire herein or in any other Project Agreement to which the Concessionaire and the Department are parties is false or misleading in any respect on the date made and a material adverse effect upon the Project or the Department’s rights or obligations under the Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof, with cure regarded as complete only when the adverse effects are remedied;

(b) the Concessionaire fails to comply with, perform or observe any other material obligation, covenant, agreement, term or condition in this Agreement or any Project Agreement to which the Department and the Concessionaire are parties (provided, that a debarment pursuant
to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a Concessionaire Default, which failure materially and adversely affects the Department’s rights or obligations under this Agreement or any other VDOT Project Agreement, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; provided, that the maximum cure period may be extended one time for any such failure to a final date if (i) at least 30 Days prior to the end of the maximum 180-Day cure period, the Concessionaire delivers a written work plan to the Department outlining the actions by which the Concessionaire will cure such failure and setting forth a final date by which the Concessionaire will cure such failure and (ii) the Department approves such work plan within 30 Days in its reasonable discretion; provided, that in all cases and regardless of the duration of the cure period, (A) the Concessionaire is proceeding with all due diligence to cure or cause to be cured such failure, (B) the failure is capable of being cured within a reasonable period of time, and (C) such failure is in fact cured within such period of time; provided further, that this Section 19.01(b) will not apply to events covered by other provisions of this Section 19.01; and provided, further, that any failure to comply with, perform or observe any obligation that is covered by the Non-Compliance Points system will constitute a Concessionaire Default only as provided in Section 11.05(c);

c) the Concessionaire fails to pay to the Department when due any undisputed amount in excess of $100,000, adjusted annually by the percentage increase in CPI, payable to the Department pursuant to this Agreement or any other VDOT Project Agreement or to deposit funds to any reserve account in the amount and within the time period required by this Agreement, and such failure, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof;

(d) other than a Permitted Closure, the Concessionaire closes all or part of the HOT Lanes to traffic, at any time following Service Commencement, other than in accordance with the terms of this Agreement, and such closure continues without cure for a period of ten Days following the date the Department delivers to the Concessionaire written notice thereof;

(e) (i) the Concessionaire fails to achieve Substantial Completion of the Project by the Long Stop Date, as such date may be extended pursuant to this Agreement or (ii) in the case where a new Long Stop Date has been established pursuant to Section 8.15 hereof, the Concessionaire fails to diligently implement the Substantial Completion Recovery Plan;

(f) the Concessionaire fails to maintain, or to cause to be maintained, in effect the insurance, guarantees, letters of credit or other performance security as and when required pursuant to this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same and such failure continues without cure for a period of ten Business Days following the date the Department delivers to the Concessionaire written notice thereof;
(g) this Agreement or all or any portion of the Concessionaire’s Interest is Transferred, or there occurs a Change in Control, in contravention of Section 25.01;

(h) after exhaustion of all rights of appeal, (i) there occurs any suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the Concessionaire, any affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905 or successor regulation of similar import), or Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor whose work is not completed, from bidding, proposing or contracting with any Federal or State department or agency or (ii) the Concessionaire, Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor who have ongoing Work, or any of their respective officers, directors, or Administering Employees have been convicted of, or plead guilty or nolo contendere to, a violation of Law for fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the State, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail); provided, that a debarment pursuant to the provisions set forth in Section 24.03(b) (relating to SWaM participation) will not constitute a Concessionaire Default. If the offending Person is an officer, director or Administering Employee, cure will be regarded as complete when the Concessionaire proves that such Person has been removed from any position or ability to manage, direct or control the decisions of the Concessionaire, Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor (as applicable) or to perform Work; and if the Person debarred or suspended or subject to an agreement for voluntary exclusion is an affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905 or successor regulation of similar import), Fluor, Lane Construction Corporation, Transurban or the Design-Build Contractor, cure will be regarded as complete when the Concessionaire replaces such Person in accordance with this Agreement;

(i) the Concessionaire or any Concessionaire Financial Party (i) admits, in writing, that it is unable to pay its debts as they become due, (ii) makes an assignment for the benefit of its creditors, (iii) files a voluntary petition under Title 11 of the U.S. Code, or files any other petition or answer seeking, consenting to or acquiescing in any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar Law, or (iv) seeks or consents to or acquiesces in the appointment of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of such Concessionaire or Concessionaire Financial Party, or of all or any substantial part of its properties or of the Project or any interest therein;

(j) within 90 Days after the commencement of any proceeding against the Concessionaire or any Concessionaire Financial Party seeking any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar Law, such proceeding has not been dismissed, or, within 90 Days after the appointment, without the consent or acquiescence of such Concessionaire or Concessionaire Financial Party, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of such Concessionaire or Concessionaire Financial Party or of all or any substantial part of its properties
or of the Project or any interest therein, such appointment has not been vacated or stayed on appeal or otherwise, or, within 90 Days after the expiration of any such stay, such appointment has not been vacated;

(k) a levy under execution or attachment has been made against all or any part of the Project or any interest therein (including the Concessionaire’s Interest) as a result of any Lien (other than a Lien relating to permitted Concessionaire Debt) created, incurred, assumed or suffered to exist by the Concessionaire or any Person claiming through it, and such execution or attachment has not been vacated, removed or stayed by court order, bonding or otherwise within a period of 60 Days, unless such levy resulted from actions or omissions of the Department or its Representatives; and

(l) after the sixth full month following the Service Commencement Date, the Concessionaire (i) fails to deliver an OSPS Improvement Plan meeting the requirements set forth in Section 5.08(b) at the time specified in Section 5.08(b) and such failure continues without cure for a period of 30 Days following the date on which the Department delivers to the Concessionaire notice of such failure, or (ii) fails to use commercially reasonable efforts to comply with any of the provisions set forth in an OSPS Improvement Plan submitted pursuant to Section 5.08(b), and such failure to use commercially reasonable efforts continues without cure for a period of 30 Days following the date on which the Department delivers notice of such failure to the Concessionaire.

Section 19.02 Department Remedies upon Concessionaire Default

Upon the occurrence of a Concessionaire Default, the Department may, subject to the provisions of the Direct Agreement, do any or all of the following as the Department, in its sole discretion, will determine:

(a) the Department may terminate this Agreement and any other Project Agreements to which the Department and the Concessionaire are both parties, to the extent provided in Section 20.05;

(b) if the Concessionaire Default is by reason of the failure to pay any undisputed monies to a third party, the Department may (but will have no obligation to) make payment on behalf of the Concessionaire of such monies, and any amount so paid by the Department will be payable by the Concessionaire to the Department within five Days after demand, including accrued interest at the Bank Rate from the date such payment is made by the Department to the repayment date; provided, that (i) the Department will not incur any liability to the Concessionaire for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default and (ii) the Department’s cure of any Concessionaire Default will not waive or affect the Department’s rights against the Concessionaire by reason of the Concessionaire Default;

(c) the Department may cure the Concessionaire Default (but this will not obligate the Department to cure or attempt to cure a Concessionaire Default or, after having commenced to cure or attempted to cure a Concessionaire Default, to continue to do so), and all costs and
expenses reasonably incurred by the Department in curing or attempting to cure the Concessionaire Default, including the Department’s Allocable Costs, will be payable by the Concessionaire to the Department within five Days of demand, including accrued interest at the Bank Rate from the date such costs or expenses were incurred to the repayment date; provided, that (i) the Department will not incur any liability to the Concessionaire, and the Concessionaire hereby irrevocably waives and releases any liability of the Department to the Concessionaire, for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default and (ii) the Department’s cure of any Concessionaire Default will not waive or affect the Department’s rights against the Concessionaire by reason of the Concessionaire Default;

(d) except as provided in Section 19.02(e) below, the Department will not incur any liability to the Concessionaire for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default, and the Department’s cure of any Concessionaire Default will not affect the Department’s rights against the Concessionaire by reason of the Concessionaire Default.

(e) without notice and without awaiting lapse of the period to cure, in the event of a Concessionaire Default under Section 19.01(d) (closure of all or any part of the Project or any lane in violation of this Agreement), or any failure to perform a Safety Compliance Order and the Concessionaire Default or failure to perform the Safety Compliance Order results in or prolongs an Emergency or danger to persons or property, the Department may enter and take control of the Project or applicable portion thereof to the extent the Department finds it necessary to rectify the closure, Emergency or danger, and may suspend construction Work and/or close or cause to be closed the portion of the Project affected by the Emergency or danger, until such time as such breach or failure is cured, or the Department terminates this Agreement. In the event of such action by the Department, the Department may, subject to Law, distrain against any of the materials and equipment purchased exclusively for the Project that are situated on the Project and the Concessionaire waives any statutory protections and exemptions in connection therewith. Further, the Concessionaire will pay to the Department on demand the Department’s Allocable Costs in connection with the exercise of the Department’s rights pursuant to this Section 19.02(e). So long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a breach or failure, such action will not be deemed unlawful or a breach of this Agreement, will not expose the Department to any liability to the Concessionaire and will not entitle the Concessionaire to any other remedy, it being acknowledged that the Department has a high priority, paramount public interest in providing and maintaining continuous public access to the Project Assets and in protecting public and worker safety. The foregoing will not, however, protect the Department from the Concessionaire’s lawful Claims for recovery for third party bodily injury or property damage arising out of any such Department action, if and to the extent (i) (A) the Department was mistaken in believing such a breach or failure occurred, or (B) such injury or property damage was caused by the Department’s gross negligence, recklessness or willful misconduct, and (ii) the third party liability is not insured and not required to be insured pursuant to this Agreement. Immediately following rectification of such breach or failure, as determined by the Department,
acting reasonably, the Department will relinquish control and possession of the Project or applicable portion thereof back to the Concessionaire; and

(f) the Department may exercise any of its other rights and remedies provided for hereunder or the other Project Agreements or at law or in equity, except where a specific remedy is expressly provided for herein.

Section 19.03 Financial Close Liquidated Damages

No liquidated damages will be assessed for failure to achieve Financial Close by the Financial Close Deadline.

Section 19.04 Department Default

The occurrence of any one or more of the following events during the Term will constitute a “Department Default” pursuant to this Agreement:

(a) any representation or warranty made by the Department herein or in any other Project Agreement to which the Department and the Concessionaire are parties is false or misleading in any respect on the date made and a material adverse effect upon the Project or the Concessionaire’s rights or obligations under such Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Concessionaire delivers to the Department written notice thereof, with cure regarded as complete only when the adverse effects are remedied;

(b) the Department fails to comply with, perform or observe any material obligation, covenant, agreement, term or condition in this Agreement or any other Project Agreement to which it is a party, which failure materially adversely affects the Concessionaire’s Interest, and such failure continues without cure for a period of 90 Days following the date the Concessionaire delivers to the Department written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; provided, that in the latter case, (i) the Department is proceeding with all due diligence to cure or cause to be cured such failure, (ii) the failure is capable of being cured within a reasonable period of time and (iii) such failure is in fact cured within such period of time; or

(c) subject to Section 25.19, the Department fails to pay to the Concessionaire when due any undisputed amount in excess of $100,000, adjusted annually by the percentage increase in CPI, payable to the Concessionaire pursuant to this Agreement, and such failure continues without cure for a period of 90 Days following the date on which the Concessionaire delivers to the Department written notice thereof.

Section 19.05 Concessionaire Remedies upon Department Default

(a) Upon the occurrence of a Department Default pursuant to this Agreement, the Concessionaire may by notice to the Department declare the Department to be in default and
may, subject to the provisions of Section 19.05(b), do any or all of the following as the Concessionaire, in its discretion, will determine:

(i) the Concessionaire may terminate this Agreement and any Project Agreements to which the Concessionaire and the Department are both parties, to the extent provided in Section 20.04; and

(ii) the Concessionaire may exercise any of its other rights and remedies provided for under this Agreement or at Law, subject to any limitations thereon set forth in this Agreement, including Section 25.09 and Section 25.19.

(b) If the Department’s failure constitutes a Delay Event or Compensation Event, the Concessionaire’s sole recourse will be to seek remedies pursuant to Article 13 and Article 14.

ARTICLE 20.

TERMINATION; HANDBACK

Section 20.01 Termination Upon Expiration of Term

Unless earlier terminated in accordance with the terms of this Article 20, all the rights and obligations of the parties hereunder will cease and terminate, without notice or demand, on the last Day of the Term. Not later than 180 Days preceding the end of the Term, the Concessionaire and the Department will develop a plan (the “Transition Plan”) to assure the orderly transition of the Project to the Department or its designee (which Transition Plan is in addition to the adjustments and changes to the Life Cycle Maintenance Plan under Section 20.02). The parties will then diligently implement the Transition Plan in accordance with the Technical Requirements.

Section 20.02 Handback Obligations and Reserve

(a) Upon the end of the Term, the Concessionaire shall hand-back the Project to the Department, at no charge to the Department, with asset condition having a remaining life of the greater of: (i) five years; or (ii) life within its normal lifecycle (collectively referred to as the “Handback Requirements”). In addition, if requested by the Department, the Concessionaire will dismantle the HOT Lanes toll system as required to convert the HOT Lanes back to HOV Lanes; provided that the Department shall notify the Concessionaire at least one year prior to the end of the Term if the HOT Lanes are to be converted back to HOV Lanes. Any such dismantling of the HOT Lanes toll system shall be at Concessionaire’s sole cost and expense.

(b) Beginning 20 years prior to the expiration of the Term and every five years thereafter, the Concessionaire and the Department will jointly conduct inspections of the Project Assets, for the purposes of jointly (i) determining and verifying the condition of all Project Assets and their residual lives, and (ii) determining, revising and updating the Life Cycle Maintenance Plan to reflect the Handback Requirements.
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(c) Beginning five years prior to the expiration of the Term, the Concessionaire and the Department will jointly conduct annual inspections of the Project Assets to ensure that the Handback Requirements will be met.

(d) The Concessionaire shall diligently perform and complete all work contained in the Life Cycle Maintenance Plan prior to reversion of the Project back to the Department, based on the required adjustments and changes to the Life Cycle Maintenance Plan resulting from the inspections and analysis under Section 20.02(b) and (c). The Concessionaire shall complete all such work prior to the end of the Term.

(e) Starting five years prior to the expiration of the Term, the Concessionaire shall post to the Department a ten-year irrevocable Letter of Credit or a Performance Bond for a period of five years after expiration of the Term in an amount equal to 50% of the nominal lifecycle cost expended in the previous five years of the Term pursuant to the most recent Life Cycle Maintenance Plan approved by the Department. This Letter of Credit or Performance Bond may be drawn upon by the Department only in the event that subsequent to termination or expiration of the Term, the Project Assets are found to fail to address the Handback Requirements and in the amount required to address such failures up to the full amount of the Letter of Credit or Performance Bond.

(f) The Department will determine whether the Project Assets meet the Handback Requirements based on routine inspections up to five years after termination or expiration of the Term (“Handback Period”). If the Concessionaire disagrees with the Department’s determination of the condition of the Project Assets during the Handback Period, the Concessionaire may, at its own expense, retain an engineer to inspect the facility and review the findings of the Department. Resolution of any disagreement will be subject to the dispute resolution procedures set forth in Article 21.

Section 20.03 Termination for a Significant Force Majeure Event

(a) If a Significant Force Majeure Event occurs, then

(i) the Concessionaire may elect to terminate this Agreement unless the Department elects, within 14 Days following receipt of the Concessionaire’s written notice of election to terminate, to treat the Significant Force Majeure Event as a Compensation Event; and

(ii) the Department may elect to terminate this Agreement unless the Concessionaire elects, within 60 Days following the Significant Force Majeure Event, to restore any resulting damage or destruction at the Concessionaire’s sole cost and expense and furnishes a restoration plan acceptable to the Department with respect to such damage or destruction;

provided, that a party will exercise its right to terminate this Agreement pursuant to this Section 20.03(a) by delivering to the other party written notice of its election to terminate this Agreement (“Significant Force Majeure Termination Notice”).
(b) If the Concessionaire has elected to restore the Project in accordance with Section 20.03(a)(ii), it will promptly carry out the restoration of the Project in accordance with the terms of this Agreement and the restoration plan approved by the Department.

(c) If this Agreement is terminated pursuant to Section 20.03(a), the Department will pay to the Concessionaire the Significant Force Majeure Termination Amount.

**Section 20.04 Termination for Failure to Achieve Financial Close; Termination Based on Excess Interest Rate Fluctuation**

(a) **Failure to Achieve Financial Close by Financial Close Deadline.** If the Concessionaire fails to achieve Financial Close by the Financial Close Deadline, either party may, at its sole discretion, elect to terminate this Agreement and any other Project Agreement to which it is a party. If a party elects to terminate pursuant to this Section 20.04(a), such party will provide written notice of termination to the other party, and such termination will be effective immediately upon delivery of such notice. In the event of such termination, the Department will pay the Concessionaire the Non-Financial Close Termination Amount.

(b) **Liability Upon Termination.** In the event of any termination under this Section 20.04, the Department will have no liability to the Concessionaire under this Agreement or any other Project Agreement other than the Non-Financial Close Termination Amount, and the Concessionaire will not be entitled to any Concessionaire Damages.

**Section 20.05 Termination for Concessionaire Default**

(a) Subject to the provisions of the Direct Agreement, at any time after the occurrence and during the continuance of a Concessionaire Default, the Department is entitled to terminate this Agreement and any other Project Agreement to which the Department and the Concessionaire are both parties.

(b) If the Department elects to terminate pursuant to this Section 20.05, the Department will deliver to the Concessionaire and the Collateral Agent written notice of its election to terminate, which termination will take effect not less than 60 Days after the delivery of such notice.

(c) In the event of termination pursuant to this Section 20.05, the Department will pay to the Concessionaire in accordance with Section 25.19, the Concessionaire Default Termination Amount.

(d) A termination by the Department for Concessionaire Default or any other termination of this Agreement by the Department which is later determined by the court of proper jurisdiction to be wrongful or in violation of this Agreement will be deemed to have been a termination for Department Default pursuant to Section 20.06 for the sole purpose of calculating the compensation owed to the Concessionaire by the Department.
Section 20.06 Termination for Department Default

(a) Subject to the provisions of this Section 20.06, the Concessionaire is entitled to terminate this Agreement and any other Project Agreement to which the Concessionaire and the Department are both parties in the event of a Department Default.

(b) If the Concessionaire elects to terminate pursuant to this Section 20.06, the Concessionaire will deliver to the Department a written notice of intent to terminate this Agreement. Upon receipt of such notice of intent to terminate, the Department will be entitled to cure such Department Default by providing the Concessionaire with a written work plan within the 90-Day period after the Department receives the written notice of intent to terminate. The work plan will outline the actions by which the Department will ensure future compliance with the obligation, covenant, agreement, term or condition in this Agreement that the Department failed to perform or observe. The work plan will be subject to the Concessionaire’s written approval (which approval will not be unreasonably withheld, delayed or conditioned).

(c) If (i) the Department fails to provide the Concessionaire with the work plan required pursuant to Section 20.06(b) or (ii) the Department fails to comply in any material respect with the work plan approved by the Concessionaire pursuant to Section 20.06(b) and in the case of this clause (ii), such failure continues without cure for 60 Days following the date the Concessionaire delivers to the Department written notice thereof, the Concessionaire may terminate this Agreement by delivering to the Department written notice of its election to terminate, which termination will take effect not less than 30 Days after the delivery of such notice.

(d) In the event of a termination pursuant to this Section 20.06, the Department will pay to the Concessionaire the Department Default Termination Amount.

Section 20.07 Other Termination

(a) If this Agreement is terminated by the Department or the State prior to the end of the Term, other than pursuant to Sections 19.02, 20.03, 20.04, 20.05 or 20.06, or is canceled, rescinded or voided during the Term, subject to Section 25.19, the Department will pay to the Concessionaire the Other Termination Amount. A termination as contemplated by this Section 20.07 shall not be effective unless and until Project Value has been determined pursuant to Section 20.11.

(b) Each of the Department and Concessionaire hereby acknowledges and agrees that it may only terminate this Agreement in accordance with the express terms hereof.

Section 20.08 Concessionaire Actions Upon Termination

(a) On delivery of notice of termination of this Agreement or the Concessionaire’s rights hereunder for any reason prior to the expiration of the Term, the provisions of this Section 20.08 will apply. The Concessionaire will timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due
to the Concessionaire or the Department on account of termination. In connection with the expiration of the Term, certain provisions of this Section 20.08, as specified, will apply.

(b) The Concessionaire will conduct all discussions and negotiations to determine the amount of any termination compensation, and will share with the Department all data, documents and information pertaining thereto, on an Open Book Basis.

(c) Except as otherwise specified in this Agreement, within 30 Days after receipt of a notice of termination, or, if applicable, not later than 120 Days before expiration of the Term, the Concessionaire will meet and confer with the Department for the purpose of developing an interim transition plan for the orderly transition of Work, demobilization and transfer to the Department of control of the Project and Project Right of Way. The parties will use diligent efforts to complete preparation of the interim transition plan within 15 Days after the date the Concessionaire receives the notice of termination or, if applicable, not later than 15 Days before expiration of the Term. The parties will use diligent efforts to complete a final transition plan within 30 Days after such date. The transition plan will be in form and substance acceptable to the Department in its good faith discretion and will include and be consistent with the other provisions and procedures set forth in this Section 20.08, all of which procedures the Concessionaire will promptly follow, regardless of any delay in preparation or acceptance of the transition plan.

(d) Upon receipt of a notice of termination, or, if applicable, before expiration of the Term, the Concessionaire will take all action that may be necessary, or that the Department may reasonably direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, parts, supplies and other property. For the avoidance of doubt, during the period from its receipt of a notice of termination until the expiration of the Term, the Concessionaire will continue to perform its obligations and be entitled to receive Toll Revenues pursuant to this Agreement.

(e) The Concessionaire will deliver to the Department on the date of expiration of the Term or on the effective date of any earlier termination:

(i) all tangible personal property, reports, books, and records necessary or useful for the Project, and, to the extent provided in Article 18, Work Product and Intellectual Property used or owned by the Concessionaire or any Contractor relating to the Project or the Work; excluding, however, all personal property, machinery, equipment and tools owned or leased by any Contractor and not incorporated or intended to be incorporated into the Project;

(ii) possession and control of the Project and Project Assets (other than the Department Shared Assets), free and clear of any and all Liens created, incurred or suffered by the Concessionaire, any Concessionaire Party or any Affiliate or anyone claiming under any of them; provided, that release of the Liens of the Lenders will be subject to payment of termination compensation owing by the Department;
(iii) all other intangible personal property used or owned by the Concessionaire and relating to or derived from the Project and the Work; and

(iv) a notice of termination of this Agreement and the Concessionaire’s Interest, in the form reasonably required by the Department, executed and acknowledged by the Concessionaire.

(f) If, as of the date on which the notice of termination is delivered, the Concessionaire has not completed construction of all or part of the Project, the Department may, subject to the provisions of the Direct Agreement, elect, by written notice to the Concessionaire and the Design-Build Contractor delivered within 90 Days after the date on which the notice of termination is delivered, to continue in effect the Design-Build Contract or to require the termination of such agreement. If the Department does not deliver written notice of election within such time period, the Department will be deemed to elect to require termination of the Design-Build Contract. If the Department elects to continue the Design-Build Contract in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire’s right, title and interest in and to the Design-Build Contract, and the Department will assume in writing the Concessionaire’s obligations thereunder that arise from and after the end of the Term. If the Department elects (or is deemed to elect) to require termination of the Design-Build Contract, then the Concessionaire will:

(i) unless the Department has granted Replacement Agreements to a Lender or its Substituted Concessionaire, take such steps as are necessary to terminate the Design-Build Contract, including notifying the Design-Build Contractor that the Design-Build Contract is being terminated and that the Design-Build Contractor is to immediately stop work and stop and cancel orders for materials, services or facilities unless otherwise authorized in writing by the Department;

(ii) immediately and safely demobilize and secure construction, staging, lay down and storage areas for the Project Assets and Utility Relocations included in the construction Work in a manner satisfactory to the Department, and remove all debris and waste materials except as otherwise approved by the Department in writing;

(iii) take such other actions as are necessary or appropriate to mitigate further cost;

(iv) subject to the prior written approval of the Department, settle all outstanding liabilities and all Claims arising out of the Design-Build Contract;

(v) cause the Design-Build Contractor to execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Design-Build Contractor’s right, title and interest in and to (A) all third party agreements and permits, except Contracts for performance of the Design-Build Work; provided, that the Department assumes in writing all of the Design-Build Contractor’s obligations thereunder that arise after the effective date of termination
and (B) all assignable warranties and Claims held by the Design-Build Contractor against other Contractors and other third parties in connection with the Project or the Work; provided that the Design-Build Contractor will be entitled to retain its rights and remedies with respect to Work performed prior to the effective date of termination; and

(vi) carry out such other directions as the Department may give for suspension or termination of Work performed under the Design-Build Contract.

(g) If, as of the date notice of termination is delivered, the Concessionaire has entered into any other Contract for the design, construction, permitting, installation and equipping of the Project, the Department will elect, by written notice to the Concessionaire, to continue in effect such Contract or to require its termination. If the Department elects to continue the Contract in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire’s right, title and interest in and to the Contract, and the Department will assume in writing the Concessionaire’s obligations thereunder that arise from and after the effective date of termination. If the Department elects to require termination of the Contract, then the Concessionaire will take actions comparable to those set forth in Section 20.08(f) with respect to the Contract.

(h) If, as of the date notice of termination is delivered, the Concessionaire has entered into any operations or maintenance Contract, the Department will elect, by written notice to the Concessionaire, to continue it in effect or require its termination; provided, that if a Lender is entitled to Replacement Agreements following termination, the Department will not elect to terminate any such Contract until the Lender’s right to Replacement Agreements expires without exercise. If the Department elects to continue any such Contract in effect, then on or about the effective date of termination (or promptly after any later election to terminate) the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire’s right, title and interest in and to the Contract, and the Department will assume in writing the Concessionaire’s obligations thereunder that arise from and after the effective date of termination.

Section 20.09 Liability After Termination; Consequences of Termination

(a) If this Agreement is terminated by reason of a Concessionaire Default or a Department Default or any other Project Agreement is terminated for default thereunder, such termination will not excuse the defaulting party from any liability arising out of such default as provided in the Project Agreements. If any outstanding Claim of the Concessionaire against the Department that is independent of the event of termination and determination of the termination compensation is resolved prior to payment of the termination compensation (if any), the parties will adjust the termination compensation by the amount of the unpaid award, if any, on the Claim. Notwithstanding the foregoing, any termination of this Agreement will automatically extinguish any Claim of the Concessionaire to payment of Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination; provided, however, that (i) Claims for
any such Net Cost Impacts that cannot reasonably be avoided by the Concessionaire will not be extinguished, and (ii) the foregoing will not limit any Claim of the Concessionaire for interest on unpaid amounts owing or to become owing by the Department as provided herein.

(b) If this Agreement is terminated by any reason other than a Concessionaire Default or a Department Default or any other Project Agreement is terminated other than a termination for default, no party will have any further obligation or liability except for performance of their respective obligations which are either expressly stated in this Agreement or any other Project Agreement to survive termination or by their sense and context are intended to survive termination.

(c) The Department will, as of the effective date of termination of this Agreement or the Concessionaire’s rights hereunder, whether due to expiration or earlier termination of the Term, assume full responsibility for the Project or, if Substantial Completion has not been achieved or other Work has otherwise not been completed as of such date, be permitted to assume full responsibility for such outstanding Work, and as of such date, the Concessionaire will have no liability or responsibility for such Work, as the case may be, occurring after such date; provided, that the Department and the Concessionaire will remain fully responsible for all of their respective obligations or liabilities pursuant to this Agreement or any other Project Agreement arising before the effective date of termination and those obligations pursuant to this Agreement or other Project Agreements which survive termination.

(d) Each of the Concessionaire and the Department will be liable for all costs, expenses and other amounts for which it is liable or responsible hereunder incurred up to the effective date of termination of this Agreement or the Concessionaire’s rights hereunder, whether due to expiration or earlier termination of the Term, and the Concessionaire will not be liable for any costs, expenses and amounts incurred in connection with the Project or the Work on and after such date, except to the extent such costs, expenses and amounts are properly included in the measure of any damages due to the Department arising from a default by the Concessionaire pursuant to this Agreement. The amount of any termination compensation is subject to reduction and offset for such damages.

(e) Regardless of the Department’s prior actual or constructive knowledge thereof, no contract or agreement to which the Concessionaire is a party (unless the Department is also a party thereto) as of the effective date of termination will bind the Department, unless the Department elects to assume such contract or agreement in writing. Except in the case of the Department’s express written assumption, no such contract or agreement will entitle the contracting party to continue performance of work or services respecting the Project following the effective date of termination, or to any Claim, legal or equitable, against the Department.

(f) As of the effective date of termination of this Agreement, whether due to expiration or earlier termination of the Term, the Permit and all of the Concessionaire’s Interest will automatically terminate and expire, and all Liens created, permitted or suffered by the Concessionaire will be automatically extinguished, provided however, that the foregoing will not prohibit the Concessionaire from assigning its right to receive termination payments to the Lenders.
Section 20.10 Exclusive Termination Remedies

(a) Each of the Department and the Concessionaire hereby acknowledges and agrees that it may only terminate this Agreement in accordance with the express terms hereof.

(b) Article 19 and this Article 20 set forth the entire and exclusive provisions and rights of the Department and the Concessionaire regarding termination of this Agreement, and any and all other rights at law or in equity to terminate or to payment of compensation upon termination are hereby waived to the maximum extent permitted by Law. The parties hereto agree that, upon any termination of this Agreement, the payments provided herein will constitute the Concessionaire’s sole compensation (and the Concessionaire shall have no further liability to the Department except as otherwise provided herein) pursuant to this Agreement and in the event the Department or any designee or licensee of the Department imposes tolls for travel on the Project after termination of this Agreement, neither the Concessionaire nor any beneficiary or Lender as a result of a Financing Assignment will be entitled to any further compensation in respect thereof. In furtherance of the foregoing, the parties hereto agree that the provisions of Section 56-568B of the Code of Virginia will not apply to the Project after the termination of this Agreement.

Section 20.11 Determination of Project Value

(a) In the event the Department owes the Concessionaire an amount calculated by reference to the Project Value, Project Value will be determined according to the following procedures:

(i) within 30 Days after a party requests the appointment of an appraiser, the Department and the Concessionaire will confer in good faith to mutually appoint an independent third-party appraiser to determine the Project Value by written appraisal. This appraiser must be nationally recognized and experienced in appraising similar assets;

(ii) if the parties are unable to agree upon such a single appraiser within such 30-Day period, then within ten Days thereafter the Department and the Concessionaire will each appoint an independent third-party appraiser and both such appraisers will be instructed jointly to select, within 15 Days after they are appointed, a third independent third-party appraiser who is nationally recognized and experienced in appraising similar assets to make the appraisal referred to above;

(iii) if the appraisers appointed by the parties are unable to appoint an independent third-party appraiser under Section 20.11(a)(ii) within 60 Days after a party has requested the appointment of an appraiser under Section 20.11(a)(i), then either party may petition the Circuit Court for the City of Richmond to appoint an independent third-party appraiser having such reputation and experience;
(iv) each party will pay the costs of its own appraiser. The Department and the Concessionaire will pay in equal shares the reasonable costs and expenses of the third independent appraiser;

(v) each party will diligently cooperate with the appraiser, including promptly providing the appraiser with data and information regarding the Project, Project Right of Way, asset condition, historical cost and revenue data, and other information the appraiser may request that is in the possession of or reasonably available to the party. Each party will provide the appraiser with access to the party’s books and records regarding the Project on an Open Book Basis; and

(vi) once appointed, the independent third-party appraiser will conduct an appraisal of the Project Value and deliver to both parties a draft appraisal report and draft valuation. The appraisal will determine Project Value as of the effective date of termination of the Agreement, based on the then condition of the Project (but without regard to any damage or loss resulting from a Department Default). The appraiser will appraise Project Value by taking into account the terms and conditions of this Agreement, projected cash flows and projected costs of the Project for the remainder of the projected Term had this Agreement not been terminated, as determined by the appraiser. For the avoidance of doubt, the calculation of Project Value is the sum of the fair market value of the projected Distributions for the remainder of the Term without taking into consideration any terminations pursuant to Article 20 and the fair market value of any Concessionaire Debt outstanding as of the date of the calculation, and will include Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination. In conducting the appraisal, and before issuing a draft appraisal report, the independent appraiser will afford reasonable and comparable opportunity to each party to provide the appraiser with information, data, analysis and reasons supporting each party’s view on the Project Value. The parties will have 15 Days after receipt of the draft appraisal report to comment thereon. After the opportunity to comment has expired, the independent third-party appraiser will consider and evaluate all comments, prepare a final appraisal report stating the Project Value, and deliver the final appraisal report to both parties.

(b) If either party disagrees with the Project Value, either party may invoke the dispute resolution procedures set forth in Article 21, by delivery of notice to the other party within 60 Days following receipt of the appraiser’s report. Failure to invoke the dispute resolution procedures within such time period will conclusively constitute acceptance of the Project Value.
ARTICLE 21.

DISPUTE RESOLUTION

Section 21.01 General

(a) The parties will attempt to resolve any Disputes arising out of this Agreement at the Project level through good faith negotiations between designated representatives. The Department, the Concessionaire, the Design-Build Contractor, all subcontractors and the FHWA are firmly committed to the following principles:

(i) trust and open communications are encouraged and expected by all participants;

(ii) all of the participants move quickly to address and resolve issues at the lowest possible level by approaching problems from the perspectives and needs of all of the participants involved;

(iii) all of the participants have identified common goals and respect each other’s individual goals and values; and

(iv) all of the participants create an atmosphere conducive to cooperation and teamwork in finding better solutions to potential problems and issues at hand.

(b) If the Dispute cannot be resolved at the Project level in accordance with Section 21.01(a) above, then either party will have the right to submit the Dispute to the Steering Committee for resolution. The Steering Committee will convene a meeting within ten Days of notification by either party of any unresolved Dispute. After the meeting has convened, the Steering Committee will have seven Days to resolve the Dispute.

(c) If the Steering Committee has not resolved the Dispute pursuant to Section 21.01(a)(i), then either party may request non-binding mediation of the Dispute or any other form of alternative dispute resolution process that is mutually acceptable to both parties. If the Dispute has not been resolved within 60 Days after the initiation of mediation proceedings or, if both parties do not agree to mediation, the other form of alternative dispute resolution process, either party will have the right to proceed in accordance with Section 21.02. The first face-to-face meeting between the mediator and both parties will be deemed to be the initiation of mediation.

(d) Any of the time periods specified in this Section 21.01 may be extended by mutual agreement of the parties.

Section 21.02 Litigation; Venue

(a) All litigation between the parties arising out of or pertaining to this Agreement or its breach will be filed, heard and decided in the Circuit Court for the City of Richmond, Virginia, Division I, which will have exclusive jurisdiction and venue.
(b) As permitted by Section 56-569 of the Code of Virginia, the parties agree that any requirement that the State Corporation Commission issue a declaratory judgment regarding a material default (as defined in Section 56-568 of the Code of Virginia) pursuant to such Section 56-569, as a prerequisite to exercising any remedy set forth in this Agreement or such Section 56-569, will not apply to this Agreement.

(c) Satisfaction of the procedures set forth in Section 21.01 will be a condition precedent to instituting a legal action in court; provided, that if the Department determines, in its sole discretion, that a Dispute involves an issue that poses an immediate and serious threat to the public health, safety and welfare, the Department will be entitled to take whatever steps it deems appropriate and to initiate litigation of the matter in court without first submitting the Dispute to the dispute resolution procedures of this Agreement.

Section 21.03 Conduct During Pendency of Dispute

(a) Notwithstanding anything to the contrary in this Agreement, neither party will be required to await the resolution of dispute proceedings regarding the reasons for terminating this Agreement before exercising such party’s termination rights.

(b) Pending final resolution of any Dispute (except a Dispute regarding the cause for terminating this Agreement), the parties will continue to fulfill their respective obligations under this Agreement.

Section 21.04 Costs of Dispute Resolution

(a) Each party will bear its own attorneys’ fees and costs in any Dispute or litigation arising out of or pertaining to this Agreement, and no party will seek or accept an award of attorneys’ fees or costs, except as otherwise expressly provided herein.

(b) The fees and costs of any mediator will be borne equally by each party.

ARTICLE 22.

RESERVED RIGHTS

Section 22.01 Exclusions from the Concessionaire’s Interest

The Concessionaire’s rights and interests in the Project have been granted to the Concessionaire under the Permit in order to enable it to accomplish the Project Purposes. Subject to Section 22.04, the Concessionaire’s rights and interests consist only of those expressly granted by this Agreement and other Project Agreements and specifically exclude all Reserved Rights.

Section 22.02 Department Reservation of Rights

(a) The Department may, at any time at its sole cost and expense, devote, use or take advantage of the Reserved Rights for any public purpose without any financial participation
whatsoever by the Concessionaire. The Department hereby reserves to itself all ownership, development, maintenance, repair, replacement, operation, use and enjoyment of, and access to, the Reserved Rights. The Department will owe no compensation or damages on account of its exercise of Reserved Rights, unless such exercise qualifies as a Compensation Event.

(b) In addition to any rights it has, the Department reserves (for itself and its representatives, as well as others claiming by, through or under the Department) the right and will have the right to enter the Project Assets and each and every part thereof at all reasonable times in the following circumstances:

(i) in the event of an actual or reported emergency, danger, threat, circumstance or event that is reasonably believed by the Department or its designee (including relevant police, fire, emergency services, armed forces, and any other security or emergency personnel in accordance with Section 9.06) to have caused (or to present the imminent potential to cause) injury to individuals, damage to property, or threat to the Environment or to public safety, to take, at such times, as the Department determines necessary in its discretion and with notice to the Concessionaire if practicable under the circumstances, such actions as the Department or such designee determines necessary to respond to or to rectify such emergency, danger, threat, circumstance or event; and

(ii) in the event of any circumstance or event that is reasonably believed by the Department to have caused an impairment to the continuous operation of the HOT Lanes as a public highway, and if the Department in its discretion determines that the Concessionaire is not then taking all necessary steps to respond to or to rectify such circumstance or event, to take, at such times as the Department determines necessary in its discretion and with notice to the Concessionaire if practicable under the circumstances, such actions as the Department determines may be necessary to respond to or to rectify such circumstance or event or to restore the operation of the Project, and all costs and expenses incurred by the Department in connection with or related to such actions will be paid by the Concessionaire.

(c) The Concessionaire acknowledges and agrees that all rights to own, lease, sell, assign, transfer, utilize, develop or take advantage of the Reserved Rights are hereby reserved to the Department, and the Concessionaire will not engage in any activity infringing upon the Reserved Rights.

Section 22.03 Disgorgement

If a Concessionaire Default concerns a breach of the provisions of Section 22.01 or Section 22.02, in addition to any other remedies pursuant to this Agreement, the Department will be entitled to disgorgement of all profits from the prohibited activity and to sole title to and ownership of the prohibited assets and improvements.
Section 22.04 Alternate Treatment of Reserved Rights

Notwithstanding Section 22.01 and Section 22.02, the Department may elect in its sole discretion to treat any development of improvements respecting Reserved Rights that it undertakes as Project Enhancements, in which case all of the provisions of Section 12.02 will apply.

Section 22.05 Naming Rights

(a) The Department hereby grants the Concessionaire the naming rights for the Project, subject to (i) approval of any such name by the Department, which approval will not be unreasonably withheld, conditioned or delayed, and (ii) compliance with Law and Governmental Approvals. The Concessionaire will request the Department’s approval of a name for the Project in writing and no such approval will be effective unless and until provided in writing by the Department; provided, that the failure of the Department to respond in writing to such request within 21 Days following receipt of the Concessionaire’s request will be deemed the Department’s approval thereof. The Concessionaire may sub-license any such rights to the O&M Contractor.

(b) If the Concessionaire changes the name of the HOT Lanes, the Concessionaire will pay the Department for the cost of changing names on signs maintained by the Department pursuant to the Technical Requirements.

(c) For purposes of the Permit Fee calculation, any revenues received by the Concessionaire with respect to the naming rights granted to the Concessionaire under this Section 22.05 will be treated as Gross Revenues.

ARTICLE 23.

REPRESENTATIONS, WARRANTIES AND FINDINGS

Section 23.01 Department Representations and Warranties

The Department hereby represents and warrants to the Concessionaire as follows:

(a) the Department is an agency of the State and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with, and subject to the terms and conditions of this Agreement and other Project Agreements to which the Department is a party;

(b) each person executing this Agreement or any other Project Agreement on behalf of the Department to which the Department is a party has been or at such time will be duly authorized to execute each such document on behalf of the Department;

(c) neither the execution and delivery by the Department of this Agreement and the other Project Agreements executed concurrently herewith to which the Department is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will
result in a default under or violation of (i) any other agreements or instruments to which it is a
party or by which it is bound or (ii) to its knowledge, any Law, where such violation will have a
material adverse effect on the ability of the Department to perform its obligations under this
Agreement;

(d) there is no action, suit, proceeding, investigation or litigation pending and served
on the Department which challenges the Department’s authority to execute, deliver or perform,
or the validity or enforceability of, this Agreement and the other Project Agreements to which
the Department is a party, or which challenges the authority of the Department official executing
this Agreement or the other Project Agreements, and the Department has disclosed to the
Concessionaire any pending and unserved or threatened action, suit, proceeding, investigation or
litigation with respect to such matters of which the Department is aware;

(e) as of the Agreement Date, no agreement, contract, option, commitment or other
right exists which binds, or which in the future may become binding on, the Department to sell,
transfer, convey, dispose of or encumber the Project. The Department has not granted or
assigned any interest in Gross Revenues to any other party other than the Concessionaire
pursuant to this Agreement;

(f) this Agreement has been duly authorized, executed and delivered by the
Department and constitutes a valid and legally binding obligation of the Department, enforceable
against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency
and similar laws affecting the enforceability of the rights of creditors generally and to general
principles of equity;

(g) the Department has taken or caused to be taken all requisite action to authorize the
execution and delivery of, and the performance of its obligations under, this Agreement and the
other Project Agreements to which the Department is a party;

(h) the Department is in material compliance with all Laws and Governmental
Approvals applicable to its obligations in connection with this Agreement; and

(i) other than with respect to portions of the Project Right of Way not yet acquired as
of the Agreement Date, the Department has good and sufficient title and interest to the Project
Right of Way, free and clear of all Liens or other exceptions to title, except Permitted
Encumbrances.

Section 23.02 Concessionaire Representations and Warranties

The Concessionaire hereby represents and warrants to the Department as follows:

(a) the Concessionaire is a duly organized limited liability company created under the
laws of the State of Delaware, is qualified to conduct business in the State, has the requisite
power and all required licenses to carry on its present and proposed activities, and has full power,
right and authority to execute and perform each and all of its obligations under the Project
Agreements;
(b) as of the Agreement Date, the membership interests in the Concessionaire are owned in 90% holdings by DRIVe USA Investments LLC and 10% holdings by Fluor and no other Person has a membership interest in the Concessionaire;

(c) the Concessionaire has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Concessionaire is a party;

(d) each person executing this Agreement or any other Project Agreement on behalf of the Concessionaire has been or will at such time be duly authorized to execute each such document on behalf of the Concessionaire;

(e) this Agreement and each Project Agreement to which the Concessionaire or a Concessionaire Financial Party is a party have been duly authorized, executed and delivered by the Concessionaire or the Concessionaire Financial Party and constitutes a valid and legally binding obligation of the Concessionaire or the Concessionaire Financial Party (as the case may be), enforceable against it in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;

(f) neither the execution and delivery by the Concessionaire of this Agreement and the other Project Agreements to which the Concessionaire is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or a violation of (i) the governing instruments of the Concessionaire or any other agreements or instruments to which it is a party or by which it is bound or (ii) to its knowledge, any Law, where such violation will have a material adverse effect on the ability of the Concessionaire to perform its obligations under this Agreement;

(g) there is no action, suit, proceeding, investigation or litigation pending and served on the Concessionaire which challenges the Concessionaire’s authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Concessionaire is a party, or which challenges the authority of the Concessionaire official executing this Agreement or the other Project Agreements; and the Concessionaire has disclosed to the Department any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Concessionaire is aware;

(h) the Concessionaire is in material compliance with all Laws applicable to the Concessionaire or its activities in connection with this Agreement and the other Project Agreements;

(i) none of the Concessionaire, any affiliate of the Concessionaire (as “affiliate” is defined in 29 CFR 98.905), or the Design-Build Contractor or their affiliates (as so defined) is suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any Federal or State department or agency;
(j) to the best of the Concessionaire’s knowledge after diligent inquiry, no event which, with the passage of time or the giving of notice, would constitute a Concessionaire Default has occurred;

(k) to the best of the Concessionaire’s knowledge after diligent inquiry, no event which, with the passage of time or the giving of notice, would constitute a Delay Event or a Compensation Event under this Agreement has occurred;

(l) the Initial Base Case Financial Model (i) was prepared by or on the Concessionaire’s behalf in good faith, (ii) fully discloses all Financial Model Formulas, and all cost, revenue and other financial assumptions and projections that the Concessionaire used or is using in making its decision to enter into this Agreement, (iii) fully discloses all Financial Model Formulas disclosed to the Lenders under the Project Financing Agreements and (iv) as of the Agreement Date, represents the projections that the Concessionaire believes in good faith are realistic and reasonable for the Project; provided, that such projections are based upon a number of estimates and assumptions and are subject to significant business, economic and competitive uncertainties and contingencies and that, accordingly, no representation or warranty is made that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results;

(m) on or before the Agreement Date, the Concessionaire has delivered to the Department an audit report and an opinion of the Financial Model Auditor addressed to the Department to the effect that the Base Case Financial Model and the Financial Model Formulas reflect the terms of this Agreement and that the Financial Model Formulas and the Base Case Financial Model are suitable for use herein in connection with Compensation Events, Delay Events and early termination procedures, and covering such other matters as may have been reasonably requested by the Department, all in form and substance acceptable to the Department; and

(n) All Early Work performed by Fluor and Transurban prior to the Agreement Date was performed in accordance with (i) Law; (ii) Governmental Approvals; and (iii) prudent industry practices, methods, techniques and standards and using the degree of care that would be expected to be exercised by a prudent, skilled and experienced developer engaged in the same kinds of undertakings and under the same or similar circumstances, conditions, scope and limitations (including limitations on access to the Project Right of Way and limitations agreed with the Department as to the scope of the work to be undertaken prior to the Agreement Date) as those applying to such work.

Section 23.03 Department’s Findings Under the Act

The Department, as the Responsible Public Entity with respect to the Project, makes the following findings:

(a) the actions taken by the Department pursuant to the Act facilitate the development, design, construction, management, operation and maintenance of the Project and the timely development of any Project Enhancements, and such public need may not be wholly
satisfied by existing methods of procurement in which qualifying transportation facilities are
developed and/or operated;

(b) there is a public need to construct and operate a qualifying transportation facility
(as defined in Section 56-557 of the Code of Virginia) of the type of the Project;

(c) the Permit granted hereunder authorizing the Concessionaire to develop, design,
construct, manage and operate and maintain the Project, including the development of any
Project Enhancements, may result in their availability to the public in a more timely, more
efficient and less costly fashion, thereby serving the public safety and welfare;

(d) the Project, its interconnections with existing transportation facilities, and the
Concessionaire’s plans for the development, design, construction, operation and maintenance of
the Project are reasonable and compatible with the State transportation plan and with local
comprehensive plans;

(e) the estimated cost of developing, designing, constructing, operating and
maintaining the Project is reasonable in relation to similar transportation facilities;

(f) the Concessionaire’s plans will result in the timely construction and operation and
maintenance of the Project and in the development of any Project Enhancements;

(g) the Department will continue to have fee title or good and valid interest to the
Project and the Project will remain open for use by members of the public as a public road upon
payment of the applicable tolls;

(h) through this Agreement, the Department intends to encourage investment in the
State by the Concessionaire to facilitate the development, construction, operation and
maintenance of the Project and the development of any Project Enhancements; and

(i) the terms and conditions of this Agreement serve the public purpose of the Act.

ARTICLE 24.

CONTRACTING PRACTICES AND PUBLIC WELFARE CONSIDERATIONS

Section 24.01 Obligation to Refrain from Discrimination

The Concessionaire covenants and agrees that it will not discriminate and it will require
all Contractors not to discriminate against any person, or group of persons, on account of age,
sex, marital status, race, creed, color, national origin, religion or the presence of any sensory,
mental or physical handicap in the permitting, design, acquisition, construction, maintenance,
operation or management of the Project, nor will the Concessionaire establish or permit any such
practice or practices of discrimination or segregation with reference to the selection, use, hiring,
 firing, promotion or termination of employees, Contractors, and vendors or with reference to the
use, occupancy or enjoyment of or access to or toll rates charged for use of the Project; provided,
that the prohibition against discrimination on the basis of sensory, mental or physical handicap
Section 24.02 Contracting

(a) General. The Concessionaire may perform the Work through use of its own personnel, materials and equipment, or by contracting to Persons with the expertise, qualifications, experience, competence, skills and know-how to perform the responsibilities being contracted in accordance with all Law, all Governmental Approvals, and the terms, conditions and standards set forth in this Agreement.

(b) Design-Build Contractor. The Concessionaire has entered into the Design-Build Contract. Notwithstanding its use of the Design-Build Contractor, the Concessionaire remains responsible for the Design-Build Work during the Term in accordance with this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement or removal of the Design-Build Contractor.

(c) Shared Facilities Agreement. The Concessionaire has entered into the Shared Facilities Agreement with CBE for the use of the Express Operations Center. In connection therewith, the Concessionaire agrees to provide to the Department copies of all notices received or given by the Concessionaire pursuant to the Shared Facilities Agreement, unless otherwise mutually agreed to by the parties.

(d) O&M Contractor.

(i) Subject to the Department’s approval, which will not be unreasonably withheld, the Concessionaire may contract with one or more separate O&M Contractors with the expertise, qualifications, experience, competence, skills and know-how to perform the operations and maintenance obligations of the Concessionaire in accordance with this Agreement; provided, that the Department’s approval will not be required with respect to any Contractor with respect to the O&M Work (other than the O&M Contractor) (A) whose Contract price is less than $4 million adjusted annually by the percentage increase in CPI and (B) is prequalified with the Department in accordance with the Department’s Rules Governing Prequalification Privileges. Notwithstanding its use of an O&M Contractor, the Concessionaire remains ultimately responsible for the operation and maintenance of the Project during the Term in accordance with this Agreement. The O&M Contractor will be subject at all times to the direction and control of the Concessionaire, and any delegation to an O&M Contractor does not relieve the Concessionaire of any of its obligations, duties or liability pursuant to this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement, removal or resignation of an O&M Contractor. Subject to the Direct Agreement, any agreement between the Concessionaire and any O&M Contractor will by its terms terminate, without penalty, at the election of the Department upon five Days’ notice to such O&M Contractor upon the termination of this Agreement. The O&M Contractor will have no interest in or rights pursuant to this Agreement or the Project.
(ii) Each O&M Contractor and its Contract will comply with this Section 24.02. In addition, the material terms of the proposed Contract of the O&M Contractor must be consistent with the corresponding duties and obligations of the Concessionaire pursuant to this Agreement and the other Project Agreements.

(iii) The O&M Contractor and its Affiliates may contract to receive or recover overhead costs ("O&M Overhead Costs") that are consistent with Part 31 of the Federal Acquisition Regulation principles and will provide the Department with a report on these costs. Any such O&M Overhead Costs will not include excluded costs of the nature described in subsection (b) of the definition of Operating Costs and will include only those costs that provide a direct and measurable benefit to the Project when compared with projects of similar scope and complexity. Any O&M Overhead Costs charged by an Affiliate of the O&M Contractor will be arms-length and commercially reasonable.

(e) Replacement of Design-Build Contractor or O&M Contractor. Before entering into any Contract replacing the initial Design-Build Contractor or O&M Contractor, as applicable, the Concessionaire will submit a true and complete copy of the proposed Contract for the Department’s review and approval, subject to the following:

(i) the Department may disapprove such proposed Contract if such Contract or the Work to be performed thereunder does not comply, or is inconsistent, in any material respect with the applicable requirements of this Agreement; and

(ii) the Department may disapprove, in its sole discretion, of the replacement Contractor after taking into account the following factors:

(A) the financial strength and integrity of the proposed Contractor, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;

(B) the capitalization of the proposed Contractor or any parent guarantor, as applicable;

(C) the experience of the proposed Contractor and each of its direct Contractors in constructing or operating toll roads or highways and performing other projects;

(D) the presence of any actions, suits or proceedings, at law or in equity, or before any Governmental Authority, pending or, to the best of such Contractor’s knowledge, threatened against such Contractor, that would or could reasonably be expected to have a material adverse effect on its ability to perform its obligations under the Contract;

(E) the background of the proposed Contractor, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees...
and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person’s past or present performance on other projects); and

(F) the Contractor’s compliance with any of the other provisions of this Section 24.02.

(f) Each Contract for the performance of the Work that the Concessionaire executes at a minimum:

(i) will set forth a standard of professional responsibility or a standard for commercial practice equal to prudent industry standards for work of similar scope and scale and will set forth effective procedures for Claims and change orders;

(ii) will establish provisions for prompt payment by the Concessionaire in accordance with the provisions of Sections 2.2-4347 through 4355 of the Code of Virginia, which would apply if the Department was contracting with such Contractor;

(iii) will require the Contractor to carry out its scope of work in accordance with Law, the Technical Requirements, all Governmental Approvals, Good Industry Practice and the terms, conditions and standards set forth in this Agreement;

(iv) will set forth warranties, guaranties and liability provisions of the contracting party in accordance with Good Industry Practice for work of similar, scope and scale;

(v) will be fully assignable to the Department upon termination of this Agreement, such assignability to include the benefit of all Contractor warranties, indemnities, guarantees and professional responsibility;

(vi) will include express requirements that, if the Department succeeds to the Concessionaire’s rights under the subject Contract (by assignment or otherwise), then the relevant Contractor agrees that it will (A) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer, service provider), (B) permit audit thereof by the Concessionaire, and provide progress reports to the Concessionaire appropriate for the type of Contract it is performing sufficient to enable the Concessionaire to provide the reports it is required to furnish the Department pursuant to this Agreement and (C) allow the Department, to assume the benefit of the Concessionaire’s Contract rights and the work performed thereunder, with liability only for those remaining obligations accruing after the date of assumption, but excluding any monetary claims or obligations that the Concessionaire may have against such Contractor that existed prior to the Department’s assumption of such Contract;
(vii) will not be assignable by the Contractor without the Concessionaire’s prior written consent; provided, that the foregoing will not limit permitted subcontracting of the Work;

(viii) will expressly require the Contractor to participate in meetings between the Concessionaire and the Department, upon the Department’s reasonable request, concerning matters pertaining to such Contractor or its work; provided, that all direction to such Contractor will be provided by the Concessionaire; and provided further, that nothing in this Section 24.02(f)(viii) will limit the authority of the Department to give such direction or take such action which in the opinion of the Department is necessary to remove an immediate and present threat to the safety of life or property;

(ix) will expressly provide that all Liens and claims of any Contractors at any time will not attach to any interest of the Department in the Project or the Project Right of Way; and

(x) will be consistent in all other respects with the terms and conditions of this Agreement to the extent such terms and conditions are applicable to the scope of work of such Contractor.

(g) The Concessionaire will not enter into any Contract at any level with any Person if that Person or any of its affiliates (as “affiliate” is defined in 29 CFR §98.905), or any of their respective officers, directors and employees, (i) is then suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any Federal or State department or agency, (ii) has been convicted, pled guilty or nolo contendere to a violation of Law involving fraud, conspiracy, collusion, bribery, perjury, material misrepresentation, or any other violation that shows a similar lack of moral or ethical integrity or (iii) is then barred or restricted from owning, operating or providing services for the Project under Law, including the Foreign Investment and National Security Act of 2007, 50 USC App. 2170 (HR556).

(h) The Concessionaire will include provisions in each Contract for the performance of the Work that the Concessionaire executes requiring the Contractor: (i) to maintain all licenses required by Law; (ii) if the Department makes a direct payment under such Contract, to comply with the requirements of the eVA Business to Government Vendor System or its successor; and (iii) to include in Contracts for the performance of the Work that such Contractor executes the provisions set forth in this Section 24.02(h).

(i) The Concessionaire will include provisions in each Contract for the performance of the Work that the Concessionaire executes (i) naming the Department as a third-party beneficiary of all Contractor representations and warranties contained in such Contract and (ii) requiring the Contractor to include in Contracts for the performance of the Work that such Contractor executes to name the Department as a third-party beneficiary of all Contractor representations and warranties contained in such Contract; provided, that the Department will have the right to exercise its rights under such representations and warranties only so long as the Concessionaire, the Contractor or a Lender is not pursuing remedies thereunder.
(j) The Concessionaire will not contract any part of the Design-Build Work or the O&M Work to a Contractor who is not prequalified with the Department in accordance with the Department’s Rules Governing Prequalification Privileges, unless otherwise indicated in this Agreement. This restriction does not apply to contract specialty items, consultants, manufacturers, suppliers, haulers or snow removal service providers.

(k) The appointment of Contractors will not relieve the Concessionaire of its responsibility hereunder or for the quality of work, materials and services provided by it. The Concessionaire will at all times be held fully responsible to the Department for the acts and omissions of its Contractors and persons employed by them and no Contract entered into by the Concessionaire will impose any obligation or liability upon the Department to any such Contractor or any of its employees. Further, absent the Department’s express written consent, no Contract or delegation of Work thereunder will affect the obligation of the Concessionaire to directly communicate with the Department and to oversee the Work of the Contractor. Nothing in this Agreement will create any contractual relationship between the Department and a Contractor.

(l) The Concessionaire will not enter into or materially amend an Affiliate Contract without notice to and consent of the Department, which consent will not be unreasonably withheld or delayed if the Contract is entered into in the ordinary course of business and the Concessionaire demonstrates to the Department’s satisfaction that the Affiliate Contract is on overall terms no less favorable or unfavorable to the Concessionaire than terms the Concessionaire could obtain in an arm’s-length transaction for comparable services with a Person that is not an Affiliate of the Concessionaire; provided, that no consent will be required for (i) reasonable overhead sharing fees and reimbursement of third-party costs payable to an Affiliate for legal, accounting, tax, computer and other centralized management services provided to the Concessionaire in lieu of the Concessionaire having its own employees for such functions; or (ii) the joint ownership of assets or property used for the operation or maintenance of the Project and other projects owned or operated by Affiliates of the Concessionaire so long as the cost of such assets and properties are reasonably shared and documented.

(m) From and after the Agreement Date, the Concessionaire will be solely responsible for paying each Contractor and any other Person to whom any amount is due from the Concessionaire for services, equipment, materials and supplies in connection with the Work. Pursuant to Section 2.2-4354 of the Code of Virginia, the Concessionaire will require the Design-Build Contractor and O&M Contractor, within seven Days following receipt of monies from the Concessionaire for work performed by any Contractor of the Design-Build Contractor or O&M Contractor, to either (i) pay such Contractor for the proportionate share of the total payment received from the Concessionaire attributable to the Work performed by such Contractor or (ii) notify the Concessionaire and such Contractor, in writing, of the Design-Build Contractor’s or O&M Contractor’s intention to withhold all or a part of the Contractor’s payment, specifying the reason for the non-payment. The Concessionaire also agrees that it will require the Design-Build Contractor and O&M Contractor to include in all of its Contracts a provision that (A) obligates the Design-Build Contractor or O&M Contractor, as applicable, to pay interest to its Contractors on all amounts owed by the Design-Build Contractor or O&M
Contractor, as applicable, that remain unpaid after seven Days following receipt of monies from the Concessionaire for work performed by its Contractor, except for amounts withheld as allowed in clause (ii) of this Section 24.02(m); (B) states, “Unless otherwise provided under the terms of this contract, interest will accrue at the rate of one percent per month.” and (C) obligates each Contractor to include or otherwise be subject to the same payment and interest requirements as specified in this Section 24.02(m) with respect to each lower-tier Contractor.

(n) Upon entering into a Contract for the Design-Build Work or O&M Work in excess of $100,000, the Concessionaire will provide the Department with a copy of such Contract and, if such Contract is with an Affiliate of the Concessionaire, a list of all Contracts in effect to which such Affiliate is a party and under which all or a substantial portion of the Affiliate’s responsibilities or obligations under its Contract are delegated to its Contractor. The Concessionaire will allow the Department ready access to all Contracts and records regarding Contracts, including amendments and supplements to Contracts and guarantees thereof.

(o) As soon as the Concessionaire identifies a potential Contractor for a potential Contract described in the first sentence of Section 24.02(n), but in no event later than five Days after Contract execution, the Concessionaire will notify the Department in writing of the name, address, phone number and authorized representative of such Contractor.

Section 24.03 Small, Women-Owned and Minority Business (SWaM) and Disadvantaged Business Enterprise (DBE) Reporting

(a) Disadvantaged Business Enterprise (DBE).

(i) General.

(A) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the DBE program, where applicable.

(B) The Concessionaire and each Contractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Concessionaire and each Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the Concessionaire and each Contractor to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as set forth in Section 24.03(a)(v).

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, in an effort to comply with 49 CFR Part 26, the Department has established a goal of 10% for DBE participation.
(B) The Department and the Concessionaire agree to manage the foregoing goals as follows:

(1) the Concessionaire will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Concessionaire’s approach to meeting the DBE participation goals set forth in this Section 24.03(a):

(2) the Concessionaire will have dedicated resources to the DBE inclusion program to ensure compliance with 49 CFR Part 26, the DBE/SWaM Plan, nondiscrimination provisions, technical assistance activities, communication of subcontracting and generate reports specific to DBE utilization;

(3) the Concessionaire will be responsible for either achieving or making Good Faith Efforts to achieve the goal of 10% for DBE participation by providing maximum contracting opportunities for DBE businesses;

(4) the Concessionaire will provide to the Department each calendar quarter documentation of all executed Contracts and payments to DBE businesses;

(5) the Concessionaire will have the opportunity to establish DBE sub-contracting work packages; and

(6) the Concessionaire will provide Good Faith Efforts documentation using form C-49 and other supplemental information as appropriate for Contracts that do not include DBE participation. The Concessionaire agrees that if the Department accepts the Good Faith Efforts documentation on a particular bid item group, the Concessionaire will make reasonable efforts to accomplish the overall goal using other bid item groups.

(C) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the applicable DBE objectives. The Department will assist the Concessionaire in meeting the Design-Build Work goals by offering assistance to include the following items:

(1) the parties will jointly conduct outreach meetings for DBE firms;

(2) the Department will identify to the Concessionaire DBE firms that are eligible to bid on the specific bid item groups; and

(3) the Department will provide access to technical and managerial assistance to eligible DBE firms, including in part, through the VDOT/GEC Civil Rights Team and the Business Opportunity Workforce Development Center based upon available funds.
(D) The Concessionaire acknowledges that the Department’s assistance and cooperation will not eliminate or reduce the Concessionaire’s responsibility to achieve the Design-Build Work goals for DBE participation or demonstrate Good Faith Efforts. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the Project. The Concessionaire is expected to meet the goal or demonstrate that Good Faith Efforts have been made. The Concessionaire will submit quarterly reports of Good Faith Efforts documentation, and, DBE payments on form C-63 to the Department Representative.

(E) When there is a contract goal for the Design-Build Work, the Concessionaire and the Concessionaire Parties must make Good Faith Efforts to meet the goal either through obtaining enough DBE participation or documenting the Good Faith Efforts it made to do so. 49 CFR Part 26 explicitly provides that the Department must not disregard showings of Good Faith Efforts, and it gives the Concessionaire and the Concessionaire Parties the right to have the Department reconsider a decision that their Good Faith Efforts were insufficient. The Department must seriously consider the Concessionaire’s documentation of Good Faith Efforts. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for the Concessionaire.

(iii) O&M Work. During performance of the O&M Work, when contracting for such work the Concessionaire will encourage the participation of DBE firms in the Project. The Concessionaire will set annual goals and make Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The annual and long-term participation DBE goals for the Concessionaire in contracting for the O&M Work is 2%.

(iv) DBE Reporting and Assessment.

(A) The Concessionaire will report quarterly, within 15 Days after each calendar quarter ends, to the Chief of Administration on the Concessionaire’s efforts to (1) satisfy the DBE goals set forth in this Section 24.03(a) or (2) demonstrate Good Faith Efforts to accomplish the DBE goals set forth in this Section 24.03(a).

(B) The Chief of Administration will assess, confirm and communicate to the Concessionaire within 30 Days after receiving each quarterly report whether the Concessionaire has (1) satisfied the DBE goals, (2) demonstrated Good Faith Efforts, or (3) failed to satisfy the requirements of clause (1) and (2) of this Section 24.03(a)(iv)(B).

(v) Failure to Demonstrate DBE Good Faith Efforts Related to Design-Build Work.

(A) If the Chief of Administration notifies the Concessionaire pursuant to Section 24.03(a)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work
for a quarterly period, the Concessionaire will have until the end of the next consecutive
quarter to demonstrate that it has satisfied the requirements of either clause (1) or (2) of
Section 24.03(a)(iv)(B) with respect to such DBE goals.

(B) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for two consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(a)(iv), the Concessionaire will prepare and submit, at the Concessionaire’s sole cost and expense, a DBE Performance Improvement Plan for the Department’s review and approval. The DBE Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of clause (1) and (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work. The Concessionaire will submit the DBE Performance Improvement Plan within 15 Days after receiving notice from the Chief of Administration pursuant to Section 24.03(a)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B). The Concessionaire will pay the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire’s compliance with the DBE Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work.

(C) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(a)(iv), the Department may debar or disqualify the Key Members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.03(a)(v).

(D) If the Chief of Administration determines at any time that the Concessionaire has satisfied the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) with respect to the DBE goals for the Design-Build Work performed to date with respect to the applicable calendar quarter, then any prior determinations by the Chief of Administration of the Concessionaire’s failure to satisfy the requirements of clause (1) of Section 24.03(a)(iv)(B) and the Concessionaire’s failure to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals will be disregarded, the Concessionaire will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure to satisfy the requirements of clause (1)
of Section 24.03(a)(iv)(B) and a failure to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) with respect to such DBE goals will be pursuant to the provisions set forth in Section 24.03(a)(v)(A).

(E) Any decision or action taken by the Chief of Administration or the Department pursuant to Section 24.03(a) is subject to the dispute resolution procedures set forth in Article 21.

(b) Small, Women-Owned and Minority Business (SWaM).

(i) General.

(A) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the SWaM program, where applicable.

(B) The Concessionaire shall not and will not permit its Contractors to discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Concessionaire shall carry out applicable requirements of Executive Order 33 (2006), in the award and administration of this Agreement and the award and administration of subcontracts pursuant to this Agreement.

(C) Failure by the Concessionaire to carry out the requirements in this Section 24.03(b) relating to SWaM participation will subject the Concessionaire to only the remedies set forth in Section 24.03(b)(v) and shall not result in a Concessionaire Default.

(D) If debarment occurs as a result of the Department's exercise of such remedies, such debarment shall not result in a Concessionaire Default.

(ii) Design-Build Work.

(A) During performance of the Design-Build Work, in an effort to support Executive Order 33 (2006), the Department has established a goal of 19% for SWaM participation.

(B) The Department and the Concessionaire agree to manage the foregoing goals as follows:

1. The Concessionaire will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Concessionaire’s approach to meeting the SWaM participation goals set forth in this Section 24.03(b);

2. The Concessionaire will have dedicated resources to the SWaM inclusion program to ensure compliance with Executive Order 33 (2006), the DBE/SWaM Plan, nondiscrimination provisions, technical assistance
activities, communication of subcontracting and generate reports specific to SWaM utilization;

(3) the Concessionaire will be responsible for either achieving or making Good Faith Efforts to achieve the goal of 19% for SWaM participation by providing maximum contracting opportunities for SWaM businesses;

(4) the Concessionaire will provide to the Department each calendar quarter documentation of all executed Contracts and payments to SWaM businesses;

(5) the Concessionaire will have the opportunity to establish SWaM-only statement of work packages; and

(6) the Concessionaire will provide Good Faith Efforts documentation using form C-49 and other supplemental information as appropriate for Contracts that do not include SWaM participation. The Concessionaire agrees that if the Department accepts the Good Faith Efforts documentation on a particular bid item group, the Concessionaire will make reasonable efforts to accomplish the overall goal using other bid item groups.

(C) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the applicable SWaM objectives. The Department will assist the Concessionaire in meeting the Design-Build Work goals by offering assistance to include the following items:

(1) the parties will jointly conduct outreach meetings for SWaM firms;

(2) the Department will identify to the Concessionaire SWaM firms that are eligible to bid on the specific bid item groups; and

(3) the Department will provide access to technical and managerial assistance to eligible SWaM firms, including in part, through the VDOT/GEC Civil Rights Team and the Business Opportunity Workforce Development Center based upon available funds.

(D) The Concessionaire acknowledges that the Department’s assistance and cooperation will not eliminate or reduce the Concessionaire’s responsibility to achieve the Design-Build Work goals for SWaM participation or demonstrate Good Faith Efforts. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the Project. The Concessionaire is expected to meet the goal or demonstrate that Good Faith Efforts have been made. The Concessionaire will submit quarterly reports of Good Faith Efforts documentation, and, SWaM payments on form C-63 to the Department Representative.
(E) When there is a contract goal for the Design-Build Work, the Concessionaire and the Concessionaire Parties must make Good Faith Efforts to meet the goal either through obtaining enough SWaM participation or documenting the Good Faith Efforts it made to do so. The Department must seriously consider the Concessionaire’s documentation of Good Faith Efforts. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for the Concessionaire.

(iii) O&M Work. During performance of the O&M Work, when contracting for such work the Concessionaire will encourage the participation of SWaM firms in the Project. The Concessionaire will set annual goals and make Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The Concessionaire will provide its participation on such matters to the Department Representative, and the Department may include those participation rates, as appropriately adjusted, with its own towards the State’s long-term goal established pursuant to the Office of the Governor’s Executive Order 33 (2006). The annual and long-term participation SWaM goal for the Concessionaire in contracting for the O&M Work is 4%.

(iv) SWaM Reporting and Assessment.

(A) The Concessionaire will report quarterly, within 15 Days after each calendar quarter ends, to the Chief of Administration on the Concessionaire’s efforts to (A) satisfy the SWaM goals set forth in this Section 24.03(b) or (B) demonstrate Good Faith Efforts to accomplish the SWaM goals set forth in this Section 24.03(b).

(B) The Chief of Administration will assess, confirm and communicate to the Concessionaire within 30 Days after receiving each quarterly report whether the Concessionaire has (1) satisfied the SWaM goals, (2) demonstrated Good Faith Efforts, or (3) failed to satisfy the requirements of clause (1) and (2) of this Section 24.03(b)(iv)(B).

(v) Failure to Demonstrate SWaM Good Faith Efforts Related to Design-Build Work.

(A) If the Chief of Administration notifies the Concessionaire pursuant to Section 24.03(b)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for a quarterly period, the Concessionaire will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals.

(B) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for two consecutive quarters based on the determinations by the Chief of
Administration pursuant to Section 24.03(b)(iv), the Concessionaire will prepare and submit, at the Concessionaire’s sole cost and expense, a SWaM Performance Improvement Plan for the Department’s review and approval. The SWaM Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of clause (1) and (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work. The Concessionaire will submit the SWaM Performance Improvement Plan within 15 Days after receiving notice from the Chief of Administration pursuant to Section 24.03(b)(iv) that the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B). The Concessionaire will pay the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire’s compliance with the SWaM Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work.

(C) If the Concessionaire has failed to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and has failed to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(b)(iv), the Department may debar or disqualify the Key Members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work or (ii) twenty-four months after the effective date of the debarment. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.03(b)(v).

(D) If the Chief of Administration determines that the Concessionaire has satisfied the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) with respect to the SWaM goals for the Design-Build Work performed to date, then any prior determinations by the Chief of Administration of the Concessionaire’s failure to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and the Concessionaire’s failure to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals will be disregarded, the Concessionaire will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) and a failure to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) with respect to such SWaM goals will trigger the provisions set forth in Section 24.03(b)(v)(A).

(E) Any decision or action taken by the Chief of Administration or the Department pursuant to Section 24.03(b) is subject to the dispute resolution procedures set forth in Article 21.
Section 24.04 Public Safety and Welfare

The parties recognize and agree that protection of the health, safety and welfare of the public and all persons engaged in connection with the performance of the Concessionaire’s obligations pursuant to this Agreement is a priority. Accordingly, the Concessionaire will comply with the following provisions, along with all other Laws and the Technical Requirements:

(a) the Concessionaire will comply, and will require all Contractors to comply, with all construction safety and health standards established by Law, including the State and Federal Occupational Health and Safety Acts. Neither the Concessionaire nor any Contractor will require any worker to work in surroundings or under working conditions that are unsanitary, hazardous or dangerous to their health or safety, as determined under construction safety and health standards promulgated by the U.S. Secretary of Labor in accordance with Section 107 of the Contract Work Hours and Safety Standards Act; and

(b) the Department will be entitled to require the Concessionaire to suspend any Work or other activities related to the Project, which, in the sole discretion of the Department, presents a risk to the public health, safety or welfare, and to take such other actions as the Department may require to prevent such risk; provided, that if it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then the suspension order and other actions will be treated as a Department Change pursuant to Section 14.02.

Section 24.05 Labor, Employment and DBE/SWaM Related Matters

The Concessionaire will comply, and will cause its Contractors to comply, with the provisions set forth in the Labor, Employment and DBE/SWaM Related Matters attached as Exhibit AA.

Section 24.06 Federal Immigration Reform and Control Act

In accordance with Section 2.2-4311.1 of the Code of Virginia, the Concessionaire certifies that it does not and agrees that it will not, during the Term, knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986. The Concessionaire further agrees that it will require all of its Contractors to certify that they do not and will not knowingly employ an unauthorized alien as defined by such Act.
ARTICLE 25.

MISCELLANEOUS

Section 25.01 Transfers by the Concessionaire

(a) Lock-Up Period. During the Lock-up Period, the Concessionaire will not, without the Department’s approval, Transfer, or otherwise permit the Transfer of, any or all of the Concessionaire’s Interest to or in favor of any Person (a “Transferee”) or permit any Person to:

(i) Transfer, or otherwise dispose of 50% or more of any direct or indirect ownership interest in the Concessionaire;

(ii) grant any security interest, Lien or other encumbrance over its direct or indirect ownership interest in the Concessionaire;

(iii) enter into any agreement in respect of any direct or indirect ownership interest in the Concessionaire or in respect of any votes attached to any such shares held by such Person in the Concessionaire, in each case (A) other than customary shareholder, partnership or organizational agreements among the Equity Members as of the Agreement Date solely with respect to the governance and management of the Concessionaire or (B) other than agreements for Transfers of less than 50% of any direct or indirect ownership interest in the Concessionaire; or

(iv) agree, whether or not subject to any condition precedent or subsequent, to do any of the foregoing.

Notwithstanding the foregoing, this Section 25.01 will not prohibit or restrict the following:

(A) a Transfer to the Collateral Agent or trustee or such Person’s nominee or transferee, as permitted in connection with the exercise of rights and remedies under the Project Financing Agreements, or a Transferee permitted or approved under the Direct Agreement;

(B) any other Transfer identified in clauses 1 through 8 of the definition of Change in Control; or

(C) any agreement to make any of the Transfers described in the preceding clauses (A) and (B) of this Section 25.01(a).

(b) Post Lock-Up Period. Following the Lock-up Period, the Concessionaire will not Transfer, any or all of the Concessionaire’s Interest to or in favor of a Transferee, unless:

(i) the Department has approved such proposed Transferee based upon a determination in accordance with Section 25.01(c) (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement); and
(ii) the proposed Transferee (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement) enters into an agreement with the Department in form and substance reasonably satisfactory to the Department wherein the Transferee acquires the rights and assumes the obligations of the Concessionaire and agrees to perform and observe all of the obligations and covenants of the Concessionaire pursuant to this Agreement.

(c) The Department’s approval of a proposed Transferee may be withheld only if the Department determines that the proposed Transfer is prohibited by Law or such proposed Transferee is not capable of performing the obligations and covenants of the Concessionaire pursuant to this Agreement, which determination may be based upon, or take into account, one or more of the following factors:

(i) the financial strength and integrity of the proposed Transferee, and its direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;

(ii) the capitalization of the proposed Transferee;

(iii) the experience of the proposed Transferee and each of its direct Contractors in operating toll roads or highways and performing other projects; and

(iv) the background of the proposed Transferee, each of its direct Contractors, and their direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person’s past or present performance on other projects).

If the Department is not satisfied that these conditions are met, it may condition its consent on provision of reasonable additional security or other reasonable arrangements.

(d) Except for a Transfer of all the Concessionaire’s Interest to the Collateral Agent upon its exercise of remedies under the Financing Assignments or to a Transferee that is permitted or has been approved under the Direct Agreement, no Transfer of all or any of the Concessionaire’s Interest will be made or have any force or effect if at the time of such Transfer there has occurred a Concessionaire Default that has not been remedied or an event that with the lapse of time, the giving of notice or otherwise would constitute a Concessionaire Default, unless the Transferee is prepared to cure such Concessionaire Default in accordance with the Direct Agreement.

(e) A Change in Control of the Concessionaire will be deemed to be a Transfer of the Concessionaire’s Interest for purposes of this Section 25.01.

(f) Any Transfer or other sale, transfer, disposition or other transaction made in violation of this Section 25.01 will be null and void ab initio and of no force and effect.
Section 25.02 Ethical Standards

(a) The Concessionaire has adopted and provided copies to the Department of its written policies establishing ethical standards of conduct for all its directors, officers and supervisory or management personnel in dealing with the Department and employment relations. Such policies including any amendments or modifications will include standards of ethical conduct concerning the following:

(i) restrictions on gifts and contributions to, and lobbying of, any State Party and any of their respective commissioners, directors, officers and employees;

(ii) protection of employees from unethical practices in the selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

(iii) protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false Claim), unethical or unsafe actions or failures to act by the Concessionaire or its personnel or any Contractors;

(iv) restrictions on directors, members, officers or supervisory or management personnel of the Concessionaire engaging in any transaction or activity, including receiving or offering a financial incentive, benefit, loan or other financial interest, that is, or to a reasonable person appears to be, in conflict with or incompatible with the proper discharge of duties or independence of judgment or action in the performance of duties, or adverse to the interests of the Project or employees;

(v) restrictions on use of an office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer or supervisory or management person, rather than primarily for the benefit of the Concessionaire or the Project, or primarily to achieve a private gain or an exemption from duty or responsibility for a director, member, officer or supervisory or management person; and

(vi) adherence to the Department’s organizational conflict of interest rules and policies pertaining to the hiring of any consultant which has assisted the Department in connection with the negotiation of this Agreement or the conduct of Oversight Services for the Project.

(b) The Concessionaire will cause its directors, members, officers and supervisory and management personnel, and require those of its Contractors, to adhere to and enforce the adopted policy on ethical standards of conduct. The Concessionaire will establish reasonable systems and procedures to promote and monitor compliance with the policy.
(c) Without limiting the foregoing provisions of this Section 25.02, the Concessionaire further agrees: (i) no gifts, gratuities, or favors of any nature whatsoever will be given or offered by any Concessionaire Party to personnel of the Department; and (ii) no Concessionaire Party will employ any personnel of the Department for any services during the Term, without the prior written consent of the Department. If the Department determines, after investigation, that a Concessionaire Party or any of its employees, representatives, or agents of any person acting in its behalf have violated this provision, the Concessionaire Party may, at the discretion of the Department, be disqualified from bidding on future contracts with the Department for a period of six months from the date of the Department’s determination of such a violation. Any implicated employees, agents, or representatives of the Contractor may be prohibited from working on any contract awarded by the Department for the period of disqualification.

Section 25.03 Assignment by the Department

The Department may, subject to giving the Concessionaire not less than 90 Days prior written notice or as required by Law, transfer and assign its interests, in whole or in part, in the Project, this Agreement and any other Project Agreements to any other public agency or public entity of the State as permitted by Law; provided, that the assignee (a) has assumed all of the Department’s obligations, duties and liabilities pursuant to this Agreement and the Project Agreements then in effect and has provided the Concessionaire with reasonable assurance of its legal authority and sufficient financial resources to honor and perform same and (b) will not be required to have financial resources in excess of those then available to the Department.

Section 25.04 Authorized Representatives

(a) Each of the Concessionaire and the Department hereby designates the following individuals as its initial Concessionaire Representative(s) and Department Representative(s), respectively, to administer this Agreement on its respective behalf:

(i) For the Concessionaire:
  
  President
  95 Express Lanes LLC
  6440 General Green Way
  Alexandria, Virginia 22312

(ii) For the Department:

  Chief Engineer
  Virginia Department of Transportation
  1401 E. Broad Street
  Richmond, VA  23219

(b) The Concessionaire Representatives and the Department Representatives will be reasonably available to each other during the Term and will have the authority to issue
instructions and other communications on behalf of the Concessionaire and Department, respectively, and will be the recipient of notices and other written communications from the other party pursuant to this Agreement (except any notice initiating or relating to the dispute resolution procedures of Article 21 will be given in accordance with Section 25.05). However, such Representatives will not have the authority to make decisions or give instructions binding upon the Concessionaire or the Department, except to the extent expressly authorized by the Concessionaire or the Department, as the case may be, in writing. In the event the Concessionaire or the Department designates different Representatives, it will give the other party written notice of the identity of and contact information for the new Concessionaire Representative(s) or Department Representative(s), as the case may be.

Section 25.05 Notices

(a) Whenever under the provisions of this Agreement it will be necessary or desirable for one party to serve any notice, request, demand, report or other communication on another party, the same will be in writing and will not be effective for any purpose unless and until actually received by the addressee or unless served (i) personally, (ii) by independent, reputable, overnight commercial courier, (iii) by facsimile transmission, where the transmitting party includes a cover sheet identifying the name, location and identity of the transmitting party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein or (iv) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

If to the Department:

Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219
Attention: Commissioner of Highways
Facsimile: (804) 786-2940

With copies to:

Office of the Attorney General
900 E. Main Street
Richmond, VA 23219
Attention: Chief Transportation Section
Facsimile: (804) 786-9136

If to the Concessionaire:

95 Express Lanes LLC
EXECUTION VERSION
JULY 31, 2012

6440 General Green Way
Alexandria, Virginia 22312
Attention: President
Facsimile: (571) 419-6101

With copies to:

Orrick Herrington & Sutcliffe LLP
51 West 52nd Street
New York, New York 10019-6142
Attention: Dan Mathews
Facsimile: (212) 506-5151

(b) Any party may, from time to time, by notice in writing served upon the other party as aforesaid, designate an additional and/or a different mailing address or an additional and/or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally will be deemed delivered upon receipt, if served by mail or independent courier will be deemed delivered on the date of receipt as shown by the addressee’s registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier, and if served by facsimile transmission will be deemed delivered on the date of receipt as shown on the received facsimile (provided, that the original is thereafter delivered as aforesaid).

Section 25.06 Binding Effect

Subject to the limitations of Section 25.01 and Section 25.03, this Agreement will be binding upon and will inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the parties hereto, such reference also will be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such party, as if in every case so expressed.

Section 25.07 Relationship of Parties

(a) The relationship of the Concessionaire to the Department will be one of an independent contractor, not an agent, partner, lessee, joint or co-venturer or employee, and neither the Department nor the Concessionaire will have any rights to direct or control the activities of the other or their respective Affiliates, contractors or consultants, except as otherwise expressly provided in this Agreement.

(b) Officials, employees and agents of the Concessionaire or the Department will in no event be considered employees, agents, partners or representatives of the other.
Section 25.08 No Third-Party Beneficiaries

Nothing contained in this Agreement is intended or will be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement, except rights expressly contained herein for the benefit of the Lenders, the Collateral Agent and/or State Indemnitees.

Section 25.09 Limitation on Consequential Damages

Except as expressly provided in this Agreement to the contrary, neither party will be liable to the other for punitive damages or special, indirect, incidental or consequential damages of any nature, whether arising in contract, tort (including negligence) or other legal theory. The foregoing limitation will not, however, in any manner:

(a) prejudice the Department’s right to recover liquidated damages from the Concessionaire as provided in this Agreement;

(b) limit the Concessionaire’s liability for any type of damage arising out of the Concessionaire’s obligation to indemnify, protect, defend and hold each State Indemnitee harmless from Third Party Claims under Article 15 and Section 16.03 of this Agreement;

(c) limit the Concessionaire’s liability for any type of damage to the extent covered by the proceeds of insurance required hereunder; or

(d) limit the amounts expressly provided to be payable by the Department or the Concessionaire pursuant to this Agreement.

Section 25.10 Waiver

(a) No waiver by any party of any right or remedy pursuant to this Agreement or the other Project Agreements will be deemed to be a waiver of any other or subsequent right or remedy pursuant to this Agreement or the other Project Agreements. The consent by one party to any act by the other party requiring such consent will not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

(b) No act, delay or omission done, suffered or permitted by one party or its agents will be deemed to waive, exhaust or impair any right, remedy or power of such party pursuant to this Agreement or any other Project Agreement, or to relieve the other party from the full performance of its obligations pursuant to this Agreement and the other Project Agreements.

(c) No waiver of any term, covenant or condition of this Agreement will be valid unless in writing and executed by the obligee party.

(d) The acceptance of any payment or payment by a party will not (i) waive any preceding or then-existing breach or default by the other party of any term, covenant or condition of this Agreement, other than the other party’s prior failure to pay the particular amount or part
thereof so accepted, regardless of the paid party’s knowledge of such preceding or then-existing breach or default at the time of acceptance of such payment or payment or (ii) continue, extend or affect (A) the service of any notice, any suit, arbitration or other legal proceeding or final judgment, (B) any time within which the other party is required to perform any obligation or (C) any other notice or demand.

(e) No custom or practice between the parties in the administration of the terms of this Agreement will be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of this Agreement.

Section 25.11 No Brokers

Except for any financial adviser or investment banker whose fee will be paid by the party retaining such adviser or banker (or in the case of a Concessionaire Financial Party, by such party or the Concessionaire), each party represents and warrants that it has not dealt with any real estate or business opportunity broker or agent or any finder in connection with this Agreement. Each party agrees, to the extent permitted by Law, to indemnify, protect, defend with counsel acceptable to the other party and hold harmless the other party against any Claim for commission, finder’s fee or like compensation asserted by any real estate or business opportunity broker, agent, finder or other Person claiming to have dealt with the indemnifying party in connection with this Agreement.

Section 25.12 Governing Law; Compliance with Law and Federal Requirements

(a) This Agreement will be governed by and construed in accordance with the Laws of the State applicable to contracts executed and to be performed within the State.

(b) The Concessionaire will keep fully informed of and comply and require its Contractors to comply with Law. The Concessionaire will execute and file the documents, statements, and affidavits required under any Law required by or affecting this Agreement or the execution of the Work. The Concessionaire will permit examination of any records made subject to such examination by such Law.

(c) The Concessionaire will comply and require its Contractors to comply with all Laws applicable to the Project as a result of the costs of the Project being financed in part with State funds, federal-aid funds and State bond proceeds, including the applicable Federal Requirements attached as Exhibit U.

(d) The Concessionaire acknowledges and agrees that the USDOT will have certain approval rights with respect to the Project, including the right to provide certain oversight and technical services with respect to the Work. The Concessionaire will cooperate with USDOT and provide such access to the Project and information as USDOT may request in the exercise of USDOT’s duties, rights and responsibilities in connection with the Project.
Section 25.13 Use of Police Power

Nothing in this Agreement limits the authority of the Department to exercise its regulatory and police powers granted by Law.

Section 25.14 Survival

The dispute resolution procedures, the indemnifications, limitations, releases, obligations to pay termination compensation and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the Work will survive the expiration or earlier termination of this Agreement and/or the completion of the Work.

Section 25.15 Subpoena

Except as provided for in Section 33.1-4 of the Code of Virginia, the Concessionaire may subpoena any Department personnel; provided, that the Concessionaire will pay for such personnel’s time at its fully burdened rate (including overhead and fringe benefits), together with all out-of-pocket expenses incurred, no later than 30 Days after the Concessionaire’s receipt of an invoice reasonably documenting the amount of such time provided.

Section 25.16 Construction and Interpretation of Agreement

(a) The language in all parts of this Agreement will in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any party. The parties hereto acknowledge and agree that this Agreement has been prepared jointly by the parties and has been the subject of arm’s length and careful negotiation over a considerable period of time, that each party has been given the opportunity to independently review this Agreement with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of this Agreement, this Agreement will not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction will be utilized.

(b) If any court of competent jurisdiction issues a final, non-appealable judicial order finding that a term or provision of this Agreement is invalid or unenforceable, the remainder of this Agreement will not be affected thereby and each other term and provision of this Agreement will be valid and enforceable to the fullest extent permitted by Law. It is the intention of the parties to this Agreement, and the parties hereto agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the parties in good faith will supply as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

(c) The captions of the articles and sections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.
(d) References in this instrument to this “Agreement” mean, refer to and include this instrument as well as any riders, exhibits, addenda and attachments hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking “herein,” “hereunder” or “pursuant hereto” (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument will be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. All references to a subsection or clause “above” or “below” refer to the denoted subsection or clause within the section in which the reference appears. Unless expressly provided otherwise, all references to Articles and Sections refer to the Articles and Sections set forth in this Agreement. Unless otherwise stated in this Agreement or the Project Agreements, words which have well-known technical or construction industry meanings are used in this Agreement or the Project Agreements in accordance with such recognized meaning. Wherever the word “including,” “includes” or “include” is used in this Agreement or the Project Agreements, except where immediately preceded by the word “not”, it will be deemed to be followed by the words “without limitation”. Wherever reference is made in the Project Agreements to a particular Governmental Authority, it includes any public agency succeeding to the powers and authority of such Governmental Authority.

(e) As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

(f) The Project Agreements are intended to be complementary and consistent and to be read together as a complete agreement. In the event of any conflict or inconsistency between the Articles of this Agreement and the exhibits to this Agreement, the conflict or inconsistency will be resolved by applying the following order of document precedence, from highest to lowest:

(i) Change Orders and amendments to the articles of this Agreement and Definitions;
(ii) the Articles of this Agreement and Definitions;
(iii) Project Description and Scope Documentation;
(iv) the Technical Requirements, as amended; and
(v) the other exhibits to this Agreement, as amended.

(g) A Project Agreement to which the Department is not a party will have no effect upon the terms and conditions of this Agreement or the construction or interpretation thereof.
(h) Any standard or specification with which the Concessionaire is required to comply by a provision of this Agreement during the Construction Period, shall be the specific edition or version identified in the Technical Requirements, and the Concessionaire shall not be required during the Construction Period to comply with any newer, updated or revised edition or version unless the parties so agree or the Concessionaire is so directed by the Department as a Department Change.

Section 25.17 Counterparts

This instrument may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

Section 25.18 Entire Agreement; Amendment

(a) THIS AGREEMENT AND THE PROJECT AGREEMENTS TO WHICH THE DEPARTMENT AND THE CONCESSIONAIRE ARE BOTH PARTIES CONSTITUTE THE ENTIRE AND EXCLUSIVE AGREEMENT BETWEEN THE PARTIES RELATING TO THE SPECIFIC MATTERS COVERED HEREIN AND THEREIN. ALL PRIOR WRITTEN AND PRIOR OR CONTEMPORANEOUS VERBAL AGREEMENTS, UNDERSTANDINGS, REPRESENTATIONS AND/OR PRACTICES RELATIVE TO THE FOREGOING, INCLUDING THE INTERIM AGREEMENT, ARE HEREBY SUPERSEDED, REVOKED AND RENDERED INEFFECTIVE FOR ANY PURPOSE. THIS AGREEMENT MAY BE ALTERED, AMENDED OR REVOKED ONLY BY AN INSTRUMENT IN WRITING SIGNED BY EACH PARTY HERETO, OR ITS PERMITTED SUCCESSOR OR ASSIGNEE, EXCEPT TO THE EXTENT THE DEPARTMENT HAS THE RIGHT TO AMEND BY DEPARTMENT CHANGE OR DIRECTIVE LETTER PURSUANT TO ARTICLE 14. NO VERBAL AGREEMENT OR IMPLIED COVENANT WILL BE HELD TO VARY THE TERMS HEREOF, ANY STATUTE, LAW OR CUSTOM TO THE CONTRARY NOTWITHSTANDING.

(b) This Agreement and the other Project Agreements attempt to set forth in full all requirements applicable under the Act as to the development, operation, maintenance, repair, management and financing of the Project and attempt to define in full the rights and responsibilities of each party in connection therewith. To the extent requirements and rights and responsibilities have not been addressed in this Agreement and the other Project Agreements, the parties agree to carry out their respective responsibilities in the spirit of cooperation contemplated by the Act, recognizing that they may not have defined in a sufficient detail or anticipated fully all activities necessary for the full implementation of the Project.

Section 25.19 Payment of Concessionaire Damages and Other Amounts by the Department

(a) THE DEPARTMENT’S PAYMENT OF ANY CONCESSIONAIRE DAMAGES, LOSSES OR ANY OTHER AMOUNTS DUE AND OWING BY THE DEPARTMENT PURSUANT TO THIS AGREEMENT WILL BE SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY AND ALLOCATION BY THE CTB.
Upon determination of Concessionaire Damages or such other amounts due and owing by the Department, the Department will with all practical dispatch consistent in all respects with Law and its obligations pursuant to this Agreement:

(i) deliver to the Governor and the Director of the Department of Planning and Budget of the State, before December 1 with respect to any such payment requested to be appropriated by the next regular session of the General Assembly, a statement of the amount of any such payment due or expected to be due and a request that the Governor include in his budget to be delivered to the next session of the General Assembly a provision that there be appropriated such amounts for such purpose to the extent required, from any legally available funds;

(ii) use its diligent efforts to have (A) the Governor include, in each biennial or any supplemental budget the Governor presents to the General Assembly, the amounts set forth in any statement delivered pursuant to (i) above, (B) the General Assembly appropriate and reappropriate, as applicable, such amounts to or on behalf of the Department for the purpose of paying any Concessionaire Damages or other amounts due and owing by the Department to the Concessionaire pursuant to this Agreement, and (C) the CTB allocates such appropriated amounts as applicable for payment to the Concessionaire; and

(iii) notify the Concessionaire promptly upon becoming aware of any failure by (A) the Governor to include such amounts in his budget delivered to the next session of the General Assembly, (B) the General Assembly to appropriate such amounts during such next session of the General Assembly or (C) the CTB to so allocate such amounts for payment to the Concessionaire.

(b) The parties hereto agree and acknowledge that, subject to appropriation, such obligation of the Department to pay the Concessionaire Damages and other amounts was and is a material inducement and consideration for the execution and delivery of this Agreement by the Concessionaire.

(c) The Department will pay any sum due pursuant to Section 20.03, Section 20.05, Section 20.06 or Section 20.07 within 60 Days after the date of determination of the applicable termination compensation amount; provided, in each case, that the Department may defer payment of such sum for an additional 270 Days if it reasonably determines that such additional period is necessary in order to obtain funds to pay such sum; provided further, that any payment of such sum will be made together with interest thereon (A) at the average earnings rate on the State’s Transportation Trust Fund or any successor thereto during the period that runs from the date such sum would have otherwise become due to the date that is 60 Days thereafter and (B) after such period, at the Bank Rate until the date of payment thereof; except that to the extent such payment is based on the Concessionaire Debt or the amounts required for the Concessionaire to achieve the Base Case Equity IRR, such amounts will be re-calculated as of the date of payment.
(d) The Department will proceed to make payment to the Concessionaire of the undisputed amount of any sum due pursuant to Section 20.03, Section 20.05, Section 20.06 or Section 20.07 without regard to the dispute resolution procedures.

Section 25.20 Taxes

The Concessionaire is solely responsible for the payment of Taxes accrued or arising out of the performance of its obligations pursuant to this Agreement.

Section 25.21 Payments to Department or Concessionaire

(a) Except as otherwise expressly provided herein or in any Project Agreement, payments due to the Department or the Concessionaire hereunder, as applicable, will be due and payable within 30 Days of receipt by the Concessionaire or the Department, as applicable, of an invoice therefor, together with any supporting documentation.

(b) Each party will be entitled to deduct, offset or withhold from any amounts due from one party to the other party any amounts then due and owing from such other party.

(c) Except as otherwise provided, neither party is required to pay amounts due that are being contested in accordance with the dispute resolution procedures described in Article 21.

Section 25.22 Interest on Overdue Amounts

Any amount not paid when due pursuant to this Agreement will bear interest from the date such payment is due until payment is made (after as well as before judgment) at a variable rate per annum at all times equal to the Bank Rate (except as provided otherwise in Section 25.19(c)), which interest will be payable on demand. Interest will be compounded annually and payable on the date on which the related overdue amount is paid.

[SIGNATURE PAGE(S) TO FOLLOW]
IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Comprehensive Agreement Relating to the I-95 HOV/HOT Lanes Project as of the date first written above.

VIRGINIA DEPARTMENT OF TRANSPORTATION,
an agency of the Commonwealth of Virginia

By: ________________________________
    Gregory A. Whirley, Sr.
    Commissioner of Highways

95 EXPRESS LANES LLC,
a Delaware limited liability company

By: ________________________________
Name: ________________________________
Title: ________________________________
95 EXPRESS LANES LLC,
a Delaware limited liability company

Signature on file with VDOT

By: ________________________________
    Name: Michelle LePlante
    Title: ________________________________
## EXHIBIT A

### DEFINITIONS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Definition</th>
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<tbody>
<tr>
<td>AASHTO</td>
<td>American Association of State Highway and Transportation Officials</td>
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<td>AID</td>
<td>Automatic Incident Detection</td>
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<td>AASHTO Materials Reference Laboratory</td>
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<td>ASTM</td>
<td>American Society for Testing Materials</td>
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<td>ATMS</td>
<td>Advanced Traffic Management System</td>
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<td>BCOM</td>
<td>Virginia Department of General Services’ Bureau of Capital Outlay Management</td>
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<td>CCCS</td>
<td>Central Control Computer System</td>
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<td>CCTV</td>
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<td>Digital Elevation Model</td>
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<td>Graphical User-Interface</td>
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<td>Interchange Justification Report</td>
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<td>IMR</td>
<td>Interchange Modification Report</td>
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<td>IP</td>
<td>Intellectual Property</td>
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<td>ISA</td>
<td>In Service Availability</td>
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<td>ISO</td>
<td>International Organization for Standardization</td>
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<td>IT</td>
<td>Information Technology</td>
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<td>ITS</td>
<td>Intelligent Transportation System</td>
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<td>IVHS</td>
<td>Intelligent Vehicle Highway System</td>
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<td>LED</td>
<td>Light Emitting Diode</td>
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<td>MMS</td>
<td>Maintenance Management System</td>
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<tr>
<td>MOI</td>
<td>Department Manual of Instructions for Material Division</td>
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<td>MOT</td>
<td>Maintenance of Traffic</td>
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<td>MPO</td>
<td>Metropolitan Planning Organization</td>
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<td>MTBF</td>
<td>Mean Time Between Failure</td>
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<td>MTTR</td>
<td>Mean Time To Repair</td>
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<td>MUTCD</td>
<td>Manual on Uniform Traffic Control Devices</td>
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<td>NEPA</td>
<td>National Environmental Policy Act</td>
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<td>NFPA</td>
<td>National Fire Protection Association</td>
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<td>NS</td>
<td>Norfolk Southern</td>
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<td>ORT</td>
<td>Open Road Tolling</td>
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<td>PABs</td>
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<td>PCI</td>
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<td>PDP</td>
<td>Project Development Plan</td>
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<td>PPTA</td>
<td>Public-Private Transportation Act</td>
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<td>PTZ</td>
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<td>QMSP</td>
<td>Quality Management System Plan</td>
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<td>RLD</td>
<td>Responsible Land Disturber Certification</td>
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<td>ROD</td>
<td>Record of Decision</td>
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<td>RUMS</td>
<td>Right of Way and Utilities Management System</td>
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<td>SAFETEA-LU</td>
<td>Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (Public Law 109-59)</td>
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<td>SAT</td>
<td>Site Acceptance Testing</td>
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<td>SPT</td>
<td>Standard Penetration Test</td>
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<td>SRA</td>
<td>Safety Rest Area</td>
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<td>STIP</td>
<td>State Transportation Improvement Plan</td>
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<tr>
<td>Acronym</td>
<td>Definition</td>
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<td>STRAHNET</td>
<td>Strategic Highway Network</td>
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<td>SWaM</td>
<td>Small Woman-Owned and Minority Business</td>
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<td>SYIP</td>
<td>Six-Year Improvement Plan</td>
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<td>SWM</td>
<td>Storm Water Management</td>
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<td>Storm Water Pollution Prevention Plan</td>
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<td>TIA</td>
<td>Time Impact Analysis</td>
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<td>TIFIA</td>
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<td>TMP</td>
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<td>UCC</td>
<td>Uniform Commercial Code</td>
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<td>UPS</td>
<td>Uninterruptible Power Source</td>
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<td>USDOT</td>
<td>United States Department of Transportation</td>
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<td>VA SHPO</td>
<td>Virginia State Historic Preservation Officer</td>
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<td>VCRI</td>
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<td>VDOT</td>
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<td>Violation Processing System</td>
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<td>VPSTF</td>
<td>Virginia Petroleum Underground Storage Tank Fund</td>
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<td>VSMP</td>
<td>Virginia Stormwater Management Program</td>
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<td>VSP</td>
<td>Virginia State Police</td>
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**Act** is defined in the first Recital to the Agreement.

**Actual Equity IRR** means, as of the end of each partial or full year under the Agreement, the post-tax Internal Rate of Return on Committed Investment, based on Distributions, as provided in the Base Case Financial Model from the Agreement Date to the end of such partial or full year.

**Additional Lanes** means any additional GP Lanes along the I-95 Corridor within the Project Right of Way to the extent the plans for such improvements have not been included in (i) the CLRIP and the SYIP as of November 30, 2011 or (ii) the Technical Requirements; provided however, that the addition of a fourth general purpose traffic lane travelling southbound on I-395 between Seminary Road and Edsall Road will not be an Additional Lane.

**Adjusted Equity IRR** means the nominal post-tax Internal Rate of Return on Committed Investment over the full Term projected in the Adjusted Financial Model or the Adjusted Financial Model Update, as applicable.

**Adjusted Financial Model** means the Initial Base Case Financial Model, as adjusted as Financial Close in accordance with Section 7.03(b)(i) through (vi) of the Comprehensive Agreement.
Adjusted Financial Model Update means the Adjusted Financial Model, as adjusted by Financial Close of the TIFIA Credit Assistance in accordance with Section 7.07 (b) of the Comprehensive Agreement.

Administering Employees means employees of Concessionaire and the Key Members whose work related to the Project has not been completed that are involved in the administration of Federal or State funds.

Advisory Panel is defined in Paragraph 5 of the Recitals to the Agreement.

Affiliate means, when used to indicate a relationship with a specified Person, a Person that: (a) directly or indirectly, through one or more intermediaries has a 10% or more voting or economic interest in such specified Person or (b) controls by or is under common control with such specified Person, and a Person is deemed to be controlled by another Person, if controlled in any manner whatsoever that results in control in fact by that other Person (or that other Person and any Person or Persons with whom that other Person is acting jointly or in concert), whether directly or indirectly and whether through share ownership, a trust, a contract or otherwise.

Affiliate Contract means a Contract with an Affiliate.

Affiliate Debt means any indebtedness incurred by the Concessionaire to an Affiliate of the Concessionaire unless the terms of such indebtedness are comparable to terms, or are no less favorable to the Concessionaire than terms that could have been obtained on an arms length basis from a Person that is not an Affiliate of the Concessionaire.

Agreement or Comprehensive Agreement means the Comprehensive Agreement Relating to the I-95 HOV/HOT Lanes Project, dated as of the Agreement Date, and all exhibits and schedules thereto, as supplemented or further amended from time to time.

Agreement Date means the date written on the cover page of the Agreement, which date will be the date on which the parties have executed and delivered the Agreement.

Agreement Year means (a) the period beginning on the Financial Close Date and ending on the first June 30 (or, if the Concessionaire has a fiscal year ending December 31 and so elects, ending on the first December 31) following the Financial Close Date, (b) each succeeding full calendar year or full fiscal year, as relevant, during which the Agreement remains in effect, and (c) the period beginning on July 1 or January 1 of the calendar year or fiscal year, as relevant, in which the Agreement terminates and ending on the date of termination. For purposes of assessing the Net Cost Impact of a Compensation Event, the partial year commencing with the date of the Compensation Event and ending on the earlier of (i) the following December 31 or June 30, as applicable, or (ii) the termination of the Agreement, will be treated as an Agreement Year.

Airspace means any and all real property, including the surface of the ground, within the vertical column extending above and below the surface boundaries of the Project Right of Way.
and not necessary or required for the Project (including Project Enhancements) or developing, permitting, designing, financing, constructing, installing, equipping, operating, maintaining, tolling, repairing, reconstructing, restoring, rehabilitating, renewing or replacing the Project (including Project Enhancements) or the Concessionaire’s timely fulfillment of its obligations under the Project Agreements.

**Allocable Costs** means:

(a) for services performed using Department or Concessionaire personnel, materials and equipment, the sum of:

   (i) an amount equal to the reasonable fully burdened hourly rate (including overhead and fringe benefits) of each employee providing such services multiplied by the actual number of hours such employee performs such services; **plus**

   (ii) the reasonable cost of all materials used, including sales taxes, freight and delivery charges and any allowable discounts; **plus**

   (iii) reasonable and documented out-of-pocket costs and expenses of each employee (including travel, meals and lodging costs), subject to any limitations and requirements on such costs and expenses set forth in the Department’s travel guidelines; **plus**

   (iv) the costs for the use, operating, maintenance, fuel, storage and other costs of all deployed tools (excluding small tools) and equipment, calculated at hourly rates determined from the most current volume of the Rental Rate Blue Book published by Nielsen/DATAQUEST, Inc. of Palo Alto, California, or its successors, or at any lesser hourly rate the Department may approve from time to time in its sole discretion, without area adjustment, but with equipment life adjustment made in accordance with the rate adjustment tables, *provided*, that if rates are not published for a specific type of tool or equipment, the Department will establish a rate for it that is consistent with its cost and use in the industry; and

(b) if the services are performed by a contractor under contract with the Department or the Concessionaire, the sum of:

   (i) all reasonable amounts owing under such contract; *provided*, that if the contract is an Affiliate Contract, the lesser of the contract amount or the amount that would be reasonably obtained in an arm’s length transaction for comparable services with a person that is not an Affiliate; **plus**

   (ii) the amount to reimburse the Department or the Concessionaire for the actual and documented reasonable costs of administering the contract, but not to exceed 10% of the value of the contract; **plus**
(iii) all reasonable costs the Department or the Concessionaire reasonably incurs to enforce or pursue remedies for the contractor’s failure to perform in accordance with the contract, except in the case of a contract that is an Affiliate Contract.

**Allowance Items** is defined in Section 8.16(a).

**Alternative Facility** means (i) the Route One Improvements, (ii) Additional Lanes, (iii) the Occoquan Bridge Improvements or (iv) the Southern HOT Lanes, in either case, for which Commencement of Use occurs during the Term and that is built and opened to traffic, except for any Alternative Facility developed by or at the direction of the federal government, where the CTB or the Department does not have discretionary authority to effectively prevent the construction or opening to traffic or to control the location of such Alternative Facility.

**Annual Budget** is defined in Section 9.08(a).

**Approved for Construction (AFC) Documents** means all drawings, specifications, revisions thereto, and any other items necessary to construct the Work, sealed by a professional engineer licensed by the State.

**As-Built Schedule** means the last Project Schedule Update submitted to and approved by the Department.

**Asset** means an individual component, system or subsystem of the Project, as identified in the first column of the Performance Requirements Baseline Table.

**Average Toll** means, for any period of not less than 45 consecutive minutes during which Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement going in the same direction for two consecutive Toll Sections exceeds the applicable rate of vehicles per hour per traffic lane specified in Section 5.07 and the percentage of High Occupancy Vehicles exceeds the applicable threshold specified in Section 5.07, (a) the total revenue for all toll paying vehicles going in such direction using such Toll Section in such period, divided by (2) the number of toll paying vehicles going in such direction using such Toll Section in such period.

**Bank Rate** means the prime rate of interest announced publicly by The Wall Street Journal (or its successors) as the so-called “prime rate.”

**Base Case Equity IRR** means the nominal post-tax Internal Rate of Return on Committed Investment over the full Term projected in the Base Case Financial Model or the Base Case Financial Model Update, as applicable.

**Base Case Financial Model** means the Adjusted Financial Model adjusted at Financial Close pursuant to Section 7.03(b)(vii).

**Base Case Financial Model Update** means the Base Case Financial Model, as most recently updated pursuant to Section 6.02.
**Base Case Traffic Model** means the traffic and revenue model and the assumptions and information used by or incorporated in the model to provide the I-95 HOV/HOT Lanes Project Investment Grade Traffic and Revenue Study dated March 2012, the results of operation of which are incorporated into the Base Case Financial Model.

**Base Equity Contributions** is defined in Section 7.01(d).

**Baseline Quantities** is defined in Section 8.16(a).

**Baseline Schedule** means (a) the Initial Baseline Schedule identifying the major Work activities in sufficient detail to enable the Department to monitor and evaluate design and construction progress until such time as the Baseline Schedule is approved by the Department pursuant to the Technical Requirements and (b) the Baseline Schedule thereafter as updated according to the Technical Requirements.

**Basis Points** or **bp** means one hundredth of one percent (0.0001).

**Benchmark Debt Service Reserve Fund Requirement** means (1) in the case of the initial Senior Concessionaire Debt, an amount equal to one year’s interest on the initial Senior Concessionaire Debt and (2) in the case of the initial TIFIA Credit Assistance, an amount equal to one year’s interest on the initial TIFIA Credit Assistance Amount.

**Benchmark O&M Reserve Fund Requirement** means an amount equal to 25% of the estimated annual Operating Costs for the first full Fiscal Year following Service Commencement.

**Benchmark PABs Interest Rate** means 7.00% per annum.

**Benchmark TIFIA Interest Rate** means 3.50% per annum.

**Benchmark TIFIA Credit Assistance Amount** is $300 million.

**Benchmark TIFIA Eligible Costs Amount** is $913.6 million.

**Breakage Costs** means any prepayment premiums or penalties, make-whole payments or other prepayment amounts (including premiums) that the Concessionaire must pay under any Project Financing Agreement as a result of the early repayment of Concessionaire Debt prior to its scheduled maturity date.

**Business Day** means any day on which the Department is officially open for business.

**Capital Beltway Comprehensive Agreement** means the Amended and Restated Comprehensive Agreement Relating to the Route 495 HOT Lanes in Virginia Project, dated as of December 19, 2007, between the Department and CBE.

**CBE** means Capital Beltway Express LLC, a Delaware limited liability company.
Casualty Cost is defined in Section 17.07(a).

Change in Control means (a) the Transfer of 50% or more of the equity interests in the Concessionaire by the Equity Members as of the Agreement Date, or (b) any Transfer of interest or other transaction of any type or description, including by or through voting securities, asset transfer, contract, merger, acquisition, succession, dissolution, liquidation or otherwise, that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of the Concessionaire or a material aspect of its business. A change in the power to direct or control or cause the direction or control of the management of a shareholder, member, partner or joint venture member of the Concessionaire may constitute a Change in Control of the Concessionaire if such shareholder, member, partner or joint venture member possesses the power to direct or control or cause the direction or control of the management of the Concessionaire; provided, that the following will not constitute a Change in Control:

(1) a change in possession of the power to direct or control the management of the Concessionaire or a material aspect of its business due solely to bona fide open market transactions in securities effected on a recognized public stock exchange, excluding such transactions involving an initial public offering;

(2) a change in possession of the power to direct or control the management of the Concessionaire or a material aspect of its business due solely to a bona fide transaction involving securities or beneficial interests in the ultimate parent organization of a shareholder, member, partner or joint venture member of the Concessionaire, unless the transferee in such transaction is at the time of the transaction suspended or debarred or subject to a proceeding to suspend or debar from bidding, proposing or contracting with any Federal department or agency or State Party;

(3) an upstream reorganization or transfer of direct or indirect interests in the Concessionaire so long as there occurs no change in the entity with ultimate power to direct or control or cause the direction or control of the management of such person, whether directly or indirectly and whether through share ownership, a trust, a contract or otherwise;

(4) the exercise of preferred or minority equity holder veto or voting rights (whether provided by Law or by the Concessionaire’s organizational documents) over major business decisions of the Concessionaire;

(5) the grant of Financing Assignments in accordance with the Agreement, or the exercise of Lender remedies thereunder, including foreclosure; or

(6) transfers of direct or indirect ownership interests in the Concessionaire (as applicable) between or among (i) Persons that are under common “control” (within the meaning of control contemplated by the definition clause (b) of Affiliate) or (ii) any fund or entity managed directly or indirectly by a shareholder, member or partner of the Concessionaire or any Affiliate.
(7) Transfers from either Equity Member as of the Agreement Date to the other Equity Member as of the Agreement Date or its Affiliate; or

(8) a pledge or grant of a security interest, lien or other encumbrance of an Equity Member’s Distributions or its parent entities indirect right to receive such Distributions from the Concessionaire for the purpose of securing or serving as collateral for a debt instrument.

Change in Law means (a) the enactment of any Law after the Agreement Date or (b) any change, amendment to, repeal or revocation of any Law or in the interpretation or application thereof by any Governmental Authority after the Agreement Date; excluding, however, any change in or new Law enacted but not yet effective as of the Agreement Date.

Change Order means a written order issued by the Department to the Concessionaire delineating changes in the Work or in the terms or conditions of the Technical Requirements, as applicable, in accordance with Section 14.02.

Change Proposal is defined in Section 14.02(b).

Chief Engineer means the Department’s Chief Engineer.

Chief of Administration means the Department’s Chief of Administration.

Claim means any and all claims, disputes, disagreements, causes of action, demands, suits, proceedings, damages, injuries, liabilities, obligations, losses, costs and expenses.

Claim Threshold is defined in Section 14.01(e).

Code of Virginia means the Code of Virginia of 1950, as amended from time to time.

Collateral Agent means the Institutional Lender acting on behalf of or at the direction of the other Lenders or the Person or Persons so designated in an intercreditor agreement or other document executed by all Lenders to whom Financing Assignments are outstanding at the time of execution of such document, a copy of which will be delivered by the Concessionaire to the Department.

Commencement of Use occurs when an Alternative Facility is opened for normal and continuous use by the travelling public or when a Project Enhancement is substantially completed.

Commissioner of Highways (Commissioner) means the appointed chief executive officer of the Department or any successor in function.

Committed Investment means (a) any form of direct investment by Equity Members, including the purchase of equity shares in the Concessionaire; (b) any bona fide indebtedness of the Concessionaire for funds borrowed that: (i) is held by any Equity Member and (ii) is subordinated in priority of payment and security to all Concessionaire Debt held by Persons who
are not Equity Members; or (c) an irrevocable on-demand letter of credit issued by or for the account of an Equity Member naming the Concessionaire as beneficiary and guaranteeing the provision of the direct investment or loan referenced in clause (a) or (b) of this definition.

**Commonwealth Transportation Board (CTB)** means a board of the State affiliated with the Department.

**Compensation Event** means any of the following events:

(a) Department-Caused Delays;

(b) the development or implementation of any Department Change or Department Project Enhancement pursuant to the Agreement;

(c) any Discriminatory Change in Law;

(d) a Toll Exemption Event;

(e) an Alternative Facility, to the extent provided for in Section 12.05;

(f) any Significant Force Majeure Event to the extent the Department or the Concessionaire elects to continue the Agreement pursuant to Section 20.03;

(g) a Tax Imposition;

(h) an order by the Department suspending tolls on, or diverting traffic onto, the HOT Lanes, other than as provided in the Agreement;

(i) an exercise by the Department of its Reserved Rights within or immediately adjacent to the HOT Lanes or the Design-Build Right of Way;

(j) an issuance by a Governmental Authority having jurisdiction over the Project of an injunction or other order enjoining or estopping the Concessionaire or the Department from the performance of its rights or obligations pursuant to the Agreement, in any case for more than 45 days in the aggregate;

(k) the discovery of any subsurface, man-made structure within the Project Right of Way, excluding any such structure known to the Concessionaire prior to the Agreement Date and to the extent provided under Section 14.01(e)(i);

(l) any Change in Law taking effect prior to the Guaranteed Substantial Completion Date that specifically affects the physical construction of the Project Assets in such a way as to increase the costs of the Work, to the extent provided under Section 14.01(e)(ii); or

(m) a Northern Hot Lanes Development Concessionaire Impact;

*provided*, that each of the above events does not arise by reason of:
(1) the negligence or misconduct of a Concessionaire Party; or

(2) any act or omission by a Concessionaire Party in breach of the provisions of the Agreement or any other Project Agreement.

Compensation Event Notice is defined in Section 14.01(a)(i).

Completed Work Value means the greater of zero and an amount equal to (A – [B + C + D]), where:

A = the total Contract Price (as defined in the Design-Build Contract);

B = the estimated cost to complete all of the Work required to be undertaken in order to achieve Service Commencement;

C = the Department's estimate of all those costs (internal and external) that it is reasonably likely to incur in retendering the Agreement; and

D = the aggregate of all amounts paid to the Concessionaire by the Department in respect of Public Funds Amount in accordance with Exhibit N on or prior to the date of termination of the Agreement.

Concessionaire has the meaning assigned to such term in Section 56-557 of the Code of Virginia and, for purposes of the Agreement, means 95 Express Lanes LLC, a Delaware limited liability company, and its permitted successors and assigns.

Concessionaire Damages means the amount calculated pursuant to Section 14.01(b).

Concessionaire Debt means (without duplication) any bona fide indebtedness (including, but not limited to, PABs, State or TIFIA loans, guaranties and credit support, subordinated indebtedness and all such obligations arising under such indebtedness) related to the Project for or in respect of funds borrowed (including bona fide indebtedness with respect to any financial insurance issued for funds borrowed) or for the value of goods or services rendered or received. Concessionaire Debt includes principal, capitalized interest, accrued interest, customary and reasonable lender, financial insurer, agent and trustee fees, costs, expenses and premiums with respect thereto, payment obligations under interest rate and inflation rate hedging agreements or other derivative facilities with respect thereto, reimbursement obligations with respect thereto, lease financing obligations and Breakage Costs. Concessionaire Debt excludes any increase in indebtedness to the extent resulting from an agreement or other arrangement the Concessionaire enters into or first becomes obligated to repay after the occurrence of an event of termination giving rise to an obligation of the Department to pay termination compensation, including the Concessionaire’s receipt of a notice of termination by the Department or the Concessionaire’s declaration of a Department Default of the type entitling the Concessionaire to terminate the Agreement, as applicable, provided, that Concessionaire Debt will include any increase in indebtedness resulting from a Refinancing. In addition, (a) no indebtedness will constitute Concessionaire Debt unless and until the Department is provided with notice thereof and any related funding agreements and security documents in accordance with the Agreement and
(b) for the purpose of calculating compensation upon a termination of the Agreement, Concessionaire Debt will not include Shareholder Loans.

**Concessionaire Default** is defined in Section 19.01.

**Concessionaire Default Termination Amount** means:

(a) with respect to termination prior to the Substantial Completion Date, the lesser of (i) the Completed Work Value and (ii) the lesser of 80% of Concessionaire Debt then outstanding or 80% of Concessionaire Debt projected in the Base Case Financial Model to be then outstanding; and

(b) with respect to termination following the Substantial Completion Date, the lesser of (i) the Project Value and (ii) the lesser of 100% of Concessionaire Debt then outstanding or 100% of Concessionaire Debt projected in the Base Case Financial Model to be then outstanding;

in each case with respect to clause (a) and (b), less:

1. Credit Balances; provided, however, that Credit Balances will not be deducted from the Project Value unless the Project Value is increased on account of such Credit Balances;

2. unpaid and/or accrued default interest;

3. Breakage Costs;

4. any other amounts referred to in the definition of Concessionaire Debt that arise as a consequence of the termination of the Agreement or the acceleration of or requirement to mandatorily prepay the Concessionaire Debt;

5. Non-Reimbursable Concessionaire Damages; provided, however, that Non-Reimbursable Concessionaire Damages will only be deducted from Concessionaire Debt and only to the extent the Non-Reimbursable Concessionaire Damages were used to make Distributions; and

6. Allocable Costs incurred by the Department in terminating the Agreement for Concessionaire Default.

**Concessionaire Financial Party** means any guarantor of the Concessionaire’s material and executory obligations under the Agreement or any Equity Member of the Concessionaire with material financial obligations to the Concessionaire, unless such obligations have been satisfied or are fully secured under the terms of the Equity Funding Guaranties.

**Concessionaire Management Plan** means the plan developed by the Concessionaire that describes the Concessionaire’s managerial approach, strategy, and quality procedures to design,
build, operate and maintain the Project and achieve all requirements of the Agreement, as described in more detail in the Technical Requirements.

**Concessionaire Marks** means the Concessionaire’s name and/or other trademarks, service marks and trade names owned or licensed by the Concessionaire.

**Concessionaire Party** means the Concessionaire and any Affiliate and any agents, Representatives, officers, directors, employees, Contractors, suppliers and materialmen of the Concessionaire or any Affiliate, and will include the Design-Build Contractor and the O&M Contractor.

**Concessionaire Project Agreements** means the Design-Build Contract, the O&M Agreement and any new construction contract entered into by the Concessionaire for a substantial rebuild of the Work.

**Concessionaire Project Enhancement** means any extensions of, additions to, or major modifications to the Project undertaken by the Concessionaire pursuant to Section 12.01, Section 12.05 or Section 12.06.

**Concessionaire Representative** means an individual designated in accordance with Section 25.04.

**Concessionaire TIFIA Protection Amount** is defined in Section 7.03(a)(v)(B).

**Concessionaire’s Equity Value** means the net present value of the anticipated future nominal Distributions (post-tax on the part of the Concessionaire but pre-tax on the part of the Equity Members) in respect of drawn equity contributions or Shareholder Loans as of the termination date determined by an independent nationally recognized third party expert appraiser, pursuant to the process set forth in Section 20.11.

**Concessionaire’s Interest** means the interest of the Concessionaire in the Project created by the Agreement and the rights and obligations of the Concessionaire pursuant to the Agreement, which will constitute contract rights.

**Constrained Long-Range Transportation Plan (CLRP)** means the constrained long-range transportation plan that is adopted by the applicable metropolitan planning organization and approved by the FHWA and the Federal Transit Administration as a prerequisite to receiving Federal transportation funds and/or approvals.

**Construction Documentation** means all Design Documentation, AFC Documents, and all shop drawings, working drawings, fabrication plans, material and hardware descriptions, specifications, construction quality control reports, construction quality assurance reports and samples necessary for construction of the Project and/or the Utility Relocations included in the Work, in accordance with the Agreement and the other Project Agreements.

**Construction Escrow Documents** is defined in Section 18.05(a).
Construction Period means the period commencing on the Agreement Date through the Service Commencement Date.

Construction Quality Management Plan means the plan developed by the Concessionaire that provides the organization, relationship and procedures that define clear lines of responsibility and well defined approach for meeting Project requirements and innovation in construction approach, as described in more detail in the Technical Requirements.

Consultant means any Person at the time retained by or on behalf of the Department or the Concessionaire, which Person is experienced and has a national and favorable reputation in the matters for which such Person is so employed.

Consumer Price Index (CPI) means the “Consumer Price Index – U.S. City Averages for all Urban Consumers, All Items” (not seasonally adjusted), or its successor, as published by the U.S. Department of Labor, Bureau of Labor Statistics, or its successor; provided, that if the CPI is changed so that the base year of the CPI changes, the CPI will be converted in accordance with the conversion factor published by the U.S. Department of Labor, Bureau of Labor Statistics, or its successor. If the CPI is discontinued or substantially altered, the applicable substitute index will be that chosen by the Secretary of the Treasury for the Department of Treasury’s Inflation-Linked Treasuries as described at 62 Fed. Reg. 846-847 (Jan. 6, 1997), or if no such securities are outstanding, will be determined by the parties in accordance with general market practice at that time.

Contingent Capital Contribution Amount is defined in Section 7.01(d).

Contract means any contract, subcontract, or other form of agreement to perform any part of the Work or provide any materials, equipment or supplies for the Project and/or the Utility Relocations included in the Work, on behalf of the Concessionaire or any other Person with whom any Contractor has further subcontracted any part of the Work, at all tiers.

Contractor means any Person with whom the Concessionaire has entered into any contract to perform any part of the Work or provide any materials, equipment or supplies for the Project and/or the Utility Relocations included in the Work, on behalf of the Concessionaire, and any other Person with whom any Contractor has further subcontracted any part of the Work, at all tiers. The term “Contractor” will include the Design-Build Contractor and the O&M Contractor.

Cost is defined in Section 3.03(b).

Credit Balances means the aggregate of any amounts standing to the credit of any bank account held by or on behalf of the Concessionaire.

Critical Path means the longest chain(s), in terms of time, of logically connected activities on a Project Schedule ending with Final Acceptance.

Day or day means a calendar day.
**DBE Performance Improvement Plan** is the plan submitted and approved by the Department pursuant to **Section 24.03(a)(v)(B)** with respect to improving the Concessionaire’s performance.

**DBE/SWaM Plan** means the plan developed by the Concessionaire that defines the Concessionaire’s approach to meet the DBE/SWaM participation goal, as described in more detail in the Technical Requirements.

**Debt Service Reserve Fund** means any cash fund, letter of credit or similar security required to be maintained as a reserve for the payment of debt service on the initial Senior Concessionaire Debt under the Initial Project Financing Agreements or the initial TIFIA Credit Assistance.

**Defect** means a deterioration in the condition or performance of an Asset, whether by design, construction, installation, damage or wear, affecting the condition, use, functionality or operation of any Project Asset, which would cause or have the potential to cause one or more of the following:

(a) a hazard, nuisance or other risk to public or worker health or safety, including the health and safety of road users;

(b) a structural deterioration of the affected Project Asset;

(c) damage to a third party’s property or equipment;

(d) damage to the Environment; or

(e) failure of the affected Project Asset to meet a Performance Requirement.

**Definitions** means this Exhibit A.

**Delay Event** means:

(a) with respect to the Construction Period, the occurrence of one or more of the following during the Construction Period:

(i) a Force Majeure Event;

(ii) discovery of a Differing Site Condition or Unknown Geotechnical Condition;

(iii) an unreasonable and unjustifiable failure by a Governmental Authority to issue, or an unreasonable and unjustified delay by a Governmental Authority in issuing, any Governmental Approval or other authorization required for the Project or the Work;
(iv) issuance by a Governmental Authority of competent jurisdiction of an injunction or other order enjoining or estopping either the Department or the Concessionaire from the performance of its rights or obligations under the Agreement;

(v) a Change in Law that imposes one or more changed or additional requirements that directly and materially adversely impact the performance of the Work and that could not have been reasonably anticipated by a reasonable concessionaire;

(vi) the development or implementation of any Department Change or Department Project Enhancement pursuant to the Agreement;

(vii) Department-Caused Delay; or

(viii) an exercise by the Department of any of its Reserved Rights within or immediately adjacent to the HOT Lanes or the Design-Build Right of Way;

(b) with respect to the Operating Period, the occurrence of one or more of the following during the Operating Period:

(i) a Force Majeure Event;

(ii) issuance by a Governmental Authority of competent jurisdiction of an injunction or other order enjoining or estopping either the Department or the Concessionaire from the performance of its rights or obligations under the Agreement;

(iii) a Change in Law occurring after the Service Commencement Date that imposes one or more changed or additional requirements that directly and materially adversely impact the performance of the Work and that could not have been reasonably anticipated by a reasonable concessionaire;

(iv) the development or implementation of any Department Change or Department Project Enhancement pursuant to the Agreement; or

(v) Department-Caused Delay; and

(c) which in either case under clause (a) or (b) above results in a delay or interruption in the performance by the Concessionaire of any obligation under the Agreement, provided, that the Delay Events do not include any delay that:

(i) could have been reasonably avoided by a Concessionaire Party;

(ii) is caused by the negligence or misconduct of a Concessionaire Party;

(iii) is caused by any act or omission by a Concessionaire Party in breach of the provisions of the Agreement or any other Project Agreement;
(iv) arises by reason of lack or insufficiency of funds or failure to make payment of monies or provide required security on the part of any Concessionaire Party;

(v) except to the extent the same constitutes a Force Majeure Event, arises by reason of any strike, labor dispute or other labor protest involving any Person retained, employed or hired by a Concessionaire Party or its Representatives to supply materials or services for or in connection with the Project or any strike, labor dispute or labor protest caused by or attributable to any act (including any pricing or other price or method of operation) or omission of a Concessionaire Party or its Representatives;

(vi) except to the extent the same constitutes a Force Majeure Event, arises by reason of any weather condition (including any flooding) whether or not such weather conditions or the severity of such weather conditions are not or have not ordinarily or customarily been encountered or experienced; or

(vii) arises by reason of the development, redevelopment, construction, modification, maintenance or change in the operation of any existing or new mode of transportation (including mass transit facilities or operations, a road, street or highway) that results in the reduction of Toll Revenues or in the number of vehicles using the HOT Lanes, other than an Alternative Facility to the extent provided in Section 12.05.

Delay Event Notice is defined in Section 13.01(a).

Demobilization Costs means the amount necessary to reimburse the reasonable out-of-pocket and documented costs and expenses incurred by the Concessionaire, including its reasonable Allocable Costs, to demobilize and terminate Contracts between the Concessionaire and third parties or Affiliates for performance of Work, excluding the Concessionaire’s non-contractual liabilities and indemnity liabilities (contractual or non-contractual) to third parties or Affiliates.

Department means the Virginia Department of Transportation, an agency of the State, and any other state agency succeeding to the powers, authorities and responsibilities of the Department invoked by or pursuant to the Agreement.

Department-Caused Delay means:

(a) a delay or failure by the Department in performing any of its material obligations pursuant to the Agreement; or

(b) performance of work by the Department or its contractors (other than the Concessionaire and its Contractors performing the Work) within or immediately adjacent to the HOT Lanes or the Design-Build Right of Way that causes physical damage to the HOT Lanes or the Design-Build Work or limits access to the Design-Build Right of Way and such physical damage or limited access delays the Concessionaire’s Work;

provided, however, that a Department-Caused Delay specifically excludes a delay attributable to:
(1) the submission of incomplete documentation for the Department’s review;

(2) required review of Governmental Approvals from other Governmental Authorities necessary or appropriate to the Department’s review;

(3) failure to obtain appropriation and allocation of public funds;

(4) consumption of available Float;

(5) submittals or requests that are “deemed approved” if no response is provided within the applicable timeframe;

(6) Force Majeure Events; or

(7) the resolution of disputed payment amounts in connection with Service Commencement pursuant to Section 9.02.

Department Change means (a) a change to the Work pursuant to a Change Order or a Directive Letter issued pursuant to Section 14.02(d)(i) except to the extent that such change constitutes a Department Project Enhancement and (b) any other event that the Agreement expressly states will be treated as a Department Change.

Department Credit Amount has the meaning specified in Section 7.07(d)(ii).

Department Default is defined in Section 19.04.

Department Default Termination Amount means:

(a) if a notice of termination is delivered prior to the end of the Ramp-Up Period, the aggregate of (i) the lesser of 100% of Concessionaire Debt then outstanding or 100% of Concessionaire Debt projected in the Base Case Financial Model to be then outstanding, (ii) all reasonable Demobilization Costs, and (iii) the greater of (A) the Concessionaire’s Equity Value as of the date of payment of the applicable termination compensation amount, and (B) an amount that, when added to the Distributions actually received by the Equity Members up until the date of payment of the applicable termination compensation amount, are sufficient to yield the Initial Equity IRR on aggregate amounts paid by the Equity Members to the Concessionaire in the form of capital contributions or Shareholder Loans up until the date of payment of the applicable termination compensation amount; and

(b) if a notice of termination is delivered following the Ramp-Up Period, the greater of (i) the lesser of 100% of Concessionaire Debt then outstanding or 100% of Concessionaire Debt projected in the Base Case Financial Model to be then outstanding, and (ii) the Project Value;

in each case, less any Credit Balances; provided, however, that Credit Balances will not be deducted from the Project Value unless the Project Value is increased on account of such Credit Balances.
**Department Project Enhancements** means any extensions of, additions to, or major modifications of the Project within the Project Right of Way undertaken by the Department pursuant to Section 12.02, except as part of maintenance, repair, reconstruction, rehabilitation, restoration or replacement of any improvements and assets.

**Department Projects** is defined in Section 12.04(a).

**Department Representative** means the individual designated in accordance with Section 25.04.

**Department Shared Assets** means those components of the Department’s transportation network existing as of the Agreement Date or constructed, renovated or improved by the Concessionaire as part of the Project that are set forth in the Technical Requirements as “Department Shared Assets.”

**Department TIFIA Protection Amount** is defined in Section 7.02(b).

**Depositary** means a savings bank, a savings and loan association or a commercial bank or trust company which would qualify as an Institutional Lender, designated by the Concessionaire and approved by the Department, to serve as depositary pursuant to the Agreement; provided, that so long as Concessionaire Debt is outstanding, the Depositary will be the Collateral Agent.

**Design-Build Contract** means the contract, dated as of July 31, 2012, between the Concessionaire and the Design-Build Contractor for the Project, attached as Exhibit E, as it may be amended or supplemented.

**Design-Build Contractor** means Fluor-Lane 95, LLC, a Delaware limited liability company.

**Design-Build Letter of Credit** is defined in Section 17.08(b).

**Design-Build Right of Way** means active construction areas on the Project Right of Way during the Construction Period.

**Design-Build Work** means the services provided by the Design-Build Contractor under the Design-Build Contract for the construction of the Project Assets.

**Design-Build Work Guarantee** is defined in Section 17.08(c).

**Design Documentation** means such plans, drawings, specifications and other design documentation (including design standards, design or durability reports, models, samples and calculations) in computer readable and written formats prepared by or on behalf of the Concessionaire for the purposes of the performance of the Work or any component thereof in accordance with the Agreement.
Design Public Hearing Documentation means documents approved by the Department’s Chief Engineer following a required public hearing relative to design of the Project.

Design Quality Management Plan means the plan developed by the Concessionaire that provides the organization, relationship and procedures that define clear lines of responsibility and well defined approach for meeting Project requirements and innovation in design approach, as described in more detail in the Technical Requirements.

Design Work Notice to Proceed is defined in Section 8.03(a).

Development Contract means any agreement that is entered into by the Department and the Concessionaire from time to time that sets forth the parties’ rights and obligations with respect to the design and construction of a Project Enhancement, which will include such terms as may be mutually agreed by the Concessionaire and the Department.

Deviation means any material proposed or actual change, deviation, modification, alteration or exception from any of the Technical Requirements.

Differing Site Conditions means any:

(a) threatened or endangered species whose habitat is protected by Law on the Project Right of Way;
(b) archaeological, paleontological or cultural resources on the Project Right of Way;
(c) Unknown Pre-Existing Hazardous Substances;
(d) Hazardous Substances spilled or otherwise placed on the Project Right of Way subsequent to the Agreement Date other than by a Concessionaire Party in the course of performing the Work; or
(e) Utilities in the Project Right of Way, excluding any such Utilities known to the Concessionaire on the Agreement Date;

provided, however, that to qualify as a Differing Site Condition, such condition:

(1) was not known or discovered by the Concessionaire prior to the Agreement Date, and could not reasonably be expected to have been known or discovered by the Concessionaire prior to the Agreement Date; and

(2) has a material impact on the Concessionaire’s performance of the Work pursuant to the terms of the Agreement.

Direct Agreement means the agreement executed among the Department, the Concessionaire and the Collateral Agent, in the form attached as Exhibit R.
Directive Letter means an order issued by the Department in accordance with Section 14.02 directing the Concessionaire to perform Work.

Disadvantaged Business Enterprise Program (DBE) means the Federal program designed to support socially and economically disadvantaged firms working with transportation agencies.

Discriminatory Change in Law means the adoption of any State Law or any change in any State Law or in the interpretation or application thereof during the Term that, except as otherwise provided within this definition:

(a) has the effect of discriminating solely against the Project, the Concessionaire or operators of toll roads in the State, except where such State Law or change in State Law or in interpretation or application (1) is in response, in whole or in part, to any failure to perform or breach of the Agreement or other Project Agreement, violation of Law or Governmental Approval, culpable act, omission or negligence on the part of any Concessionaire Party or (2) is otherwise permitted under the Agreement;

(b) permits vehicles other than Permitted Vehicles to travel on the Project;

(c) permits vehicles then paying tolls to travel on the Project at reduced tolls or without tolls, including decreases in then existing High Occupancy Requirements; or

(d) limits the Concessionaire’s right to impose, charge, collect and enforce tolls and incidental charges in accordance with Section 5.01.

None of the following will be a Discriminatory Change in Law:

(i) the development and operation of any existing or new mode of transportation (including a road, street, highway or mass transit facility) that results in the reduction of Toll Revenues or in the number of vehicles using the Project;

(ii) any changes in Taxes of general application;

(iii) the exercise by the State of its regulatory and police powers;

(iv) a Toll Exemption Event; or

(v) any order issued by a State or federal court or the interpretation by a State or federal court of any Law.

A Safety Compliance Order will not be deemed to be a Discriminatory Change in Law. For purposes of the definition of “Discriminatory Change in Law,” the term “Governmental Authority” means the government of the State or of any department, commission, board, bureau, agency or other regulatory or governmental authority established under the laws of the State.
**Dispute** means any Claim, dispute, disagreement or controversy between the Department and the Concessionaire concerning their respective rights and obligations under the Project Agreements, including concerning any alleged breach or failure to perform and remedies.

**Distribution** means

(a) any distribution, dividend or other payment, monetary or in-kind, made by the Concessionaire to any Equity Members, including from the proceeds of any Refinancing, on account of equity investment in the Concessionaire;

(b) any payment by the Concessionaire to an Affiliate other than pursuant to an Affiliate Contract to which the Department has consented in accordance with Section 24.02(k) or which does not require the Department’s consent in accordance with Section 24.02(k); or

(c) the early release of any contingent funding liabilities to any Equity Member.

**Document Management Plan** means the plan developed by the Concessionaire to define the document management approach for all Work Product, as described in more detail in the Technical Requirements.

**Early Work** means the work identified in Exhibit B-4.

**Electronic Toll Collection Agreement** means the agreement between the Concessionaire and the Department executed in accordance with Section 5.01(e), attached as Exhibit K.

**Emergency** means any unplanned event within the Project Right of Way that:

(a) presents an immediate or imminent threat to the long term integrity of any part of the infrastructure of the Project, to the Environment, to property adjacent to the Project or to the safety of road users or the traveling public;

(b) has jeopardized the safety of road users or the traveling public; or

(c) is a declared state of emergency pursuant to State or Federal Law.

**Employment Related Matters** means Exhibit AA.

**Environment** means soil, surface waters, groundwaters, land, stream sediments, surface or subsurface strata and ambient air.

**Environmental Assessment** means the Revised Environmental Assessment submitted by the Department to FHWA on November 7, 2011, and consisting of (i) the Environmental Assessment prepared by the Department and dated September 8, 2011, (ii) the summary of comments that the Department received to the September 8, 2011, Environmental Assessment along with the Department’s responses to those comments, (iii) the summary of changes to the...
Project and mitigation measures that were based on the comments, and (iv) a summary of findings, agreements, and determinations that the Department made for the Project.

**Environmental Laws** means any Laws applicable to the Project regulating or imposing liability or standards of conduct concerning or relating to the regulation, use or protection of human health, the Environment or Hazardous Substances, including, by way of example and not limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 USC Section 9601 et seq., the Resource Conservation and Recovery Act, 42 USC Section 6901 et seq., the Federal Clean Water Act, 33 USC Section 1351 et seq., the Occupational Safety and Health Act, 29 USC Section 651 et seq., as currently in force or as hereafter amended.

**Environmental Management Plan** means the plan developed by the Concessionaire that sets forth the Concessionaire’s approach to environmental management, as described in more detail in the Technical Requirements.

**Equity Contribution Amount** is defined in Section 7.01(d).

**Equity Contributions** means (without duplication) cash and Equity Funding Agreements, each in form and substance acceptable to the Department in its sole discretion.

**Equity Funding Agreements** means the equity funding agreements, dated the Financial Close Date, by and among the Equity Sponsors, the Concessionaire and the agent for the Lenders, with respect to the capital commitments for the Project.

**Equity Funding Guaranty** is defined in Section 17.08(a).

**Equity IRR** means the nominal post-tax Internal Rate of Return calculated on the Committed Investment over the full Term projected in the Base Case Financial Model.

**Equity Member** means any Person with a direct equity interest in the Concessionaire.

**Equity Sponsors** means Fluor and Transurban Drive USA LLC.

**Escrow Agent** means SunTrust Bank, and its successors and assigns, or such other entity serving as escrow agent pursuant to the Escrow Agreement.

**Escrow Agreement** means the Escrow Agreement dated as of July 31, 2012 among the Concessionaire, the Department and the Escrow Agent which will be in substantially the form attached as Exhibit D, as it may be amended or supplemented from time to time.

**Escrow Documents** is defined in Section 18.05(a) and includes any documents submitted after the Agreement Date pursuant to Section 18.05(d).

**ETTM** means electronic toll and traffic management.
**ETTM Data** means all data generated by or accumulated in connection with the operation of the ETTM System, including but not limited to customer lists, customer identification numbers, customer account information and billing records and other customer specific information.

**ETTM Equipment** means the automatic vehicle identification equipment, video monitoring equipment, vehicle occupancy detection equipment, toll violator systems, and electronic toll collection equipment, including its components, systems and subsystems; the traffic management system equipment; communications equipment, and all associated hardware and physical infrastructure and other computer hardware and software necessary to meet the performance specifications for ETTM.

**ETTM Facilities** means the administration/operations building, toll gantries and technical cabinets, utility connections, lighting facilities and other facilities associated with electronic toll and traffic management.

**ETTM System** means the ETTM Facilities, ETTM Equipment and the Software which monitors, controls or executes the ETTM Equipment, all of which will meet the minimum performance criteria established by the Technical Requirements.

**Exempt Vehicles** means (a) maintenance vehicles of the Department and its contractors and snow removal vehicles of the Department and its contractors, each in the performance of its duties related to the HOT Lanes; and (b) emergency vehicles and law-enforcement vehicles using the Project for the performance of their duties.

**Express Operations Center** means the HOT OC Services facilities located at 6440 General Green Way, Alexandria, Virginia.

**E-ZPass** means an electronic toll collection system used in the Commonwealth of Virginia and as part of the “E-ZPass Interagency Group”.

**Federal** means of or relating to the central government of the United States of America.

**Federal Requirements** means the provisions required to be part of federal-aid contracts relating to highway projects and applicable to the Project, including the provisions set forth in Exhibit U.

**Final Acceptance** means the occurrence of all the events and satisfaction of all the conditions with respect to the Work as set forth in Section 8.09(b).

**Final Acceptance Certificate** means the certificate issued by the Department pursuant to Section 8.09(c).

**Final Acceptance Date** means the date on which Final Acceptance is achieved, as indicated on the Final Acceptance Certificate.
Final Acceptance Deadline means the date which is 90 Days from the Substantial Completion Date, as such date may be extended for Delay Events from time to time in accordance with the terms of the Agreement.

Financial Close means satisfaction of all of the conditions set forth in Section 7.03(b).

Financial Close Adjustment Protocol attached as Exhibit BB.

Financial Close Date means the date on which Financial Close occurs.

Financial Close Deadline means the date by which Financial Close must occur, which is the first to occur of (a) 270 Days following the date on which the Concessionaire has submitted an application to USDOT to obtain financing under any credit assistance program under TIFIA for the Project, or (b) 270 Days following the date on which USDOT provides written notice to the Concessionaire that the Project will not receive financing under any credit assistance program under TIFIA for the Project.

Financial Model Auditor means any independent, recognized auditor engaged by the Concessionaire, acceptable to the Department, who will audit the Base Case Financial Model and modifications to the Financial Model Formulas, and perform such other services as are required in the Agreement.

Financial Model Formulas means the financial formulas that the Concessionaire and the Department have agreed upon as of the Agreement Date as a basis for the Initial Base Case Financial Model and any updates pursuant to the Agreement but without the data and the information used by or incorporated in the Initial Base Case Financial Model, Base Case Financial Model or Base Case Financial Model Update.

Financing Assignment is defined in Section 7.04(a).

Financing Escrow Documents is defined in Section 18.05(a).

First Measurement Period is defined in Section 5.07(b)(i).

First Threshold HOV Percentage and Rate is defined in Section 5.07(b)(i).

Fitch Ratings mean Fitch Ratings, and any successor thereto which is a nationally recognized rating agency.

Float means the amount of time that any given activity or logically connected sequence of activities shown on a Project Schedule may be delayed before it will affect the Concessionaire’s ability to achieve Substantial Completion by the Guaranteed Substantial Completion Date. Such Float is generally identified as the difference between the early completion date and late completion date for all activities as shown on a Project Schedule.

Fluor means Fluor Enterprises, Inc.
**Fluor Guarantor** means Fluor Corporation.

**FONSI** means the Finding of No Significant Impact related to the Project issued by the FHWA on December 5, 2011.

**Force Majeure Event** means the occurrence of an event, act, omission, condition, or circumstance beyond either parties’ reasonable control and due to no fault of either party, or those for whom either party is responsible, that materially prevents or delays the Concessionaire from performing any of its obligations pursuant to the Agreement. An event is not a Force Majeure Event if such event is otherwise specifically dealt with in the Agreement or arises by reason of:

(a) the negligence or misconduct of a Concessionaire Party;
(b) any act or omission by a Concessionaire Party in breach of the provisions of the Agreement;
(c) Delay Events, other than Force Majeure Events;
(d) lack or insufficiency of funds or failure to make payment of monies or provide required security on the part of a Concessionaire Party;
(e) any strike, labor dispute or labor protest directed solely at a Concessionaire Party or caused by or attributable to any act (including any pricing or other practice or method of operation) or omission of a Concessionaire Party;
(f) an earthquake after Substantial Completion that causes ground accelerations below the AASHTO bridge design standards for the site of the Project Assets;
(g) floods after Substantial Completion below the base flood levels specified in the Technical Requirements;
(h) market conditions and economic conditions affecting the availability, supply, or cost of labor, equipment and materials, construction equipment and supplies, or commodities;
(i) market conditions and economic conditions affecting traffic volumes, traffic revenue or the Concessionaire’s ability to meet its financial obligations for the Project; or
(j) weather conditions, other than hurricane force winds, tornadoes and floods to the extent not excluded by the above.

**GARVEE Trustee** means U.S. Bank National Association, as trustee under the Master Trust Indenture between the CTB and the U.S. Bank National Association, as the same may be supplemented from time to time.
**General Assembly** means the General Assembly of the State.

**Generally Accepted Accounting Principles (GAAP)** means such accepted accounting practice as conforms at the time to generally accepted accounting principles in the United States of America, consistently applied.

**Geotechnical Conditions** means any geotechnical, subsurface or latent physical conditions within the Project Right of Way (including natural foundations, infrastructures or manmade obstructions within the Project Right of Way).

**Good Faith Efforts** means the adequate demonstrated effort required by the Concessionaire and its Contractors to achieve the DBE and SWaM goals or other requirements in Section 24.03, as set forth in the Labor, Employment and DBE/SWaM Related Matters.

**Good Industry Practice** means the industry practices and standards that would be exercised by a prudent and experienced concessionaire, designer, engineer, contractor, operator or maintenance provider engaged in the same kinds of undertakings and under similar circumstances as those applying to the Work.

**Governmental Approvals** means all local, regional, state and Federal agreements, studies, findings, permits, approvals, authorizations, certifications, consents, decisions, exemptions, filings, leases, licenses, registrations, rulings and other governmental authorizations required to be obtained or completed under Law prior to undertaking any particular activity contemplated by the Agreement, a Development Contract or a Change Order. The term “Governmental Approvals” includes NEPA Documents.

**Governmental Authority** means any court, Federal, state, or local government, department, commission, board, bureau, agency or other regulatory or governmental authority, but will not include the Department.

**GP Lanes** means the general purpose traffic lanes (in either or both directions) along the I-95 Corridor.

**Gross Revenues** means the amount calculated as follows:

(a) Toll Revenues; plus

(b) proceeds of business interruption or similar insurance against loss of revenues from operation of the Project; plus

(c) all other amounts derived from or in respect of the operation of the Project which constitute revenues in accordance with GAAP, including any interest income the Concessionaire earns on any funds on deposit in any bank account or securities account; plus

(d) the amounts paid or to be paid by the Department to the Concessionaire as a result of a Compensation Event within the current calendar year that compensates for Net Revenue Impact and Net Cost Impact pursuant to the Agreement; plus
(e) all amounts received or retained by the Concessionaire pursuant to Section 22.05; minus

(f) total credits and refunds of Toll Revenues made by the Concessionaire to customers and users on account of Toll Revenue previously collected.

**Guaranteed Substantial Completion Date** means December 31, 2014, as such date may be extended for Delay Events from time to time in accordance with the terms of the Agreement.

**Guidelines** means the PPTA Implementation Guidelines, as revised October 31, 2005.

**Handback Period** is defined in Section 20.02(f).

**Handback Requirements** is defined in Section 20.02(a).

**Hazardous Environmental Condition** means the presence of any Hazardous Substances on, in, under or emanating from the Project Right of Way that is present at concentrations or in quantities that: (a) may present an imminent or substantial safety or health hazard for the Department, the Concessionaire or their respective employees, agents, representatives or independent contractors, the general public or the surrounding environment or (b) are required to be removed or remediated as a matter of Law or in accordance with the requirements of any Governmental Authority.

**Hazardous Substance** means, but is not limited to, any solid, liquid, gas, odor, heat, sound, vibration, radiation or other substance or emission which is or could be considered a contaminant, pollutant, dangerous substance, toxic substance, Hazardous Waste, solid waste, or hazardous material which is or becomes regulated by Laws or which is classified as hazardous or toxic under Laws.

**Hazardous Waste** means a waste that is (a) listed as a hazardous waste in 40 CFR Section 261.31 to 261.33, and (b) exhibits one of the following characteristics: ignitability, corrosivity, reactivity or toxicity, or is otherwise defined as a hazardous waste by Law.

**Health, Safety and Security Plan** means the plan developed by the Concessionaire that defines the health, safety and security activities required during the design and construction of the Project, as described in more detail in the Technical Requirements.

**High Occupancy Requirement** means the number of Persons in accordance with Law applicable to the Project required to be traveling in a vehicle for the vehicle to use the HOT Lanes without payment of a toll.

**High Occupancy Vehicle** or **HOV** means a Permitted Vehicle traveling with at least the number of Persons required by the High Occupancy Requirement.

**Highest Revenue Share IRR** means the fourth level of Internal Rate of Return as set forth in Exhibit J.
**HOT Lanes** means the high occupancy toll lanes and the associated entry and exit ramps within the Project Right of Way that are separated from the adjacent GP Lanes, and the use of which is restricted pursuant to Section 5.01.

**HOT OC Buy-In Cost** means the amount paid to CBE pursuant to the Shared Facilities Agreement.

**HOT OC Services** means the toll and other services to be provided to the Project pursuant to the Shared Facilities Agreement, the O&M Agreement and the Operations and Support Services Agreement for the Capital Beltway HOT Lanes Project dated December 19, 2007 between CBE and Transurban (USA) Operations, Inc.

**HOV Assets** is defined in Section 9.01(a).

**HOV Lanes** means the two reversible high occupancy vehicle lanes and the associated entry and exit ramps within the Project Right of Way that are separated from the adjacent GP Lanes, and in operations as of the Agreement Date.

**I-95 Corridor** means the portion of Interstate 95 located within the State with a northern terminus approximately 1 mile north of Route 648 (Edsall Road) and a southern terminus at the ramp for the Route 610 interchange (Garrisonville Road) on Interstate 95 in Stafford County.

**Incident** means any unplanned event within the Project Right of Way that causes potential or actual disruption to the free flow of traffic.

**Initial Base Case Financial Model** means the Financial Model Formulas and the assumptions and information, including, but not limited to, projections and calculations with respect to revenues, expenses, the repayment of Concessionaire Debt, applied to the Financial Model Formulas and which is prepared on the basis of the Base Case Traffic Model as of the Agreement Date.

**Initial Baseline Schedule** means the initial construction schedule, proposed by the Concessionaire and approved by the Department, which is attached as Exhibit B-2.

**Initial Equity Commitment Amount** is defined in Section 7.01(d).

**Initial Equity IRR** means the nominal post-tax Internal Rate of Return on Committed Investment over the full Term as defined in the Initial Base Case Financial Model.

**Initial HOT OC Buy-In Cost** means $21.4 million.

**Initial Project Financing Agreements** means the Project Financing Agreements entered into by the Concessionaire on or about the Financial Close Date in the form agreed between the parties on or before the Agreement Date.

**Initial Public Funds Amount** means $94 million, which will be adjusted at Financial Close pursuant to Section 7.03(b).
Initial Review Committee is defined in Paragraph 4 of the Recitals to the Agreement.

Institutional Lender means:

(a) the United States of America, any state thereof or any agency or instrumentality of either of them, any municipal agency, public benefit corporation or public authority, advancing or insuring mortgage loans or making payments which, in any manner, assist in the financing, development, operation and maintenance of projects;

(b) any (i) savings bank, commercial bank, investment bank, trust company (whether acting individually or in a fiduciary capacity) or insurance company organized and existing under the laws of the United States of America or any state thereof, (ii) foreign insurance company or commercial bank qualified to do business as an insurer or commercial bank as applicable under the laws of the United States of America or any state thereof, (iii) pension fund, hedge fund, foundation or university or college endowment fund, (iv) entity which is formed for the purpose of securitizing mortgages, whose securities are sold by public offering or to qualified investors under the U.S. Securities Act of 1933, as amended, (v) Person engaged in making loans in connection with the securitization of mortgages, to the extent that the mortgage to be made is to be so securitized in a public offering or offering to qualified investors under the U.S. Securities Act of 1933, as amended, within one year of its making (provided, that an entity described in this clause (b) only qualifies as an Institutional Lender if it is subject to the jurisdiction of state and Federal courts in the State in any actions);

(c) any “qualified institutional buyer” under Rule 144(a) of the Securities Act of 1933 or any other similar Law hereinafter enacted that defines a similar category of investors by substantially similar terms;

(d) the holders of debt issued by a PABs Issuer or the trustee for such holders, so long as the indenture trustee for such holders of debt itself is an Institutional Lender; or

(e) any other financial institution or entity designated by the Concessionaire and approved by the Department (provided, that such institution or entity, in its activity under the Agreement, is acceptable under then current guidelines and practices of the State);

provided, that each such entity (other than entities described in clause (b)(iv) and clause (c) of this definition) or combination of such entities if the Institutional Lender is a combination of such entities will have individual or combined assets, as the case may be, of not less than $1 billion; and provided further, that an entity described in clause (b)(iv) of this definition must have assets of not less than $100 million.

Insurance Requirements means Exhibit Y.

Intellectual Property means the ETTM books and records, Escrow Documents, copyrights (including moral rights), trade marks (registered and unregistered), designs (registered, including applications, and unregistered), patents (including applications), circuit layouts, Source Code and Source Code Documentation, plant varieties, business and domain
names, inventions, trade secrets, proposals, copyrightable works, customer and supplier lists and information, and other results of intellectual activity, copies and tangible embodiments of all of the foregoing (in whatever form or medium) and licenses granting any rights with respect to any of the foregoing (to the extent assignable), in each case, relating to the Project.

**Interim Agreement** is defined in Paragraph 8 of the Recitals to the Agreement.

**Internal Rate of Return** means the discount rate that makes the net present value of all cash flows from an investment equal to zero.

**Key Member** means (a) Fluor, Lane Construction Corporation (but not Virginia Paving Corporation) and the Design-Build Contractor with respect to the Design-Build Work or (b) Transurban and the O&M Contractor with respect to the O&M Work.

**Known Geotechnical Conditions** means Geotechnical Conditions:

(a) identified in Exhibit S;

(b) which the Concessionaire should have known were present within the Project Right of Way based on the Geotechnical Conditions identified in Exhibit S; and

(c) which were actually known by the Concessionaire to be present within the Project Right of Way as of the Agreement Date.

**Known Pre-Existing Hazardous Substances** means Hazardous Substances:

(a) identified in Exhibit T;

(b) which the Concessionaire should have known were present within the Project Right of Way based on the contents of Exhibit T, as of the Agreement Date; and

(c) which were actually known by the Concessionaire to be present within the Project Right of Way as of the Agreement Date;

provided, however, that notwithstanding anything to the contrary herein (including Exhibit T), any Hazardous Substances resulting from the gasoline spill on February 26, 1995 at the northbound on-ramp to I-95 at Backlick Road in Newington, Exit 166 and any Hazardous Substances consisting of asbestos on the existing bridges within the Corridor (other than asbestos contained in insulation in steel pipes on such existing bridges) shall not be considered to be Known Pre-Existing Hazardous Substances for purposes of the Agreement.

**Lane Closure Damages** is defined in Section 8.14.

**Law** means all laws, treaties, ordinances, judgments, Federal Requirements, decrees, injunctions, writs and orders of any Governmental Authority, and all rules, regulations, orders, formal interpretations and permits of any Governmental Authority having jurisdiction over construction of the Project on the Project Right of Way, performance of the Work, or operation
of the Project, or the health, safety or environmental condition of the Project or the Project Right of Way, as the same may be in effect from time to time. Laws include the Code of Virginia and the Uniform Act.

**Lenders** means each of the Institutional Lenders that are parties to the Project Financing Agreements, including the Collateral Agent, and their respective successors and assigns who also qualify as Institutional Lenders subject to Section 7.04(a)(i).

**Letter of Credit** means an irrevocable, unconditional letter of credit in favor of the Department (or where indicated, the Concessionaire or the Collateral Agent with the Department as permitted transferee), in form and content reasonably acceptable to the Department that:

(a) is payable within one Business Day in U.S. dollars upon presentation of a sight draft and a certificate confirming that the Department (or, where indicated, the Collateral Agent or the Concessionaire) has the right to draw under such letter of credit from time to time in the amount of such sight draft and confirming such other matters that may be required under the Letter of Credit, without presentation of any other document, statement or authorization;

(b) is issued by a commercial bank or trust company that (i) has a combined capital and surplus of at least $1,000,000,000, (ii) is a national banking association, a state bank chartered in one of the states of the United States, or the U.S. branch of a foreign bank, and (iii) is not an Affiliate of the Concessionaire;

(c) is issued by a commercial bank or trust company that has a current credit rating of at least A- or its equivalent from at least two nationally recognized Rating Agencies (or such other credit rating as is acceptable to the Department in its discretion and approved by the Department prior to the submission of the letter of credit);

(d) provides that, if the issuer of the Letter of Credit fails to maintain the ratings specified above in clause (c), then the Letter of Credit may be drawn upon in full within 30 Days unless the Concessionaire or other applicable account party provides a replacement Letter of Credit that meets the requirements of the Agreement or provides additional security acceptable to the Department in its sole discretion;

(e) has an initial term as specified in the Agreement, to the extent applicable;

(f) provides for the continuance or extension of its term for a period of at least one year or, if earlier, until the end of the term for which the Letter of Credit is required or as otherwise provided for in the Agreement;

(g) provides that the office for presentment of sight drafts specified in the Letter of Credit will be located at a specified street address in the City of New York, New York; and

(h) provides that it may be drawn upon in accordance with its terms within ten Business Days of its scheduled expiration date unless, prior to such tenth Business Day, the Department (or, where indicated, the Collateral Agent or the Concessionaire) has received evidence that the scheduled expiration date of such letter of credit has been extended or
continued in accordance with the provisions hereof or that the replacement letter of credit meeting the requirements of the Agreement has been provided to the intended beneficiary of the expiring letter of credit.

**Leverage Ratio** means the ratio that results from the following calculation: Total Financing Amount minus Equity Contributions divided by the Total Financing Amount. For example and the avoidance of doubt, (1) a Leverage Ratio of 65% means 65% of the Total Financing Amount consists of funds other than Equity Contributions and 35% of the Total Financing Amount consists of Equity Contributions and (2) a positive change in the Leverage Ratio means a decrease in the percentage of Equity Contributions.

**Lien** means any pledge, lien, security interest, mortgage, deed of trust or other charge or encumbrance of any kind, or any other type of preferential arrangement (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature of a security instrument and the filing of or agreement to file any financing statement under the Virginia Uniform Commercial Code).

**Life Cycle Maintenance Plan** means the plan produced annually by the Concessionaire identifying Major Maintenance and Handback Requirements needs, the estimated costs and timing of those needs and such other information as may be reasonably requested by the Department, as described in Section 9.04(b) and the Technical Requirements.

**Limited Notice to Proceed (LNTP)** means the applicable limited notice to proceed issued pursuant to Section 8.02(a).

**List of Initial Project Financing Agreements and Financing Assignments** means Exhibit O.

**Lock-up Period** means the period commencing on the Agreement Date and ending on the later of (i) December 20, 2017 and (ii) the Service Commencement Date.

**Long Stop Date** means the date that is 547 Days after the Guaranteed Substantial Completion Date; *provided* that a new Long Stop Date may be established pursuant to a Substantial Completion Recovery Plan proposed and approved pursuant to Section 8.15 as such date may be extended for Delay Events from time to time in accordance with the terms of the Agreement.

**Losses** means, with respect to any Person, any losses, liabilities, judgments, damages, fees, penalties, fines, sanctions, charges or out-of-pocket and documented costs or expenses actually suffered or incurred by such Person, including as a result of any injury to or death of persons or damage to or loss of property.

**Major Arterials** means primary routes and all other State Highways in the State that connect directly to I-95 or I-495.
**Major Maintenance** means maintenance, repair, renewal, reconstruction or replacement of any portion or component of the Project Assets, as applicable, of a type which is not normally included as Ordinary Maintenance.

**Major Maintenance Performance Security** means any Performance Bond, surety, Letter of Credit, guaranty or similar instrument procured in accordance with the terms of this Agreement as set forth in Section 17.08(e).

**Major Maintenance Reserve Fund** means a deposit account established by the Concessionaire at a financial institution which qualifies as an Institutional Lender under clause (b) of the definition thereof for the exclusive purpose of holding funds to pay for Tasks of Major Maintenance as described in Section 9.04, together with all amounts from time to time contained therein.

**Maintenance Management System (MMS)** means the system required under the Technical Requirements to record inventory, failures, repairs, maintenance activities, inspections performed, communications, and notifications of Incidents and Defects.

**Maintenance of Traffic (MOT) Plan** means the plan developed by the Concessionaire that sets forth the Concessionaire’s approach to maintenance of traffic, as described in more detail in the Technical Requirements.

**Maintenance Rating Program (MRP)** means the Department’s Maintenance Rating Program.

**Mass Transit Vehicles and Commuter Buses** means vehicles providing scheduled transportation services to the general public over designated routes with specified stops and for the purposes of Section 5.01(b) transporting at a minimum the High Occupancy Requirement.

**Measurement Period** means each of the First Measurement Period, the Second Measurement Period and the Third Measurement Period.

**Monthly Progress Reports** means those reports prepared by the Concessionaire or its contractors that are required pursuant to the Agreement for monthly delivery to the Department Representative that reflect the status of and information related to the development and operation of the Project.

**Moody’s** means Moody’s Investor Service, Inc. and any successor thereto which is a nationally recognized rating agency.

**NEPA** means the National Environmental Policy Act, 42 U.S.C. Section 4321 et seq., as amended and as it may be amended from time to time.

**NEPA Documents** means the Environmental Assessment and the FONSI.

**Net Cost Impact** means the aggregate value of any net increase in the Concessionaire’s costs (including the Concessionaire’s Allocable Costs to the extent applicable), reflected on an
annual basis, directly attributable to a Compensation Event, as compared with what the Concessionaire’s costs (including the Concessionaire’s Allocable Costs, to the extent applicable) would have been absent the occurrence of the Compensation Event, less the increased costs that can reasonably be mitigated by the Concessionaire. Net Cost Impact will:

(a) exclude:

(i) third-party entertainment costs, lobbying and political activity costs, costs of alcoholic beverages, costs for first class travel in excess of prevailing economy travel costs, and costs of club memberships, in each case to the extent that such costs would not be reimbursed to an employee of the Department in the regular course of business;

(ii) unallowable costs under the following provisions of the Federal Contract Cost Principles, 48 CFR Section 31.205: Section 31.205-8 (contributions or donations), Section 31.205-13 (employee morale, health, welfare, food service, and dormitory costs and credits), Section 31.205-14 (entertainment costs), Section 31.205-15 (fines, penalties, and mischarging costs), Section 31.205-27 (organization costs), Section 31.205-34 (recruitment costs), Section 31.205-35 (relocation costs), Section 31.205-43 (trade, business, technical and professional activity costs), Section 31.205-44 (training and education costs), and Section 31.205-47 (costs related to legal and other proceedings); and

(b) exclude amounts paid or to be paid to Affiliates that have not been approved by the Department pursuant to Section 24.02(k) that are in excess of the pricing the Concessionaire could reasonably obtain in an arms’ length, competitive transaction with an unaffiliated Contractor; and

(c) take into account any savings in costs, including finance costs, attributable to the Compensation Event.

Net Cost Saving means the aggregate value of any decrease in the Concessionaire’s costs reflected on an annual basis directly attributable to a Compensation Event, a Deviation, whether proposed, approved or unauthorized, a change in the Technical Requirements, whether or not such change constitutes a Department Change, or Non-Conforming Work waived by the Department, as compared with what the costs would have been absent occurrence of a Compensation Event, Deviation or Non-Conforming Work but excluding any savings in costs taken into account to reduce the Net Cost Impact attributable to such Compensation Event.

Net Revenue Impact means:

(a) any net increase or decrease in Gross Revenues directly attributable to a Compensation Event;

(b) in the case of a net decrease in Gross Revenues, less any savings in Project operating and maintenance costs resulting from the Compensation Event (excluding any savings
in costs subtracted from Net Cost Impact for the same Compensation Event) as compared with what the Gross Revenues would have been absent occurrence of the Compensation Event;

(c) in the case of a net increase in Gross Revenues, less any incremental increase in Project operating and maintenance costs resulting from the Compensation Event (excluding any increase in costs included in Net Cost Impact for the same Compensation Event); less

(d) any lost Gross Revenues that can reasonably be mitigated by the Concessionaire (excluding any mitigation of costs subtracted from Net Cost Impact for the same Compensation Event).

Non-Compliance Points means the points that may be assessed for Performance Shortfalls, as set forth in Exhibit W.

Non-Compliance Points Table means the table attached as Exhibit W showing the Performance Shortfalls.

Non-Conforming Work means Work that does not conform to the requirements of the Agreement, relevant Governmental Approvals, Law or the Design Documentation, including but not limited to Deviations not approved in writing by the Department.

Non-Financial Close Termination Amount means the amounts due and owing for unpaid Early Work performed up to the effective date of termination of the Agreement, in an amount not to exceed $42,706,962.

Non-Permitted Closure is defined in Section 8.14.

Non-Reimbursable Concessionaire Damages means that portion of any Concessionaire Damages previously paid to the Concessionaire that compensated the Concessionaire for Net Cost Impacts and/or Net Revenue Impacts attributable to the period after the effective date of termination of the Agreement.

Northern HOT Lanes means high occupancy toll lanes added to Interstate 395 in the area between Eads Street and the current northern terminus of the Project, which is approximately 1 mile north of Route 648 (Edsall Road).

Northern HOT Lanes Development Concessionaire Impact means the Department proposes to develop the Northern HOT Lanes pursuant to Section 12.06(a) but Concessionaire can demonstrate that the Department's plans as presented to Concessionaire to develop the Northern HOT Lanes are not commercially viable for Concessionaire to undertake as a Concessionaire Project Enhancement, the Concessionaire declines the opportunity to develop the Northern HOT Lanes and the Department develops the Northern HOT Lanes. For purposes of this definition "commercially viable" means that the Department's proposal to develop the Northern HOT Lanes is (i) of a scope and complexity which is materially consistent with projects seeking to develop similar assets; (ii) is materially consistent with the standards of construction and operations and maintenance set forth in this Agreement and the Technical Requirements and (iii) is reasonably financeable by Concessionaire through any one, or a
combination of, public contribution, equity, debt, or collection of tolls or other dedicated revenues.

**Notice to Commence Right of Way (ROW) Acquisition** means a notice issued by the Department, providing the Concessionaire with the right and obligation to initiate an offer and/or to acquire a property.

**O&M Agreement or Operations and Maintenance Agreement** means the Contract between the Concessionaire and the O&M Contractor, pursuant to which the O&M Contractor will operate and maintain the Project, as it may be amended or supplemented.

**O&M Contractor or Operations and Maintenance Contractor** means Transurban (USA) Operations Inc. (the “Initial O&M Contractor”) or any Person entering into a Contract with the Concessionaire to perform the O&M Work.

**O&M Overhead Costs** is defined in Section 24.02(d)(iii).

**O&M Reserve Fund** means any cash fund or Letter of Credit required to be maintained as a reserve to pay Operating Costs.

**O&M Work** means any and all operation, management, administration, maintenance, repair, preservation, modification, reconstruction, rehabilitation, restoration, renewal and replacement of the Project during the Operating Period, including Major Maintenance and potential Project Enhancements, except to the extent that such Work is furnished pursuant to the Design-Build Contract.

**Occoquan Bridge Improvements** means the addition of any additional lanes on the bridge over the Occoquan River on U.S. Route One in Virginia, the plans for which have not been included in the CLRP or the SYIP as of November 30, 2011.

**Open Book Basis** means allowing the Department to review all underlying assumptions and data associated with each Base Case Financial Model, Base Case Financial Model Update, Net Revenue Impact, Net Cost Saving, pricing or compensation (whether of the Concessionaire or the Department) or adjustments thereto, including assumptions as to costs of the Work, schedule, composition of equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, inflation and deflation rates, traffic volumes and related data including vehicle categories, Gross Revenues, changes in toll rates, and other items reasonably required by the Department to satisfy itself as to the reasonableness and accuracy of the amount.

**Open Road Tolling (ORT)** means an electronic toll collection system without toll plazas, where drivers will be charged the toll without having to stop, slow down, or stay in a given lane.

**Operating Costs** means all reasonable costs incurred and paid for by the Concessionaire in connection with the performance of the Work during the Operating Period, including:
(a) (i) costs for operation and maintenance and consumables, (ii) payments under any lease (other than a financing lease constituting Concessionaire Debt), (iii) payments pursuant to the agreements for the management, operation and maintenance of the Project, (iv) Taxes, (v) insurance, (vi) payments for Oversight Services, (vii) police services and costs for any security, (viii) Permit Fee payments to the Department, (ix) payment of Department Share of Net Cost Saving, (x) Concessionaire’s reasonable Allocable Costs, (xi) capital expenditures including the cost of implementing any Change (as and to the extent set forth in the related Change Order or Directive Letter) or Safety Compliance Order, and (xii) any other reasonable expense paid for the enhancement, expansion, major maintenance, repair, reconstruction, rehabilitation, renewal and replacement of the Project.

(b) Operating Costs do not include: (i) debt service payments or financing costs or fees, (ii) any Distributions, (iii) entertainment costs, lobbying and political activity costs not related to the business and operations of the Concessionaire, (iv) costs of alcoholic beverages, costs for first class travel in excess of prevailing economy travel costs, and costs of club memberships, in each case, to the extent that such costs would not be reimbursed to an employee of the Department in the regular course of business, (v) non-cash charges, such as depreciation, amortization or other bookkeeping entries of a similar nature, or (vi) liquidated damages payable pursuant to the Agreement.

Operating Period means the period commencing on the Service Commencement Date through the end of the Term.

Operating Synergies means reductions in Operating Costs of the Project actually occurring as a result of the HOT OC Services.

Operations and Maintenance Plan means the plan developed by the Concessionaire that identifies the methods, systems and procedures for performing the O&M Work, as described in more detail in the Technical Requirements.

OSPS means the Operating Speed Performance Standard described in the Technical Requirements.

OSPS Improvement Plan is defined in Section 5.08(a).

Ordinary Maintenance means maintenance actions taken place to preserve the current condition of assets that are routine in nature and may be performed and funded annually. The actions may include pot hole repair, mowing, shoulder repair, guardrail repair, removal of roadside hazards, etc.

Other Termination Amount means the greater of (a) Project Value (determined, without regard to the effect of such termination, pursuant to Section 20.11) plus, without duplication, the reasonable out-of-pocket and documented costs and expenses incurred by the Concessionaire, including its reasonable Allocable Costs, as a direct result of such termination and (b) the lesser of 100% of Concessionaire Debt then outstanding or 100% of Concessionaire Debt projected in the Base Case Financial Model to be then outstanding, and any Breakage Costs
related to the prepayment or satisfaction thereof on the date on which the termination payment is paid by the Department.

**Oversight Services** means those services and functions the Department has the right or obligation to perform or to cause to be performed under Law or any Project Agreement in order to monitor, review, approve, administer or audit the Work.

**PABs** means private activity bonds allocated and issued pursuant to Section 11143 of Title XI of SAFETEA-LU, which amended Section 142 of the Internal Revenue Code to add highway and freight transfer facilities to the types of privately developed and operated projects for which private activity bonds may be issued.

**PABs Interest Rate** means the all-in cost of borrowing of PABs based on the coupon and the net issuer premium or discount for the PABs proceeds received by the Concessionaire at Financial Close. If the PABs are issued in more than one tranche, the PABs Interest Rate will be the weighted average all-in cost of borrowing of all tranches of PABs.

**PABs Issuer** means any public entity or corporation eligible under State Law to issue the PABs.

**Performance Bond** means a performance bond made on official forms furnished by the Department, executed by a surety company carrying a minimum “Best Rating” of “B +” and authorized to do business in the State in accordance with the Laws of the State and the rules and regulations of the State Corporation Commission.

**Performance Requirement** means a performance requirement with respect to the O&M Work, as set forth in the Performance Requirements Baseline Table for each Asset.

**Performance Requirements Baseline Table** means the table included in the Technical Requirements, as may be updated pursuant to the Agreement, which sets forth the Performance Requirements for each Asset.

**Performance Security** means (i) the Equity Funding Guaranties, the Design-Build Letter of Credit, the Design-Build Work Guarantee, the Major Maintenance Performance Security, any Performance Bond, and a Letter of Credit or (ii) any surety bond, letter of credit, guaranty or similar instrument acceptable to the Department in its reasonable discretion procured in accordance with the terms of this Agreement.

**Performance Shortfalls** is defined in Section 11.01(a).

**Permit** is defined in Section 4.01.

**Permit Fee** means the payments received by the Department as compensation for the Department’s grant to the Concessionaire of the Permit, as set forth in Exhibit J.

**Permitted Encumbrance** means, with respect to the Project:
(a) the rights and interests of the Concessionaire under the Agreement;

(b) any Lien that is being contested by the Department (but only for so long as such contestation effectively postpones enforcement of any such Lien);

(c) inchoate materialmen’s, mechanics’, workmen’s, repairmen’s, employees’, carriers’, warehousemen’s or other similar Liens arising in the ordinary course of business of the Project or the Department’s performance of its obligations hereunder, and either (A) not delinquent or (B) which are being contested by the Department (but only for so long as such contestation effectively postpones enforcement of any such Lien);

(d) any recorded or unrecorded easement, right, claim, license, privilege, covenant, condition, right-of-way or servitude, or other similar reservation, right, limitation or restriction, relating to, affecting or encumbering the Project or the development, use or operation of the Project (including, but not limited to, easements and rights-of-way for utilities and utility facilities), or any defect or irregularity in the title to the Project, including, but not limited to those discoverable by a physical inspection or survey of the Project, that does not materially interfere with the operations of the Projects or the right and benefits of the Concessionaire and the Department under the Agreement;

(e) any zoning, building, environmental, health or safety Law now or hereafter in effect relating to, affecting or governing the Project or the development, use or operation of the Project, together with all amendments, modifications, supplements or substitutions thereto or therefore;

(f) any right reserved to or vested in any Governmental Authority (other than the Department) by any statutory provision;

(g) any other encumbrance permitted hereunder;

(h) any Lien created, incurred, assumed or suffered to exist by the Concessionaire or any Person claiming through it; and

(i) any amendment, extension, renewal or replacement of any of the foregoing.

Permitted Vehicles means (a) any vehicle with two axles including motorcycles; (b) Mass Transit Vehicles and Commuter Buses and school buses; and (c) Exempt Vehicles. Permitted Vehicles will not include any vehicle pulling a trailer except Exempt Vehicles.

Person means any individual (including, the heirs, beneficiaries, executors, legal representatives or administrators thereof), corporation, partnership, joint venture, trust, limited liability company, limited partnership, joint stock company, unincorporated association or other entity or a Governmental Authority.

Planned Refinancing means a Refinancing which is planned by the Concessionaire and included in the Base Case Financial Model.
Pre-Existing Hazardous Substances means Known Pre-Existing Hazardous Substances and Unknown Pre-Existing Hazardous Substances.

Pricing Date means November 29, 2011.

Project means the development, design, financing, construction, operation, maintenance and tolling of the Project Assets, all as more particularly described in the Technical Requirements and in Exhibit B-1.

Project Agreements means the VDOT Project Agreements, the Concessionaire Project Agreements, the Direct Agreement and all other agreements identified in Section 3.02, as those agreements may be amended, superseded or replaced during the Term.

Project Assets means the HOT Lanes and other assets constructed, maintained or held by the Concessionaire pursuant to the Agreement (or any applicable portion of such assets).

Project Development Plans means the project development plans developed by the Concessionaire pursuant to the Technical Requirements.

Project Documentation means Construction Documentation and Design Public Hearing Documentation.

Project Enhancement Account means a concession payments account created in accordance with Virginia Code Section 33.1-23.03:9(A).

Project Enhancements means, collectively, Concessionaire Project Enhancements and Department Project Enhancements.

Project Financing Agreements means the Financing Assignments and any other documents evidencing Concessionaire Debt (including Refinancings) obtained in compliance with the terms of the Agreement, together with any and all amendments and supplements thereto.

Project Purposes means the development, permitting, design, financing, acquisition, construction, installation, equipping, management, operation, maintenance, tolling and administration of the Project, in each case in accordance with the Agreement.

Project Right of Way or Right of Way (ROW) means any real property within the I-95 Corridor (which term is inclusive of all estates and interests in real property, including easements), which is:

(a) necessary for performance of the Work, including temporary and permanent easements, and ownership and operation of the Project;

(b) shown on the approved ROW Acquisition and Relocation Plan; and

(c) within the lines established by the NEPA Documents, as such limits may be adjusted pursuant to the Agreement.
**Project ROW Acquisition Work** means the Work associated with acquisition of the Project ROW as set forth in the ROW Acquisition and Relocation Plan.

**Project Schedule** means the Initial Baseline Schedule, Baseline Schedule, Project Schedule Updates or the As-Built Schedule, as applicable.

**Project Schedule Update** means the schedule attached to the Monthly Progress Report submitted to the Department, as described in more detail in the Technical Requirements.

**Project Value** means fair market value of the Concessionaire’s Interest, determined according to the appraisal procedures set forth in Section 20.11.

**Proposed Project** means the development, design, financing, construction, operation and maintenance of the HOT Lanes on I-95 submitted by Clark/Shirley in an unsolicited conceptual proposal to the Department.

**Proprietary Intellectual Property** means any Intellectual Property that is patented or copyrighted by the Concessionaire, the Department or any other Person, as applicable, or any of its respective contractors or subcontractors, or, if not patented or copyrighted, is created, held and managed as a trade secret or confidential, proprietary information by the Concessionaire, the Department or any other Person, as applicable, or any of its respective contractors or subcontractors, but excludes any item of Intellectual Property that is produced for multiple purposes and is not unique to the technology that is being applied to or for the Project.

**Proprietary Work Product** means any Work Product that is created, held and managed as a trade secret or confidential proprietary information by the Concessionaire or any of its Contractors.

**Public Funds Amount** means the Initial Public Funds Amount and the Department TIFIA Protection Amount.

**Public Funds Amount Payment Terms** means Exhibit N.

**Public Information and Communications Plan** means the plan developed by the Concessionaire setting forth the Concessionaire’s approach to communicating with road users and other stakeholders affected by the development and operation of the Project, as described in more detail in the Technical Requirements.

**Punch List** means an itemized list of Work which remains to be completed with respect to the Project Assets after Substantial Completion has been achieved and before Final Acceptance, the existence, correction and completion of which will have no material or adverse effect on the normal, uninterrupted and safe use and operation of the Project Assets.

**Quality Management System Plan (QMSP)** means the plan developed by the Concessionaire that defines the quality management systems during the design, construction and operations and maintenance phases of the Project, as described in more detail in the Technical Requirements.
**Railroad Easements** is defined at Section 8.05(f).

**Ramp-Up Period** means the period commencing on the Substantial Completion Date and ending on the first anniversary of the Substantial Completion Date.

**Rating Agency** means any nationally recognized statistical rating organization, such as Moody’s, Fitch Ratings, or S&P or any similar entity, or any of their respective successors.

**Refinancing** means, at any time after the Financial Close Date:

(a) any amendment, variation, novation or supplement of any Concessionaire Debt, Project Financing Agreement or Financing Assignment;

(b) the issuance by the Concessionaire of any Concessionaire Debt other than the Concessionaire Debt incurred pursuant to the Initial Project Financing Agreements, secured or unsecured, including issuance of any reimbursement agreement respecting a letter of credit;

(c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, any Concessionaire Debt, Project Financing Agreement or Financing Assignment or the creation or granting of any other form of benefit or interest in any Concessionaire Debt, Project Financing Agreement or Financing Assignment, or the revenues, assets or other contracts of the Concessionaire whether by way of security or otherwise; or

(d) any other arrangement put in place by Concessionaire or another person which has an effect similar to clause (a), (b) or (c) of this definition;

excluding, however, any capitalization of interest or accretion of principal or other committed increases on any Concessionaire Debt incurred or committed on or prior to the Agreement Date, that is not part of any Planned Refinancing.

**Remedial Actions** is defined in Section 16.01(b).

**Remedial Action Plan** means the plan developed by the Concessionaire with respect to Hazardous Substances encountered by the Concessionaire within the Project Right of Way, as described in more detail in the Technical Requirements.

**Replacement Agreements** has the meaning ascribed thereto in the Direct Agreement.

**Representative** means, with respect to any Person, any director, officer, employee, official, lender (or any agent or trustee acting on its behalf), partner, member, owner, agent, lawyer, accountant, auditor, professional advisor, consultant, engineer, contractor, other Person for whom such Person is, under Law, responsible or other representative of such Person and any professional advisor, consultant or engineer designated by such Person as its “Representative.”

**Request for Change Proposal** means a written notice issued by the Department to the Concessionaire pursuant to Section 14.02(b).
Reserved Rights means the Department’s 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 the Agreement and the collection, use and enjoyment of Toll Revenues as provided in the Agreement. The Reserved Rights reserved to the Department include but are not limited to all the following:

(a) all rights to finance, design, construct, use, possess, operate and maintain any passenger or freight rail facility, roads and highways (State and local) or other mode of transportation in the Airspace, including tunnels, flyovers, frontage roads, crossings, interchanges and fixed guide-ways, and to grant to others such rights;

(b) all rights to install, use, lease, grant indefeasible rights of use, sell and derive revenues from electrical and fiber optic conduit, cable, capacity, towers, antennas and associated equipment or other telecommunications equipment, hardware and capacity, existing over, on, under or adjacent to any portion of the Project Right of Way installed by anyone, whether before or after the Agreement Date, and all software which executes such equipment and hardware and related documentation, except for the capacity of any such improvement installed by the Concessionaire that is necessary for and devoted exclusively to the operation of the Project;

(c) all rights to use, sell and derive revenues from ETTM Data and other data generated from operation of the Project or any ETTM System, except use of such data as required solely for operation of the Project and enforcement and collection of tolls and incidental charges;

(d) all ownership, possession and control of, and all rights to develop, use, operate, lease, sell and derive revenues from, the Airspace, including development and operation of service areas, rest areas and any other office, retail, commercial, industrial, residential, retail or mixed use real estate project within the Airspace;

(e) all rights to install, use and derive information, services, capabilities and revenues from ITS, except installation and use of any such systems and applications by the Concessionaire as required solely for operation of the Project. For avoidance of doubt, if the Concessionaire installs any such systems or applications, all use and capacity thereof not necessary for operation of the Project is reserved to, and will be the sole property of, the Department;

(f) all rights to use, install, maintain, repair, or authorize the use, installation, maintenance or repair, of Utilities;

(g) 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, or that may be confused with those of the Department or the Project;
(h) all rights and opportunities to grant to others sponsorship and advertising rights with respect to the Project or any portion thereof, except for a non-exclusive license for the Concessionaire to use the name in connection with Project operations;

(i) all rights to revenues and profits derived from the right or ability of electronic toll account customers to use their accounts or transponders to purchase services or goods other than payment of tolls;

(j) any other commercial or noncommercial development or use of the Airspace or electronic toll collection technology for other than operation of the Project; and

(k) 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 resulting from the development, use, operation or maintenance of the Project.

Response is defined in Section 10.05(a).

Responsible Public Entity has the meaning assigned to such term in Section 56-557 of the Code of Virginia and, for purposes hereof, means the Department.

Restoration Funds is defined in Section 17.07(a).

Route One Improvements means any new construction, material expansion or other alteration to U.S. Route One in Virginia between Route 642 (Lorton Road) in Fairfax County and Route 610 (Garrisonville Road) in Stafford County, the plans for which have not been included in the CLRP or the SYIP as of November 30, 2011, that results in more than two miles in the aggregate of limited access highway with a speed limit of at least 55 miles per hour.

ROW Acquisition and Relocation Plan means the plan developed by the Concessionaire that defines the approach to acquisition of the Project ROW and, to the extent permitted by Section 8.05, any other real property or real property rights as set forth in Section 8.05, as described in more detail in the Technical Requirements.

ROW Costs means the actual amount paid or payable to a property owner for the acquisition of Project ROW and any other real property and real property rights as set forth in Section 8.05, which includes any relocation, settlement, or damage costs. For the avoidance of doubt, ROW Costs do not include any acquisition activities and/or property management services required for the acquisition of Project ROW and any other real property and real property rights as set forth in Section 8.05.


Safety Compliance Order means any written order or directive of the Department issued after the Substantial Completion Date, which directs the Concessionaire to undertake certain improvements to the Project (a) to correct a specific safety condition affecting the Project, which the Department has determined to exist by investigation or analysis, or (b) to conform to changes
in safety standards or methodologies agreed to or adopted by the Department for similar portions of comparable State Highways.

**Scope of Work and Schedules and Early Work** means Exhibit B.

**Second Funding Closing Amount** means, as of the Second Funding Closing Date, collectively, (a) the amount of the TIFIA Credit Assistance (if any), (b) the Department TIFIA Protection Amount, and (c) the Concessionaire TIFIA Protection Amount.

**Second Funding Closing Date** has the meaning specified in Section 7.07(d)(i).

**Second Measurement Period** is defined in Section 5.07(b)(ii).

**Second Threshold HOV Percentage and Rate** is defined in Section 5.07(b)(ii).

**Senior Concessionaire Debt** means Concessionaire Debt secured by a Lien on the Concessionaire’s Interest that is senior to or on parity with any other Lien on the Concessionaire’s Interest.

**Senior Loan Agreement** means a loan agreement, dated the Financial Close Date, to be entered between the PABs Issuer and the Concessionaire, with respect to the initial financing of the Project.

**Service Commencement** means the opening of the Project for normal and continuous operations and use by the traveling public, after occurrence of all the events and satisfaction of all the conditions therefor set forth in Section 9.01(a).

**Service Commencement Date** means the date on which Service Commencement is achieved, as indicated in the Service Commencement Notice.

**Service Commencement Notice to Proceed** has the meaning ascribed thereto in Section 9.01(a).

**Shared Facilities Agreement** means the Shared Facilities Agreement dated as of July 31, 2012 between the Concessionaire and CBE.

**Shareholder Loan** means any Subordinated Debt made by any Equity Members to the Concessionaire.

**SIB** means the State Infrastructure Bank.

**Signage Plan** is defined as the Construction Documentation associated with the signage elements of the Project.

**significant Force Majeure Event** means one or more Force Majeure Events occurring after the Financial Close Date (a) that (i) has the effect of causing physical damage or destruction to the Project Assets or surrounding infrastructure within the Project Right of Way, and (ii)
results in the Project Assets being substantially unavailable for public use or the suspension or substantial reduction of toll collections for a period in excess of (A) 180 consecutive Days; or (B) a period otherwise agreed to by the parties; or (b) which halts the performance of the Work by the Design-Build Contractor during the Construction Period for a period in excess of 180 consecutive Days; provided that such Force Majeure Event will not become a Significant Force Majeure Event by reason of the Concessionaire or the Design Build Contractor’s failure to mitigate or cure the result of such Force Majeure Event through the exercise of reasonably diligent efforts.

**Significant Force Majeure Termination Amount** means the aggregate of (a) the Concessionaire Debt, (b) all amounts at par paid by the Equity Members in the form of capital contributions or Shareholder Loans up until the termination date, less any amounts actually received by the Equity Members from the Concessionaire as Distributions or payment of principal and interest for such Shareholder Loans, and (c) all Demobilization Costs; (d) less Credit Balances; and (e) less proceeds of insurance that is required to be carried pursuant to Section 17.01.

**Significant Force Majeure Termination Notice** is defined in Section 20.03.

**Six-Year Improvement Program (SYIP)** means the CTB’s approved allocation of funding in accordance with Article 1.1, Chapter 1, Title 33.1 of the Code of Virginia.

**Small, Women-Owned, and Minority Business (SWaM)** means the State program to support small, women-owned and minority groups in doing business with the State.

**Software** means (a) computer instructions, including programs, routines and databases and applications supplied, procured or developed by the Concessionaire or the Department in connection with the operation of the Project or in connection with Reserved Rights, including but not limited to that which monitors, controls or executes on ETTM Equipment or ITS equipment or hardware, and (b) all modifications, updates and revisions made to the matter described in clause (a) above, including those made to correct errors or to support new models of computer equipment and/or new releases of operating systems.

**Source Code and Source Code Documentation** mean Software written in programming languages, such as C and Fortran, including all comments and procedural code, such as job control language statements, in a form intelligible to trained programmers and capable of being translated into object or machine readable code for operation on computer equipment through assembly or compiling, and accompanied by documentation, including flow charts, schematics, statements of principles of operations, architectural standards, and commentary, explanations and instructions for compiling, describing the data flows, data structures, and control logic of the software in sufficient detail to enable a trained programmer through study of such documentation to maintain and/or modify the Software without undue experimentation. Source Code and Source Code Documentation also include all modifications, additions, substitutions, updates, upgrades and corrections made to the foregoing items.

**Source Code Escrows** is defined in Section 18.06(b).
Southern HOT Lanes means the addition of any toll lanes in the median of the Interstate 95 general purpose lanes (in either or both directions) and not specifically part of the general purpose lanes and the associated entry and exit ramps built on Interstate 95 with a northern terminus of the Route 610 Interchange (Garrisonville Road) and a southern terminus of U.S. Route 17 By-Pass at Massaponax.

State means the Commonwealth of Virginia.

State Highway means any highway designated a State Highway pursuant to Title 33.1, Chapter 1, Sections 25, 48 and 67, Code of Virginia.

State Indemnitee means any of the State Parties and their respective Representatives.

State Law means any Law or any change in any Law by any State Party.

State Party means the State, the CTB, the Department or any other agency, instrumentality or political subdivision of the State.

Statewide Transportation Improvement Program (STIP) means the state improvement program that schedules the detailed funding for all Federally supported surface transportation projects/programs within the boundaries of the State, for the next three fiscal years, that is approved by the FHWA and the Federal Transit Administration as a prerequisite to receiving Federal transportation funds and/or agreements. Projects/programs in the STIP have to be consistent with the long-range plans of the State and/or the metropolitan planning organizations within the boundaries of the State.

Steering Committee means the executive-level committee established by the Concessionaire and the Department to provide executive-level business guidance on issues relating to the Project, which will include the Design-Build Contractor during the Construction Period and, solely with respect to issues involving Design-Build Work, after the Construction Period.

Subordinate Debt means (a) Affiliate Debt or Shareholder Loans or (b) any other Concessionaire Debt that would be paid at the same level of priority as the payment of any Distributions or that would be payable at a level of priority after all payments other than Distributions are made. The term “Subordinate Debt” does not include any Concessionaire Debt constituting loans, guaranties and other credit support under TIFIA.

Substantial Completion means the satisfaction of the criteria for completion of construction of the Project set forth in Section 8.08(e), as and when confirmed by the Department’s issuance of the Substantial Completion Certificate.

Substantial Completion Certificate means a letter or certificate issued by the Department in accordance with Section 8.08(e) evidencing the Department’s determination that Substantial Completion has occurred.
**Substantial Completion Date** means the date on which Substantial Completion is achieved, as indicated in the Substantial Completion Certificate.

**Substantial Completion Recovery Plan** has the meaning given to it in Section 8.15.

**Substituted Concessionaire** means any person or entity selected by the Lenders (acting through the Collateral Agent) and approved by the Department in accordance with the Direct Agreement to perform the Concessionaire’s obligations and succeed to the Concessionaire's Interests after any such Lender, or any such Person, acquires the Concessionaire’s Interests by foreclosure or transfer in lieu of foreclosure, or after the Collateral Agent takes possession and control of the Project in accordance with the Direct Agreement.

**SWaM Performance Improvement Plan** is the plan submitted and approved by the Department pursuant to Sections 24.03(b)(v)(B) with respect to improving the Concessionaire’s performance.

**Task** is defined in Section 9.04(b).

**Tax** means any Federal, state, local or foreign income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental (including taxes under Section 59A of the Internal Revenue Code of 1986, as amended), customs duties, permit fees, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated or other tax, levy, impost, stamp tax, duty, fee, withholding or similar imposition of any kind whatsoever payable, levied, collected, withheld or assessed at any time, including any interest, penalty or addition thereto, whether disputed or not including in each case utility rates or rents.

**Tax Imposition** means:

(a) any State or local property tax or similar ad valorem tax or charge (including property taxes under Section 58.1-3203 of the Code of Virginia, as amended from time to time) or recordation tax on a deed, release or other document recorded in connection with the Agreement, unless recorded by or at the behest of the Concessionaire; and

(b) any license fee or sales, use, receipts or similar tax on or measured by receipts or revenues levied, rated, charged, imposed or assessed by the State or any county, city or town of the State with respect to Toll Revenues paid to or collected by the Concessionaire for travel on the Project;

but excluding (i) any taxes of general application on overall net income or (ii) any taxes levied, rated, charged, imposed or assessed in connection with any Transfer during the Term of all or any portion of the Concessionaire’s Interest or of any interest in the Concessionaire.

**Technical Requirements** means the Technical Requirements included as Exhibit C (including all Attachments thereto), as the same may be revised in accordance with the Agreement.
**EXECUTION VERSION**

**JULY 31, 2012**

**Term** is defined in Section 4.02.

**Third Measurement Period** is defined in Section 5.07(b)(iii).

**Third-Party Claim** means any Claim asserted against a State Indemnitee by any Person who is not a party to the Agreement or an Affiliate of such party.

**Third-Party Hazardous Substances** means any Hazardous Substances introduced or brought onto the Project ROW prior to Substantial Completion by a Person other than a Concessionaire Party.

**Third Threshold HOV Percentage and Rate** is defined in Section 5.07(b)(iii).

**TIFIA** means The Transportation Infrastructure Finance and Innovation Act of 1998.

**TIFIA Closing Date** means the date of the execution and delivery of the TIFIA Loan Documentation.

**TIFIA Commercial Terms** means TIFIA Credit Assistance that: (1) contains the terms attached hereto as Exhibit H, (2) does not contain any other terms or conditions that are inconsistent with the terms and conditions contained in the TIFIA loan agreement and intercreditor agreement for the Pocahontas Parkway Project, the Capital Beltway Project, the North Tarrant Express Managed Lanes Project, the LBJ Express Project or the Midtown Tunnel Project (collectively, the “Relevant Precedent”), and the Concessionaire demonstrates to the Department that such inconsistent terms are reasonably expected to have a material adverse effect on the Concessionaire’s financial profile, its ability to perform its obligations and enjoy its rights and benefits under this Agreement or its risk profile, and (3) does not contain any material conditions precedent to execution and delivery. For purposes of (2) above, a term or condition that is inconsistent with the terms and conditions contained in the TIFIA loan agreements and intercreditor agreements for Relevant Precedent will not be reasonably expected to have a material effect on the Concessionaire’s ability to perform its obligations and enjoy its rights and benefits under this Agreement to the extent the Department agrees to perform or cause to be performed such term or condition or resolve the inconsistency in any other way, in each case, to the mutual satisfaction of the Concessionaire and the Department, each acting reasonably.

**TIFIA Credit Assistance** means funding made available to the Concessionaire under the TIFIA Loan Documentation.

**TIFIA Credit Assistance Amount** means $300,000,000.

**TIFIA Financial Close** means the execution of the TIFIA Loan Documentation by the Concessionaire and the TIFIA Lender.

**TIFIA Interest Rate** means the rate of interest borne by the TIFIA Credit Assistance.

**TIFIA Lender** means the United States Department of Transportation.
TIFIA Loan Documentation means a loan agreement between the Concessionaire and the TIFIA Lender pursuant to which TIFIA Credit Assistance is provided, and a subordination and intercreditor agreement, in each case, that is in a form agreed and readily executable by the parties (other than the completion of terms of an administrative, non-substantive or ministerial nature, or the final interest rate and related terms that by their nature cannot be finalized prior to the Second Funding Closing Date), together with any related agreements and documents delivered therewith.

TIGER Credit Assistance means any financial assistance provided by USDOT to the Concessionaire or a State Party in respect of the Project under the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2010 (Division A of the Consolidated Appropriations Act, 2010 (Pub. L. 111–117, Dec. 16, 2009)), regarding National Infrastructure Investments, the Consolidated and Further Continuing Appropriations Act, 2012 (Pub. L. 112-055, Nov. 18, 2011) or similar program.

Time Impact Analysis (TIA) means a time impact analysis, (a) establishing the influence of an event on the Baseline Schedule, and will include a fragmentary network, and for events that have not yet occurred (such as proposed changes or Project Enhancements), the fragmentary network will demonstrate how the Concessionaire proposes to incorporate such event in the Baseline Schedule, and (b) demonstrating: (i) the time impact based on the date the event occurred or notice of a proposed change is given to the Concessionaire, (ii) the status of the Work at such point of time; and (iii) the time computation of all affected activities.

Toll Agreement means the Toll Agreement between FHWA and the Department which permits the imposition of tolls and other user fees on the use of the Project, a copy of which is attached as Exhibit M.

Toll Exemption Event means the enactment, adoption, promulgation, modification or repeal by any Governmental Authority of any Law during the Term that (a) changes the types of vehicles or categories of users of vehicles then permitted by Section 5.02 to travel on the HOT Lanes without paying the full tolls established by the Concessionaire, including by any change in the High Occupancy Requirement lower than HOV-3 or (b) either permits vehicles other than Permitted Vehicles to travel on the HOT Lanes or restricts vehicles then classified as Permitted Vehicles from traveling on the HOT Lanes without paying a toll.

Toll Revenues means:

(a) all amounts received by or on behalf of the Concessionaire applicable to vehicles for the privilege of traveling on the Project imposed pursuant to the Agreement and from any other permitted use or operation of the Project, including without limitation fees, tolls, rates, incidental charges and other charges (including administrative charges such as late fees, insufficient funds fees, etc.);

(b) amounts received pursuant to any collection or enforcement action, judgment or settlement with respect to any of the foregoing revenues; and
(c) amounts the Concessionaire receives as contractual liquidated or other contract damages with respect to any of the foregoing revenues.

**Toll Section** means the toll sections described in Exhibit DD, which may be revised by mutual agreement of the Department and the Concessionaire.

**Total Financing Amount** means the sum of the Initial Equity Commitment Amount, the Contingent Capital Contribution Amount, the initial principal amount of the PABs, the Benchmark TIFIA Credit Assistance Amount and other Concessionaire Debt (including Shareholder Loans) at Financial Close. The Total Financing Amount shall not include the Public Funds Amount.

**Traffic and Revenue Study** means any study of the projected traffic and Toll Revenue for the Project prepared by or on behalf of Concessionaire, as well as all data, charts, tables, analyses and other documentation assembled or prepared in connection therewith and all existing and future updates, reissues, supplements and amendments thereto.

**Traffic Management System (TMS)** means any application of computer, electronics and/or telecommunications equipment and software and supporting fixtures and equipment whose function is to provide information, data and/or services to the traveling public or the Department or to manage and control traffic, and any future systems or services conceived or developed for the same or similar purposes.

**Transfer** means to sell, convey, assign, sublease, mortgage, encumber, transfer or otherwise dispose of.

**Transferee** is defined in Section 25.01(a).

**Transition Plan** is defined in Section 20.01.

**Transportation Improvement Program (TIP)** means the transportation improvement program that schedules the detailed funding for projects, project phases and programs that will be implemented in the next six fiscal years. The TIP is adopted by the metropolitan planning organization and approved by the FHWA and the Federal Transit Administration as a prerequisite to receiving Federal transportation funds and/or approvals.

**Transportation Management Plan (TMP)** is defined in Section 8.12(a).

**Transportation Trust Fund** means the State’s Transportation Trust Fund, which is codified in Virginia Code Section 33.1-23.03:1.

**Transurban** means Transurban (USA) Inc.

**Transurban Guarantor** means Transurban Holdings Limited, Transurban International Limited, and Transurban Infrastructure Management Limited, in its capacity as responsible entity of the Transurban Holding Trust.
**Trustee** means U.S. Bank National Association, as trustee under the trust indenture relating to the PABs.

**Turnover Plan** means the plan developed by the Concessionaire pursuant to the Technical Requirements that describes the process by which the Concessionaire will take over operations and maintenance responsibilities from the Department for the Project, attached as Exhibit V.

**Uniform Act** is defined in Section 8.05(a)(ii).

**Unknown Geotechnical Conditions** means any Geotechnical Conditions which are not Known Geotechnical Conditions.

**Unknown Pre-Existing Hazardous Substances** means any Hazardous Substances present on the Project Right of Way or portion thereof as of the date that the Concessionaire assumes responsibility of such Project Right of Way or portion pursuant to Section 16.01(a) and which are not Known Pre-Existing Hazardous Substances.

**Utilities Plan** means the plan developed by the Concessionaire that defines the Utility coordination activities during the design and construction of the Project, as described in more detail in the Technical Requirements.

**Utility** means a public, private, cooperative, municipal and/or government line, facility or system used for the carriage, transmission and/or distribution of cable television, electric power, telephone, data or other telecommunications, telegraph, water, gas, oil, petroleum products, steam, chemicals, sewage, storm water not connected with the highway drainage and similar systems that directly or indirectly serve the public. The term “Utility” specifically excludes (a) storm water lines connected with the highway drainage, and (b) traffic signals, street lights, and electrical systems for Project roadways.

**Utility Owner** means the owner or franchisee of any Utility (including both privately held and publicly held entities, cooperative utilities, and municipalities and other governmental agencies).

**Utility Relocation** means the removal, relocation and/or protection in place (including provision of temporary services as necessary) of any and all Utility facilities that have to be removed, relocated and/or protected in place in order to permit construction of the Project.

**VDOT Funding Account** means a project trust account established by the Department or its designee to fund the Public Funds Amount pursuant to Article 7.

**VDOT Project Agreements** means the Agreement, the Escrow Agreement, the Toll Agreement and the Electronic Toll Collection Agreement.

**Violation Processing Services Agreement** means an agreement the Concessionaire and the Department may enter into to govern utilization of the Department’s violation processing
system in accordance with Section 5.01(f)(i), which will be in the form then in use by the Department.

**Virginia Petroleum Underground Storage Tank Fund (VPSTF)** is defined in Section 16.01(e).

**Warranty Period** is defined in Section 8.11(a).

**Work** means collectively, the finance, development, planning, design, acquisition, installation, construction, completion, management, equipment, operation, repair and maintenance and any other services identified in the Agreement to be performed by the Concessionaire.

**Work Product** means all the data, information, documentation and other work product produced, prepared, obtained or deliverable by or on behalf of the Concessionaire or the Department, as applicable, for the Project or the Project Right of Way, including but not limited to designs, drawings, plans and specifications, record and as-built plans and specifications, engineering documents, geotechnical soils and soil boring data, analyses, reports and records, property acquisition files, agreements and documents (including records of payment and related correspondence, title policies, parcel diaries and all construction documents relating to the Work or Project Enhancements), engineers’ and inspectors’ diaries and reports, Utility Relocation plans and agreements, right of way record maps and surveys, traffic and revenue studies, and other feasibility data, analyses, studies and reports, correspondence and memoranda relevant to design or construction decisions, contracting plans, air quality monitoring data, environmental reviews, studies and reports, mitigation studies and reports, data, assessments, studies and reports regarding Hazardous Substance investigations, testings, borings, monitoring and analyses, manifests regarding handling, storage or transportation of Hazardous Substances, correspondence and agreements relating to Governmental Approvals, change orders, final quantities, pile driving records, records of accidents and traffic management, field test records and reports, concrete pour records, surfacing depth check records, grade and alignment books, cross-section notes, drainage notes, photographs, false work and form plans, records of construction materials, ETTM Equipment and ETTM Facilities records and reports, and any other documents which can be reasonably described as technical or engineering documents. Work Product expressly excludes, however, documents and information which the Concessionaire and the Department mutually agree in writing, or which a court determines, to be exempted or protected from public disclosure under Section 18.02 and which is not conceived or first reduced to practice for the Project Purposes, such as proprietary financial and pricing information of the Concessionaire.
EXHIBIT B-4

SCOPE OF EARLY WORK

[see attached]
### A. FHWA Eligible Design Costs that will NOT be Reimbursed to FHWA if Project Does Not Reach Financial Close

#### Project Wide

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**TOTAL COSTS FOR FHWA ELIGIBLE**

|                  | $1,717,278 | $2,944,600 | $1,461,000 | $1,520,218 | $5,750,940 | $15,365,358 |
### B. Design Costs to be Reimbursed to FHWA, if Project Does Not Reach Financial Close

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#### TOTAL COSTS FOR FHWA REIMBURSEMENT IF NO F/C

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### C. Design Management Costs - will NOT Be Reimbursed to FHWA if Project Does Not Reach Financial Close

#### Design Management for milestone packages submitted for payment in March

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#### Design Management for milestone packages submitted for payment in April

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#### Design Management - Monthly Totals

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#### FHWA Non-payment; Early Work before Financial Close

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Page 235
### Package/Activity Summary

#### March 12

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<th>May 12</th>
<th>June 12</th>
<th>July 12</th>
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**FLUOR-LANE Cash Flow by Package (20% - 80% Payment)**

**Professional Services for Early Works**
- Mobilization of key staff
- Mobilization of remaining project staff for Early Works
- Partnering / Alignment Meetings
- Draft Project Management Plan
- Safety Plan
- Draft DBE/SWaM Plan
- Final DBE/SWaM Plan
- Final DBE/SWaM Plan
- Baseline schedule
- Utility Conflict Report
- Traffic Control Plan
- Prepare Construction Subcontracting Plan
- Prepare construction mobilization plan
- Project Management

**Total Monthly Payment**

| Professional Services Subtotal | $4,080,572 | $7,311,004 | $4,264,932 | $2,774,834 | $17,510,981 | $37,959,627 |

**Summary of FHWA-Eligible Costs (from above):**

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<th>Description</th>
<th>Amount</th>
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<tr>
<td>B.</td>
<td>TOTAL COSTS FOR FHWA REIMBURSEMENT IF NO F/C</td>
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<td>C.</td>
<td>DESIGN MANAGEMENT MONTHLY TOTALS</td>
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**TOTAL: $22,722,230**
# Exhibit F - Early Work Package/Deliverables
## FLUOR-LANE Package Content/Scope of Work

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<th>Package Content or Activities</th>
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<td>Right-of-Way Acquisition Plan</td>
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<td>Utility Relocation Plan</td>
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<td>Subsurface Utility Exploration</td>
<td>Utility Relocation Data</td>
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<td>Environmental Mitigation and Permitting</td>
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<td>Clearing &amp; Grubbing / Erosion and Sediment Control Zones 1.1, 1.2, 1.3 - 80% Plans</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Typical Sections, Roadway Plans, Roadway Details, Erosion/Sediment Plans/Control Details/Notes/Details, MOT Notes/Typical Sections/Plans/Details, Standards, Cross Sections</td>
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<td>Roadway Geometrics Review Package</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, General Notes, Plan and Utility Legend, Survey Control Sheets, Alignment/Curve Data Sheets, Scroll plans and profiles, Typical Sections</td>
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<td>Utility Coordination and Relocation Design - Zones 1.1, 1.2, 1.3 - 80% Plans</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Survey Control Sheets, Alignment/Curve Data Sheets, Typical Sections, Roadway Plans, Subsurface utility data and test hole information, Utility Relocation Plans/Elevations/Details, MOT Notes/ Typical Sections/Plans/Details, Cross Sections, Standards</td>
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<td>Final Roadway (FR) Package 1 - Zones 1.1, 1.2, 1.3 - 30% Plans</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Survey Control Sheets, Alignment/Curve Data Sheets, Typical Sections, Edge Treatment Details, Roadway Plans, Ramp Gore Details, Enforcement Area Details, Conc Barrier Transition Details, Gantry/LUMS/Pole Transition Details, Barrier Transitions at Bridge Piers/Culverts, Barrier/Guard Fence Opening Details, Emergency Mechanical Gate Details, Roadway Details, Drainage Tabulation Sheets, Drainage Plans/Details/Inlets/Manholes, Culvert Extension Plans/Elevation/Details, Pipe Profiles, Erosion/Sediment Plans/Control Details/Notes/Details, Storm Water Management Pond Plans/Sections/Details, MS-19 Plans/Sections/Details, Retaining Wall Plans/Elevations/Details, MOT Notes/ Typical Sections/Plans/Details, Soundwall Notes/ Typical Sections/Plans/Details, Cross Sections, Standards</td>
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<td>Final Roadway (FR) Package 1 - Zones 1.1, 1.2, 1.3 - 60% Plans</td>
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<td>Title Sheet, Index of Sheets, General Notes, General Plan &amp; Elevation, Substructure Layout, Transverse Sections, Deck Slab Plans, Sections, Bearing Details, Elastomeric Expansion Dam, Cast-in-Place Concrete Parapet Details, Bridge Deck Details, Drilled Shaft Details, Suppier/Piping Details, Abutment Plan/Elevation/Details, Pier Plan/Elevation/Details, Reinforcing Steel Schedules, Engineering Geology, Approach Slab, Design Summary</td>
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<td>1_BR05</td>
<td>Bridge B67A (Flyover JHS) Superstructure Final Design</td>
<td>Title Sheet, Index of Sheets, General Notes, Curved Bridge Layout, Sequence of Construction, Deck Slab Elevations, Framing Plan, Girder Elevations, Field Splice Details, Girder Details, Cross Frame Details, Integral Pier Cap Details, Dead Load Deflection Diagrams, Camber Diagram, Deck Elevations along Girder</td>
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<td>Bridge B67A (Flyover JHS) Substructure Final Design - 80% Plans</td>
<td>Title Sheet, Index of Sheets, General Notes, Curved Bridge Layout, Sequence of Construction, Deck Slab Elevations, Framing Plan, Girder Elevations, Field Splice Details, Girder Details, Cross Frame Details, Integral Pier Cap Details, Dead Load Deflection Diagrams, Camber Diagram, Deck Elevations along Girder</td>
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<td>29</td>
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<td>Retaining Walls RW-8. RW-9, RW-10 (JHS Flyover) - 80% Plans</td>
<td>Title Sheet, Index of Sheets, General Notes, Curved Bridge Layout, Sequence of Construction, Deck Slab Elevations, Framing Plan, Girder Elevations, Field Splice Details, Girder Details, Cross Frame Details, Integral Pier Cap Details, Dead Load Deflection Diagrams, Camber Diagram, Deck Elevations along Girder</td>
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<td>Bridge B68 (Joplin Road) Final Design</td>
<td>Title Sheet, Index of Sheets, General Notes, General Plan &amp; Elevation, Slope Protection Details, Transverse Sections, Substructure Layout, Sequence of Construction Framing Plan, Beam Details, Cross Frame Details, Dead Load Deflection Diagrams, Camber Diagrams, Deck Slab Plans, Sections, Bearing Details, Elastomeric Expansion Dam, Cast-in-Place Concrete Parapet Details, Abutment Plan/Elevation/Details, Pier Plan/Elevation/Details, Reinforcing Steel Schedules, Engineering Geology, Approach Slab, Design Summary</td>
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<td>Title Sheet, Index of Sheets, General Notes, General Plan &amp; Elevation, Slope Protection Details, Transverse Sections, Substructure Layout, Sequence of Construction Framing Plan, Field Splice Details, Girder Details, Cross Frame Details, Dead Load Deflection Diagrams, Camber Diagrams, Deck Slab Plans, Sections, Bearing Details, Elastomeric Expansion Dam, Cast-in-Place Concrete Parapet Details, Abutment Plan/Elevation/Details, Reinforcing Steel Schedules, Engineering Geology, Approach Slab, Design Summary</td>
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<td>1_BR09</td>
<td>Bridge B69 (Russell Road) Final Design</td>
<td>Title Sheet, Index of Sheets, General Notes, General Plan &amp; Elevation, Slope Protection Details, Transverse Sections, Substructure Layout, Sequence of Construction Framing Plan, Field Splice Details, Girder Details, Cross Frame Details, Dead Load Deflection Diagrams, Camber Diagrams, Deck Slab Plans, Sections, Bearing Details, Elastomeric Expansion Dam, Cast-in-Place Concrete Parapet Details, Abutment Plan/Elevation/Details, Reinforcing Steel Schedules, Engineering Geology, Approach Slab, Design Summary</td>
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<td>Bridge B70 (Chopawamsic Creek) Final Design</td>
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<td>Bridge B71 (Telegraph Road) Final Design</td>
<td>Title Sheet, Index of Sheets, General Notes, General Plan &amp; Elevation, Slope Protection Details, Transverse Sections, Substructure Layout, Sequence of Construction Framing Plan, Field Splice Details, Girder Details, Cross Frame Details, Dead Load Deflection Diagrams, Camber Diagrams, Deck Slab Plans, Sections, Bearing Details, Elastomeric Expansion Dam, Cast-in-Place Concrete Parapet Details, Abutment Plan/Elevation/Details, Reinforcing Steel Schedules, Engineering Geology, Approach Slab, Design Summary</td>
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<td>Retaining Walls RW-4, RW-5, RW-6 (Chopawamsic and Telegr</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Survey Control Sheets, Alignment/Curve Data Sheets, Typical Sections, Roadway Plans, Retaining Wall Plans/Elevations/Details, Retaining Wall Cross Sections, Standards</td>
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<td>Bridge B72 (Aquia Creek) Final Design</td>
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<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Sign/ Pavement Plans, Guide Sign, Sign Face Layouts/Schedule, Sign Elevation Sheets, Sign/Structure Details, Lighting/Electrical Plans/Details/Calculation Reports, Comm Electrical Service Plans, Standards</td>
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**Segment 2**

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<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Typical Sections, Roadway Plans, Roadway Details, Erosions/Sediment Plans/Control Details/Notes/Details, MOT Notes/Typical Sections/Plans/Details, Standards</td>
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<td>Segment 2 NORTH SOUND WALLS - Sound Wall Plans/Details &amp; Phase 3 MOT (Sound Wall Construction) (N. of Sta.643)</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, MOT Notes/Typical Sections/Plans/Details, Sound Wall Plans/Elevations/Details, Sound Wall Cross Sections, Standards</td>
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<td>Segment 2 SOUTH COMPLETE ROADWAY - Roadway/Drainage Plans/Details, Erosion/Sediment Control, Sound Wall Plans/Details &amp; MOT (South of Sta.643)</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Survey Control Sheets, Alignment/Curve Data Sheets, Typical Sections, Edge Treatment Details, roadway Plans, Ramp Gore Details, Enforcement Area Details, Conc Barrier Transition Details, Gantry/LUMS/Pole Transition Details, Barrier Transitions at Bridge Piers/Culverts, Barrier/Guard Fence Opening Details, Emergency Mechanical Gate Details, roadway Details, Drainage Tabulation Sheets, Drainage Plans/Details/Inlets/Manholes, Culvert Extension Plans/Elevation/Details, Pipe Profiles, Erosion/Sediment Plans/Control Details/Notes/Details, Storm Water Management Pond Plans/Sections/Details, MS-19 Plans/Sections/Details, Retaining Wall Plans/Elevations/Details, MOT Notes/Typical Sections/Plans/Details, Cross Sections, Standards</td>
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<td>54</td>
<td>2_BR01</td>
<td>Minor Bridge Rehabs - B6OA, B6OB, B63, B63A, B65</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, General Plan &amp; Elevation, Sequence of Construction, Approach Slab Widening Details, Deck Drainage System Additions/Piping Details, Reinforcing Steel Schedule, Deck Repair Plan, Misc. Repair Details, Standards</td>
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<td>Segment 2 NORTH - Misc. Roadway (Lighting/ITS/Tolling/Pavement Marking) - 60% Plans</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, ITS/Tolling/Comm/LUMS Plans, Special Detail Sheets, Comm/Detection/Mounting/Installation Details, Transition Plan, Elevation, Interim System Plans, Signing/Pavement Plans, Guide Sign, Sign Face Layouts/Schedule, Sign Elevation Sheets, Sign/Structure Details, Lighting/Electrical Plans/Details/Calculation Reports, Comm Electrical Service Plans, Standards</td>
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<td>Survey Data</td>
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<td>Geotech Services</td>
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<td>Segment 3 NORTH ADVANCE ROADWAY - Erosion and Sediment Control, Clearing &amp; Grubbing, Duct Banks &amp; Phase 1 Steps 1.82 MOT (East Shldr Rehab and West Side Construction), Barrier Demo. (North of Sta. 1173+00) - 80% Plans</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Typical Sections, Roadway Plans, Roadway Details, Erosions/Sediment Plans/Control Details/Notes/MOT Notes/Typical Sections/Plans/Details, Standards</td>
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<td>Segment 3 NORTH ADVANCE ROADWAY - Erosion and Sediment Control, Clearing &amp; Grubbing, Duct Banks &amp; Phase 1 Steps 1 &amp; 2 MOT (East Shldr Rehab and West Side Construction), Barrier Demo. (North of Sta. 1173+00) - 100% Plans</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Typical Sections, Roadway Plans, Roadway Details, Erosions/Sediment Plans/Control Details/Notes/MOT Notes/Typical Sections/Plans/Details, Standards</td>
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<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Survey Control Sheets, Alignment/Curve Data Sheets, Typical Sections, Edge Treatment Details, roadway Plans, Ramp Gore Details, Enforcement Area Details, Conc Barrier Transition Details, Gantry/LUMS/Pole Transition Details, Barrier Transitions at Bridge Piers/Culverts, Barrier/Guard Fence Opening Details, Emergency Mechanical Gate Details, roadway Details, Drainage Tabulation Sheets, Drainage Plans/Details/Inlets/Manholes, Culvert Extension Plans/Elevation/Details, Pipe Profiles, Erosion/Sediment Plans/Control Details/Notes/Details, Storm Water Management Pond Plans/Sections/Details, MS-19 Plans/Sections/Details, Retaining Wall Plans/Elevations/Details, MOT Notes/Typical Sections/Plans/Details, Cross Sections, Standards</td>
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<td>3NRDY02b</td>
<td>Segment 3 NORTH ROADWAY - Roadway/Drainage Plans/Details &amp; Phase 2 MOT (East Side Construction) (North of Sta. 1173+00) - 80% Plans</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Survey Control Sheets, Alignment/Curve Data Sheets, Typical Sections, Edge Treatment Details, roadway Plans, Ramp Gore Details, Enforcement Area Details, Conc Barrier Transition Details, Gantry/LUMS/Pole Transition Details, Barrier Transitions at Bridge Piers/Culverts, Barrier/Guard Fence Opening Details, Emergency Mechanical Gate Details, roadway Details, Drainage Tabulation Sheets, Drainage Plans/Details/Inlets/Manholes, Culvert Extension Plans/Elevation/Details, Pipe Profiles, Erosion/Sediment Plans/Control Details/Notes/Details, Storm Water Management Pond Plans/Sections/Details, MS-19 Plans/Sections/Details, Retaining Wall Plans/Elevations/Details, MOT Notes/Typical Sections/Plans/Details, Cross Sections, Standards</td>
</tr>
<tr>
<td>#</td>
<td>Pkg. No.</td>
<td>Package Content or Activities</td>
<td>Content/Sheets</td>
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<tr>
<td>64</td>
<td>JSIDW01</td>
<td>Segment 3 NORTH - Sound Wall Plans/Details &amp; Phase 3 MOT (Sound Wall Construction) (North of Sta. 1173+00)</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, MOT Notes/Typical Sections/Plans/Details, Sound Wall Plans/Elevations, Sound Wall Cross Sections, Standards</td>
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<td>65</td>
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<td>Segment 3 SOUTH - Complete Roadway/Drainage Plans/Details, Erosion/Sediment Control, Sound Wall Plans/Details &amp; MOT (South of Sta. 1173+00)</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Survey Control Sheets, Alignment/Curve Data Sheets, Typical Sections, Edge Treatment Details, Roadway Plans, Ramp Gore Details, Enforcement Area Details, Conc Barrier Transition Details, Gantry/LUMS/Pol Transition Details, Barrier Transitions at Bridge Piers/Culverts, Barrier/Guard Fence Opening Details, Emergency Mechanical Gate Details, Roadway Details, Drainage Tabulation Sheets, Drainage Plans/Details/Inlets/Manholes, Culvert Extension Plans/Elevation/Details, Pipe Profiles, Erosion/Sediment Plans/Control Details/Notes/Details, Storm Water Management Pond Plans/Sections/Details, MS-19 Plans/Sections/Details, Retaining Wall Plans/Elevations/Details, MOT Notes/Typical Sections/Plans/Details, Cross Sections, Standards</td>
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<tr>
<td>66</td>
<td>JNBRI01</td>
<td>Seg 3 NORTH - Minor Bridge Rehabs - B32, B43A, 48B, B50</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, General Plan &amp; Elevation, Sequence of Construction, Approach Slab Widening Details, Deck Drainage System Additions/Piping Details, Reinforcing Steel Schedule, Deck Repair Plan, Misc. Repair Details, Standards</td>
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<td>67</td>
<td>JSSRI01</td>
<td>Seg 3 SOUTH-Minor Bridge Rehabs-B52, B52B, B53, B57, B57A, B59</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, General Plan &amp; Elevation, Sequence of Construction, Approach Slab Widening Details, Deck Drainage System Additions/Piping Details, Reinforcing Steel Schedule, Deck Repair Plan, Misc. Repair Details, Standards</td>
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<td>68</td>
<td>JNBRI02</td>
<td>Bridge B47 (Stage 1 TS&amp;L)</td>
<td>Title Sheet, General Plan and Elevation, Notes, Special Details, Transverse Section, Pier Details</td>
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<tr>
<td>69</td>
<td>JNBRI03a</td>
<td>Bridge B47 (Substructure/ Precast Beams/Walls) - 30% Plans</td>
<td>Title Sheet, Index of Sheets, General Notes, Substructure Layout Sequence of Construction, Deck Slab Elevation Control, Framing Plan, Prestressed Concrete beam Data, Diagonal Framing Beam Details, End Diaphragm Details, Special Design Drilled Mini-Piles, Pier Plan &amp; Elevation, Pier Details</td>
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<tr>
<td>70</td>
<td>JNBRI03b</td>
<td>Bridge B47 (Substructure/ Precast Beams/Walls) - 70% Plans</td>
<td>Title Sheet, Index of Sheets, General Notes, Substructure Layout Sequence of Construction, Deck Slab Elevation Control, Framing Plan, Prestressed Concrete beam Data, Diagonal Framing Beam Details, End Diaphragm Details, Special Design Drilled Mini-Piles, Pier Plan &amp; Elevation, Pier Details</td>
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<td>71</td>
<td>JNBRI04</td>
<td>Bridge B47 (Stage 2 Final Package)</td>
<td>Title Sheet, Index of Sheets, General Notes, General Plan &amp; Elevation, Transverse Sections, Deck Slab Elevation Control, Framing Plan, Prestressed Concrete beam Data, Diagonal Framing Beam Details, End Diaphragm Details, Special Design Drilled Mini-Piles, Pier Plan &amp; Elevation, Pier Details</td>
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<tr>
<td>72</td>
<td>JNBRI05</td>
<td>Bridge B49A (Stage 1 TS&amp;L)</td>
<td>Title Sheet, General Plan and Elevation, Notes, Transverse Section, Pier Details, Abutment Details</td>
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<td>73</td>
<td>JNBRI06</td>
<td>Bridge B49A (Structural Steel Package)</td>
<td>Title Sheet, Index of Sheets, General Notes, Curved Bridge Layout, Sequence of Construction, Deck Slab Elevations, Framing Plan, Girder Elevations, Field Splice Details, Girder Details, Cross Frame Details, Integral Pier Cap Details, Dead Load Deflection Diagrams, Camber Diagram, Deck Elevation along Girder</td>
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<tr>
<td>74</td>
<td>JNBRI07</td>
<td>Bridge B49A (Stage 2 Final Package)</td>
<td>Title Sheet, Index of Sheets, General Notes, General Plan &amp; Elevation, Substructure Layout, Transverse Sections, Deck Slab Plans/Sections, Bearing Details, Elastomeric Expansion Dam, Cast-in-Place Concrete Parapet Details, Bridge Conduit Details, Drilled Shaft Details, Scupper/Piping Details, Abutment Plan/Elevation/Details, Pier Plan/Elevation/Details, Reinforcing Steel Schedules, Engineering Geology, Approach Slab, Design Summary</td>
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<tr>
<td>75</td>
<td>JSSRI02</td>
<td>Bridge B54 (Stage 1 TS&amp;L)</td>
<td>Title Sheet, General Plan and Elevation, Notes, Transverse Section, Pier Details, Abutment Details, Construction Staging</td>
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<td>76</td>
<td>JSSRI03</td>
<td>Bridge B54 (Stage 2 Final Package)</td>
<td>Title Sheet, Index of Sheets, General Notes, General Plan &amp; Elevation, Slope Protection Details, Transverse Sections, Substructure Layout, Sequence of Construction Framing Plan, Field Splice Details, Girder Details, Cross Frame Details, Dead Load Deflection Diagrams, Deck Slab Plans/Sections, Bearing Details, Elastomeric Expansion Dam, Cast-in-Place Concrete Parapet Details, Abutment Plan/Elevation/Details, Pier Plan/Elevation/Details, Reinforcing Steel Schedules, Engineering Geology, Approach Slab, Repair Notes, Joint Reconstruction, Deck/Misc Repair Details, Design Summary</td>
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<td>77</td>
<td>JSSRI04</td>
<td>Bridge B56 (Stage 1 TS&amp;L)</td>
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<td>78</td>
<td>JSSRI05</td>
<td>Bridge B56 (Stage 2 Final Package)</td>
<td>Title Sheet, Index of Sheets, General Notes, General Plan &amp; Elevation, Slope Protection Details, Transverse Sections, Substructure Layout, Sequence of Construction Framing Plan, Field Splice Details, Girder Details, Cross Frame Details, Dead Load Deflection Diagrams, Deck Slab Plans/Sections, Bearing Details, Elastomeric Expansion Dam, Cast-in-Place Concrete Parapet Details, Abutment Plan/Elevation/Details, Pier Plan/Elevation/Details, Reinforcing Steel Schedules, Engineering Geology, Approach Slab, Repair Notes, Joint Reconstruction, Deck/Misc Repair Details, Design Summary</td>
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<td>Pkg. No.</td>
<td>Package Content or Activities</td>
<td>Content/Sheets</td>
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<td>82</td>
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<td>Survey Services</td>
<td>Survey Data</td>
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<tr>
<td>83</td>
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<td>Geotech Services</td>
<td>Field Data, Geotech Reports for each Package</td>
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<td>84</td>
<td>4_RDY01a</td>
<td>Segment 4 ADVANCE ROADWAY - Erosion and Sediment Control, Clearing &amp; Grubbing, Duct Banks &amp; Phase 1 Steps 1&amp;2 MOT (East Shldr Rehab and West Side Construction), Barrier Demo. - 80% Plans</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Typical Sections, Roadway Plans, Roadway Details, Erosions/Sediment Plans/Control Details/Notes, Details, MOT Notes/Typical Sections/Plans/Details, Standards</td>
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<td>85</td>
<td>4_RDY01b</td>
<td>Segment 4 ADVANCE ROADWAY - Erosion and Sediment Control, Clearing &amp; Grubbing, Duct Banks &amp; Phase 1 Steps 1&amp;2 MOT (East Shldr Rehab and West Side Construction), Barrier Demo. - AFC Plans</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Typical Sections, Roadway Plans, Roadway Details, Erosions/Sediment Plans/Control Details/Notes, Details, MOT Notes/Typical Sections/Plans/Details, Standards</td>
</tr>
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<td>86</td>
<td>4_RDY02a</td>
<td>Segment 4 ROADWAY - Roadway/Drainage Plans/Details &amp; Phase 2 MOT (East Side Construction) - 30% Plans</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Survey Control Sheets, Alignment/Curve Data Sheets, Typical Sections, Edge Treatment Details, Roadway Plans, Ramp gore Details, Enforcement Area Details, Conc Barrier Transition Details, Grantry/LUMS/Pole Transition Details, Barrier Transitions at Bridge Piers/Culverts, Barrier/Guard Fence Opening Details, Emergency Mechanical Gate Details, Roadway Details, Drainage Tabulation Sheets, Drainage Plans/Inlets/Manholes, Culvert Extension Plans/Elevation/Details, Pipe Profiles, Erosion/Sediment Plans/Control Details/Notes/Details, Storm Water Management Pond Plans/Sections/Details, MS-19 Plans/Sections/Details, Retaining Wall Plans/Elevations/Details, MOT Notes/ Typical Sections/Plans/Details, Cross Sections, Standards</td>
</tr>
<tr>
<td>87</td>
<td>4_RDY02b</td>
<td>Segment 4 ROADWAY - Roadway/Drainage Plans/Details &amp; Phase 2 MOT (East Side Construction) - 80% Plans</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, Plan and Utility Legend, Survey Control Sheets, Alignment/Curve Data Sheets, Typical Sections, Edge Treatment Details, Roadway Plans, Ramp gore Details, Enforcement Area Details, Conc Barrier Transition Details, Grantry/LUMS/Pole Transition Details, Barrier Transitions at Bridge Piers/Culverts, Barrier/Guard Fence Opening Details, Emergency Mechanical Gate Details, Roadway Details, Drainage Tabulation Sheets, Drainage Plans/Inlets/Manholes, Culvert Extension Plans/Elevation/Details, Pipe Profiles, Erosion/Sediment Plans/Control Details/Notes/Details, Storm Water Management Pond Plans/Sections/Details, MS-19 Plans/Sections/Details, Retaining Wall Plans/Elevations/Details, MOT Notes/ Typical Sections/Plans/Details, Cross Sections, Standards</td>
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<td>88</td>
<td>4_SDW01</td>
<td>Segment 4 - Sound Wall Plans/Details &amp; Phase 3 MOT (Sound Wall Construction)</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, MOT Notes/ Typical Sections/Plans/Details, Sound Wall Plans/Elevations/Details, Sound Wall Cross Sections, Standards</td>
</tr>
<tr>
<td>89</td>
<td>4_BR01</td>
<td>Bridge B29A (Stage 1 TS&amp;L)</td>
<td>Title Sheet, General Plan and Elevation, Notes, Transverse Section, Pier Details, Abutment Details</td>
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<tr>
<td>90</td>
<td>4_BR02</td>
<td>Bridge B29A (Substructure, Structural Steel, Walls)</td>
<td>Title Sheet, Index of Sheets, General Notes, Curved Bridge Layout, Sequence of Construction, Deck Slab Elevations, Framing Plan, Girder Elevations, Field Splice Details, Girder Details, Cross Frame Details, Integral Pier Cap Details, Dead Load Deflection Diagrams, Camber Diagram, Deck Elevation along Girder</td>
</tr>
<tr>
<td>91</td>
<td>4_BR03</td>
<td>Bridge B29A (Stage 2 Final Package)</td>
<td>Title Sheet, Index of Sheets, General Notes, General Plan &amp; Elevation, Substructure Layout, Transverse Sections, Deck Slab Plans,,Sections, Bearing Details, Elasticomeric Expansion Dam, Cast-in-Place Concrete Parapet Details, Bridge Conduit Details, Drilled Shaft Details, Scupper/Piping Details,, Abutment Plan/Elevation/Details, Pier Plan/Elevation/Details, Reinforcing Steel Schedules, Engineering Geology, Approach Slab, Design Summary</td>
</tr>
</tbody>
</table>
### Exhibit F - Early Work Package/Deliverables
#### FLUOR-LANE Package Content/Scope of Work

<table>
<thead>
<tr>
<th>#</th>
<th>Pkg. No.</th>
<th>Package Content or Activities</th>
<th>Content/Sheets</th>
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</thead>
<tbody>
<tr>
<td>93</td>
<td>4_MRD01b</td>
<td>Segment 4 - Misc. Roadway (Lighting/ITS/Tolling/Pavement Marking) - 60% Plans</td>
<td>Title Sheet, Index of Sheets, Sheet Layout Plan, Revision Data Sheet, General Notes, ITS/Tolling/Comm/LUMS Plans, Special Detail Sheets, Comm/Detection/Mounting/Installation Details, Transition Plan, Elevation, Interim System Plans, signing/Pavement Plans, Guide Sign, Sign Face Layouts/Schedule, Sign Elevation Sheets, Sign/Structure Details, Lighting/Electrical Plans/Details/Calculation Reports, Comm Electrical Service Plans, Standards</td>
</tr>
</tbody>
</table>
Exhibit F

Project Early Works Design Activities

Fluor – Lane Management Activities & Deliverables

1.0 DESIGN MANAGEMENT Scope of Work

1.1 Design Management Activities
The Work will include project management for the design activities encompassing scheduling, budgeting (internal and design subconsultants), coordination/liaison with all Project participants, supervising activities under each task, progress reporting, and invoicing.

Design Management tasks include:

- Management of the Design Builder Contractor's (DBC's) resources assigned to the Project and design sub-consultants.
- Create and execute design subconsultant contracts
- Tracking and reporting the progress of design subconsultant progress for budget, schedule, quality and innovation.
- Management, review and reporting of DBE/SWaM sub-consultants.
- Providing overall project coordination between technical disciplines involved in the project and interfacing and communicating the design concepts with the construction team.
- Providing interpretation, coordination and communication between the engineering and construction on project specific technical issues.
- Assigning appropriate resources to the Project.
- Assuring that agreements are in place for scopes of work.
- Create a Work Plan detailing the interrelationship of design events.
- Develop a schedule of deliverables (updated as required) as identified in the scope of services.
- Develop invoicing procedures.
- Establish and monitor interfaces between the TTMS and the DBC.
- Create and review input from the design team for payment invoicing and reconciliation.
- Implementation and management of reporting requirements to the Concessionaire, VDOT and FHWA.
- Early Works compliance monitoring.
- Develop and manage Document Control Procedures including: Designation of personnel responsible for internal Document Control; establishing locations for internal project documents; establishing internal electronic file formats and procedures; and developing procedures to transmit and receive documents (internal and external).
- Participate in coordination meetings.

1.2 Project Development Plans
Design Management tasks staff will assist in development, or develop and administer, the following Project Development Plans, as required by the Agreement:
• Design Quality Management Plan (DQMP)
• Project Specific Right-of-Way Plan
• Utility Relocation Plan
• Environmental Management Plan
• Document Management Plan
• DBE/SWaM Plan

1.3 Design Management Oversight Activities
The Work will include design oversight of the design activities and deliverables (See Exhibit F for listing of the Project deliverable packages and content). The DBC design management staff will review the design team activities, receive, distribute, provide comments and suggestions, resolve conflicts, audit for compliance with the DQMP, review for overall project coordination between technical disciplines, review for constructability, review for access, maintenance and operational considerations.

2.0 PROFESSIONAL SERVICES Scope of Work

2.1 Mobilization of key staff
Moving people to the project, subsistence, airline tickets, vehicles, gas, temporary hotels, home visits, moving house hold goods, training, indoctrinations, wages during mobilizations, mileage, support from human resources.

2.2 Mobilization of remaining project staff for Early Works
Moving people to the project, subsistence, airline tickets, vehicles, gas, temporary hotels, home visits, moving house hold goods, training, indoctrinations, wages during mobilizations, mileage, continued support from human resources.

2.3 Partnering / Alignment Meetings
Look for and hire facilitator, location planning, coordination with client, coordination with designers, major subcontractor coordination, payroll during sessions, printing, facilitation cost.

2.4 Draft Project Management Plan
Outlines of mobilization planning, equipment mobilization planning, organization planning, office planning, on operation planning.

2.5 Safety Plan
Develop Safety Plan in accordance with the Technical Requirements.

2.6 Draft DBE/SWaM Plan
List and plan our Objectives, DBE AND SWaM participation goals, DBE bid item goals, SWaM participation goals, outreach meetings and solicitations, review of subcontract bids, subcontractor outreach.
2.7 Final DBE/SWaM Plan
List and plan our Objectives, DBE AND SWaM participation goals, DBE bid item goals, SWaM participation goals, outreach meetings and solicitations, review of subcontract bids, subcontractor outreach.

2.8 QA/QC Plan
Quality Control process, QC testing and inspection, QC organization and responsibility, QC inspection and administration, QC inspection and testing program, inspection forms, bridge and roadway inspection plans, Quality Assurance process, Quality Assurance testing and inspection, QA documentation, QA Inspector’s Daily Reports, QA organization, QA responsibilities, QA deployment of key staff, QA inspection and testing program, QA inspection and administration.

2.9 Baseline schedule
P6 Baseline CPM Schedule per the contract submitted for approvals.

2.10 Utility Conflict Report
Main line and off main line utility identification, research owners of utility, contact name and contact information, identify size, location, length in conflict, Locate in reference to roadway stationing.

2.11 Traffic Control Plan
Phasing of construction planning, maintenance of traffic device planning, signing, MOT operation planning, concrete barrier location planning.

2.12 Prepare Subcontracting Plan
Risk assessment, contract development schedule, subcontract bid evaluation, mobilization checklist, invoicing requirements, bid item development planning, subcontractor work scheduling, permanent material planning, permanent material pricing.

2.13 Prepare Construction Mobilization Plan
Planning for equipment use schedule, equipment mobilization schedule, buy / sell analysis of equipment, yard planning, material storage planning, construction operation planning, maintenance planning, incorporate personnel planning, crane pick planning, false work planning, temporary earth retention design.

2.14 Project Management
Mobilization planning, organization planning, office planning, setup of yards planning, construction operation planning, project investigation work / design, coring shoulders, popping manholes, checking duct banks, construction over the shoulder reviews, technical work groups, construction reviews of designs, construction innovations.
<table>
<thead>
<tr>
<th>Exhibit F - Early Work Package/Deliverables</th>
</tr>
</thead>
<tbody>
<tr>
<td>TRANSURBAN TMS Cash Flow by Package</td>
</tr>
</tbody>
</table>

### Package/Activity Costs/LUMP Sum Costs

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<th>Package/Activity</th>
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<th>2nd Month</th>
<th>3rd Month</th>
<th>4th Month</th>
<th>5th Month</th>
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<td><strong>Project Wide</strong></td>
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<td>$36,000</td>
<td>$15,300</td>
<td>$6,000</td>
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NOTES:
- **NOTE**: Monthly Cash Flow is shown as is for planning purposes only. Total LUMP SUM cost is as shown for Package/Activity.

### Design Build Specific: Input Segment 1

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<th>Package/Activity</th>
<th>1st Month</th>
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<th>3rd Month</th>
<th>4th Month</th>
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<td><strong>Design Build</strong></td>
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<th>3rd Month</th>
<th>4th Month</th>
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<tr>
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### Monthly Totals

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<tr>
<td><strong>Monthly Total</strong></td>
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**Exhibit F - Early Work Package/Deliverables**

**TRANSURBAN TMS Cash Flow by Package**

<table>
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<tr>
<th>Package/Activity</th>
<th>Amount</th>
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<tr>
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**NOTE**: Monthly Cash Flow is shown as is for planning purposes only. Total LUMP SUM cost is as shown for Package/Activity.
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<tr>
<th>Design Element</th>
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<tr>
<td>4.2.2</td>
<td>Design Management Plan</td>
<td>toddlers in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].</td>
</tr>
<tr>
<td>4.2.3</td>
<td>Systems Engineering Management Plan</td>
<td>Development of Systems Engineering Management Plan in accordance with VDOT’s requirements. (+1) and with VDOT and TMS (Deliverables are: Updated Design Documents).</td>
</tr>
<tr>
<td>4.2.4</td>
<td>Final Design Plan</td>
<td>Development of Systems Engineering Management Plan in accordance with VDOT’s requirements. (+1) and with VDOT and TMS (Deliverables are: Final Final Documents).</td>
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<tr>
<td>4.3.2</td>
<td>Systems Engineering Management Plan</td>
<td>toddlers in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].</td>
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<td>Final Design Plan</td>
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<td>4.4.2</td>
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<td>Final Design Plan</td>
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</tr>
</tbody>
</table>

**Design Build Specific Input Segment 1**

- **Design Build Context:**
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].

- **Design Build Specific Input Segment 2**
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].

- **Design Build Specific Input Segment 3**
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].

- **Design Build Specific Input Segment 4**
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].

- **Design Build Specific Input Segment 5**
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].

- **Design Build Specific Input Segment 6**
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
  - toddler in its management to present the requirements as outlined in Plan Prepare Design Quality Management Plan, [Deliverables are: First documents].
### Exhibit F: Early Work Package/Deliverables

**TRANSURBAN TTMS Package Content/Scope of Work**

<table>
<thead>
<tr>
<th>Pkg. No.</th>
<th>Package Content or Activities</th>
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<tbody>
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**Design Build Specific Input Segment 3**

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**Design Build Specific Input Segment 4**

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<tr>
<td>34</td>
<td>As 4/4</td>
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**Note:** The above content is a natural representation of the document as if you were reading it naturally.
### EARLY WORKS for the SPV Management Costs (per attached scope) - Design Build Phase - $2011 USD

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<tr>
<th>Item Description</th>
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<td>$ -</td>
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<td>$325,727</td>
<td>$325,727</td>
<td>$1,628,637</td>
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</table>

**NOTE:** Monthly Cash Flow as shown is for planning purposes only. Total LUMP SUM cost is as shown for Package/Activity.
Exhibit F

PROJECT EARLY WORKS DESIGN ACTIVITIES

TRANSURBAN SPV – Management Activities

DESIGN BUILD EARLY WORKS

1.0 MANAGEMENT & PROJECT WIDE PLANS

1.1 Design Management Activities

SPV support will include review of project management deliverables for the designer activities encompassing scheduling, budgeting, coordination/liaison with all Project participants, supervising activities under each task, progress reporting, and invoicing, as well as the direct project management of the SPV activities.

Project Management tasks include:

- Management of resources assigned to the Project including sub-consultants.
- Management, review and reporting of DBE/SWaM sub-consultants.
- Assigning appropriate resources to the Project.
- Assuring that agreements are in place for scopes of work.
- Assisting in developing, implementing and review of the Design Quality Management Plan; and project controls, cost accounting, scheduling, invoicing, and other business related functions associated with the program.
- Review the Work Plan detailing the interrelationship of design events.
- Review the schedule of deliverables (updated when necessary) as identified in the scope of services.
- Develop and implement invoicing/payment procedures.
- Review the DBE/SWaM Plans, Construction Subcontracting and Construction Mobilization Plans, provide comment
- Develop and manage Document Control Procedures including: Designation of personnel responsible for internal Document Control; establishing locations for internal project documents; establishing internal electronic file formats and procedures; and developing procedures to transmit and receive documents (internal and external).
- Participate in coordination meetings, over-the-shoulders reviews, technical working groups and comment resolution meetings.
- Participate in Partnering/Alignment Meetings
- Provide input to the operations and maintenance requirements, including ease of access for maintenance, and operational requirements,
- Support of in obtaining project documentation, in verifying compliance with DQMP, in reviewing invoice payment for both the design-builder and TTMS.
- Establish and monitor interfaces between the design builder and TTMS.
- Management of payment disbursements with VDOT including reconciliations.
- Implementation and management of reporting requirements to VDOT and FHWA.
- Early Works compliance monitoring
- Liaison with VDOT and other third parties
- Initial development of the Public Information and Communications Plan, establishment of the Project Communications Team, and identification of management protocols with VDOT Communications Team.

The SPV support of the management plans is to receive, distribute, file, review, provide comments and suggestions, resolve conflicts and monitor implementation by the DB Contractor of the following:

1.2 Design Quality Management Plan (DQMP)
1.3 Project Specific Right-of-Way Plan
1.4 Utility Relocation Plan
1.5 Survey
1.6 Geotechnical Services
1.7 Noise Analysis Report
1.8 Environmental Mitigation and Permitting

2.0 ROADWAY / DRAINAGE / UTILITIES / E&S / MOT / WALLS

The SPV support of the following design deliverables is to receive, distribute, file, review, provide comments and suggestions, resolve conflicts, audit for compliance with DQMP, review for overall project coordination between technical disciplines, review for access for maintenance and meeting operations requirements, and evaluate design for interfaces with TTMS of the following design elements:

2.1 Roadway Plans/Details
  2.1.1 Roadway Alignments
    A. Alignments, Geometrics, Sections, & Profile Refinements
    B. Alignment and Survey Data
    C. Alignment and Survey Plan Sheets
  2.1.2 Sections
    A. Pavement Report & Typical Sections Design
    B. Typical Section & Edge Treatment Plan Sheets
    C. Cross Section Design
D. Cross Section Plan Sheets

2.1.3 Utilities Shown
A. Existing Utilities Shown
B. Relocated/Protected Utilities

2.1.4 Roadway Details
A. Ramp Gore Details
B. Enforcement Area Details
C. Concrete Barrier and Guardrail Details
D. Emergency Access Barrier Opening Details

2.1.5 Roadway Plans
A. Roadway Design
B. Ancillary / Supplemental Sheets
C. Roadway Plans

2.1.6 Drainage, H&H, SWM and E&S Control
Drainage, Hydrology/Hydraulics, Stormwater Management and Erosion/Sediment Control work associated with the Project includes:
A. Existing Drainage System
B. Proposed Drainage System
C. Stormwater Management Facilities
D. MS-19 Analysis and Design
E. Erosion & Sedimentation (E&S) Control
F. Bridge Scuppers/Deck Drainage Design
G. Roadway Drainage Plan Sheets

2.1.7 Staging & MOT Plans
Construction Staging and Maintenance of Traffic (MOT) work associated with project includes:
A. Staging / MOT Design
B. MOT Plan Sheets

2.1.8 Sound Walls
A. Roadway Sound Wall Design and Sheets

2.1.9 Retaining Walls
A. Roadway Retaining Wall Design and Sheets
3.0 STRUCTURES

The SPV support of the following design deliverables is to receive, distribute, file, review, provide comments and suggestions, resolve conflicts, audit for compliance with DQMP, review for overall project coordination between technical disciplines, and evaluate design for interfaces with TTMS of the following design elements:

3.1 New Bridge Plans
   3.1.1 Stage I Preliminary Design
   3.1.2 Stage II Final Design

3.2 Bridge Widening Plans Major Rehabilitation& Retro-fit/Rehabilitation Plans (Minor Rehabilitation)
   3.2.1 Stage I Preliminary Design:
   3.2.2 Stage II Final Design

3.3 Structural Support Services for Roadway Details
   3.3.1 Non-Standard Structural Items

3.4 Structural Support Services for Drainage Structures
   3.4.1 Stage I Preliminary Design
   3.4.2 Stage II Final Design

3.5 Structural Support Services for New Sound Walls
   3.6.1 Stage I Preliminary Design:
   3.5.2 Stage II Final Design:

3.6 Structural Support Services for Retaining Wall Plans
   3.6.1 Stage I Preliminary Design
   3.6.2 Stage II Final Design

3.7 Structural Support Services for Toll Gantries and Technical/Toll Shelters
   3.7.1 Stage II Final Design

3.9 Structural Support Services for New Stand-Alone Lane Use Management System (LUMS) Plans
   3.9.1 Stage I Final Design
3.9.2 Stage II Final Design

3.10 Structural Support Services for Sign Plans, Combination Sign Plans, and Stand-Alone Equipment Pole Plans

3.10.1 Stage I Final Design
3.10.2 Stage II Final Design

4.0 MISCELLANEOUS ROADWAY (ITS / COMMUNICATIONS / TOLLING / SIGNING / PAVEMENT MARKING / LIGHTING / TRAFFIC SIGNALS)

The SPV support of the following design deliverables is to receive, distribute, file, review, provide comments and suggestions, resolve conflicts, audit for compliance with DQMP, review for overall project coordination between technical disciplines, review for access for maintenance and meeting operations requirements, evaluate design for interfaces with TTMS, and review for compliance with requirements of the following design elements:

4.1 ITS, Tolling, Communications & LUMS Plans
4.2 Tolling
4.3 Communications/ITS Power
4.4 Lane Use Management (LUMS)
4.5 Gate Transitions
4.6 Signing / Pavement Marking Plans
4.7 Lighting / Electrical Plans
4.8 Traffic Signal Plans

TTMS EARLY WORKS

5.0 TTMS MANAGEMENT

The SPV support of the following design deliverables is to receive, distribute, file, review, provide comments and suggestions, resolve conflicts, audit for compliance with requirements, review for overall project coordination, review for maintenance concerns, review for meeting operations requirements, evaluate design approach for interfaces with the Design Build Contract design, and review for compliance with requirements of the following design elements:

TTMS 1 Design Management Plan
TTMS 2 Quality Management Plan
TTMS 3a System Engineering Management Plan - Draft Document
TTMS 3b  System Engineering Management Plan - Final Document
TTMS 4a  I95 Express Project Architecture - Draft Document
TTMS 4b  I95 Express Project Architecture - Final Document
TTMS 5a  I95 Express Rule 940 Checklist - Draft Document
TTMS 5b  I95 Express Rule 940 Checklist - Final Document
TTMS 6  Not in Early Works
TTMS 7  Not in Early Works
TTMS 8a  Business Requirements Workshops/ Requirements Management - Draft Document
TTMS 8b  Business Requirements Workshops/ Requirements Management - Final Document
TTMS 9  Verification Cross Reference Index
TTMS 10a Prepare Functional Requirements and ETTM Specifications
TTMS 11a Use Cases for Gate Operations and LUMS, control scenarios and document interface requirements - Draft Document
TTMS 11b Use Cases for Gate Operations and LUMS, control scenarios and document interface requirements - Final Document
TTMS 12 Review of IAG Technology implications and I95 solution (Janus v Badger)
TTMS 13 Update System Requirements Specifications for TMS/AID Subsystem/LUMS/Reversing
TTMS 14 Not in Early Works
TTMS 15 Dynamic Tolling Algorithm Transmodeller Simulation Model update
TTMS 16 Update of Pre Operations Plan to incorporate I95 requirements
TTMS 17 Update System Requirements Specifications for ETC/Maintenance Online Management/Mobile Enforcement
TTMS 18 Interface Control Documentation Coordination
TTMS 19 Not in Early Works
TTMS 20 Not In Early Works
EXHIBIT B-1

PROJECT DESCRIPTION

The I-95 HOV/HOT Lanes Project means the development, design, financing, construction, operation, maintenance and tolling of the Project Assets, all as more particularly described in the Technical Requirements, which consists of:

1. Expanding the current HOV Lanes facility from two lanes to three lanes between Prince William Parkway and approximately 2 miles north of Capital Beltway (near Turkeycock Run) and maintaining the existing two lanes from Prince William Parkway to south of the Town of Dumfries.

2. Extending the HOV Lane facility approximately 9 miles south by constructing two new lanes from Dumfries Road to Garrisonville Road (VA 610) in Stafford County.

3. Converting the HOV Lanes and ramps between 2 miles north of Capital Beltway (near Turkeycock Run) and Garrisonville Road into HOV/High Occupancy Toll Lanes (“HOT Lanes”).

4. Conversion of the Springfield Interchange Phase VIII HOV connector ramps from I-95 and I-395 to and from the Capital Beltway into HOT ramps; and the Phase VIII HOV-only through lanes on the Capital Beltway through the Springfield Interchange will be converted into HOT Lanes.

5. Adding new entry/exit points into and out of the HOT Lanes, as listed below in the access point table. All existing entry/exit points between 2 miles north of Capital Beltway (including Turkeycock Run SB HOV ramp) and south of Dumfries Road will be converted to HOT Lanes unless modified as identified below.

<table>
<thead>
<tr>
<th>No.</th>
<th>Route</th>
<th>Connection Location: Northbound Connections</th>
<th>Northbound Connections</th>
<th>Southbound Connections: Southbound Connections</th>
<th>Type of Modification</th>
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<tbody>
<tr>
<td>1</td>
<td>I - 395</td>
<td>Between VA 648 (Edsall Road) and Turkeycock Run</td>
<td>NB HOV/HOT Lanes to NB GP Lanes</td>
<td>N/A</td>
<td>New</td>
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<tr>
<td>2</td>
<td>I - 95</td>
<td>VA 7100 (Fairfax County Parkway)</td>
<td>NB HOV/HOT Lanes to Fairfax County Parkway (Alban Rd.)</td>
<td>Fairfax County Parkway (Alban Rd.) to SB HOV/HOT Lanes</td>
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<tr>
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<td>I - 95</td>
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<td>4</td>
<td>I - 95</td>
<td>Between VA 642 (Lorton Road) and Rt 1</td>
<td>N/A</td>
<td>SB GP to SB HOV/HOT Lanes</td>
<td>New</td>
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The Project will also include (i) the tolling, operation and maintenance, and repair of the Project Assets in accordance with the Agreement, (ii) all other improvements constructed pursuant to the Agreement, as amended from time to time, and (iii) enhancements to the HOT Lanes to facilitate the operation of the Project Assets as intended in the Agreement.

The Project also includes use of the Express Operations Center constructed by Capital Beltway Express, LLC (“CBE”) as concessionaire for the Capital Beltway HOT Lanes in Virginia Project, as well as use of the TTMS and certain other equipment installed by CBE at the Express Operations Center. Such Project Assets as well as new TTMS and other equipment to be installed as part of the Project will be shared with CBE as provided in the Shared Facilities Agreement.
EXHIBIT B-2

INITIAL BASELINE SCHEDULE

[see attached]
I-95 HOV/HOT Lanes Project

Schedule Narrative: Baseline Schedule
General Execution Plan

The attached schedule reflects Fluor-Lane95’s baseline execution plan to complete the Work Scope for the I-95 HOV\HOT Lanes Project and achieve Project Final Acceptance by March 30, 2015.

In developing this schedule, the Fluor-Lane95 project team has analyzed the Scope of Work and developed a plan for its execution. The Work has been broken down into a detailed network of activities required to complete the project. For each set of activities, both basic sequencing and project specific constraints have been taken into account when assigning logic relationships. To establish activity durations, quantities have been estimated and crew productions analyzed.

Fluor-Lane95 has worked with our design team to develop and prioritize a set of design packages that fully support the construction plan. Design manpower requirements have been reviewed and resources made available to the project.

The creation of this schedule has also allowed us to better understand the procurement process by quantifying and time phasing all of the critical engineered items such as bridge girders, sound wall panels, retaining wall panels, etc.

The specific construction challenges set forth by the Scope of Work have been address in our schedule. Foremost amongst these is maintaining daytime traffic flow on the current HOV lanes while constructing the facilities required for the new HOT lanes. Our MOT plan reflected in the schedule involves shifting HOV traffic into east and west phases, allowing the work to proceed on the portion of the corridor available to us at that time. When required by the nature of the work, full nighttime closures of the HOV lanes will be carried out to allow for the execution of the work.

Through coordination with our Tolling and Traffic Management team we have detailed the current construction scope and included the time requirements for the final testing and commissioning of the system.

We believe the attached schedule provides an effective tool to accurately baseline the Project, provides a tool to manage project execution, establishes a basis to measure progress and provides a tool to evaluate monthly billings.

Schedule Development

The following activities have been fully detailed base on current knowledge of work scope:

- ROW – All ROW parcels currently identified in the ROW Acquisition Plan, have been included in the Schedule. All the Parcels are included with a “start as late as possible” constraint and show the latest date that will not impact construction.
Design – All the design packages, with their review process have been included in the Schedule. Design activities have been loaded with man-hours and tied to the relevant construction activities.

Utility relocations – Design packages for all known utility relocations have been included in the schedule. Information from utility owners (when available) has been utilized when calculating durations, utility owners have been identified and coded, utility type & location added to the descriptions and all affected construction activities tied.

Permits – Major permits have been included in the schedule.

Interface with other projects – Known interfaces with other project had been shown in the schedule.

Maintenance of Traffic – Activities have been included for all major MOT items. Activities for traffic shifts have been included and opening and closing of roadways and ramps identified.

Demolitions – Activities have been included for roadway and bridge demolitions where required.

Ground Improvements – All ground improvement activities including soil improvements and settlement durations have been included in the schedule.

Earthwork – Earthwork activities have been included for each of the work zones and detailed as required. “Cut” and “Fill” quantities have been included for each of the activities as a “material resource”

Drainage – Drainage has been included and detailed into separate “deep” and “shallow” activities. Linear ft of pipe quantities have been included for each of the activities as a “material resource”. Major box culverts have also been identified with separate activities.

Retaining Walls – Retaining walls have been thoroughly detailed in the schedule. Each RW has been detailed into leveling pad, construct & backfill, place panels and moment slab/coping activities.

Roadway Activities – Activities have been included for placing of subbase and concrete paving. Each of these has been loaded with their relevant quantities.

Roadway Finishes – Activities have been included for striping, permanent barrier, guardrail, etc.

Bridges – Bridges have been detailed in great depth. Activities have been included for piling, shoring, substructures, superstructures, girder placement, approach panels, etc. Quantities have been included for most of these categories.

Noise Walls – Activities have included for installation of noise walls. Quantities have been included for both number of posts and square feet of panels.
• Tolling and Traffic Management – TTMS activities have been included for each of the major work zones. These currently include activities for installation of duct banks, pulling of wires, installation of tech. shelters, erection of toll gantries, DMS / LUMS systems, etc. These activities will be further detailed once the Work Scope is further developed.

Schedule Organization

• Project Calendars – Fluor-Lane955 has made use of numerous project calendars to model the work. These have been listed in Attachment A and working / non working periods can be reviewed directly in the schedule. The standard calendar is a 5 day/week administrative calendar that includes all standard VDOT holidays.

• Work Breakdown Structure – The WBS utilized has four levels (see Attachment B):
  o Project (level 1)
  o Work Segments (level 2)
  o Work Areas (level 3)
  o Work Zones (level 4) or specific elements, bridges, roadway segments, etc

• Activity Codes – Provide additional grouping, sorting and filtering capabilities (see Attachment C):
  o Design Pkg – applicable to all design activities these codes identify to what design package an activity belongs to.
  o Responsibility – identifies who is responsible to carry out the work or, in case of utilities, who the utility owner is.
  o Type of Work – hierarchical structure use to identify the type of work for each activity.
  o Lane Phase – designates the construction phase for an activity when applicable.
  o Walls – allows the filtering and organization of sound and retaining walls by number.
  o Summary – coding for the creation of summary level executive reports.
  o Path – identifies project longest path activities and near critical paths.
  o Funding Source – identifies the funding source for a certain activity (under development).
Use of Constraints in the Schedule

Fluor-Lane95 has strived to reduce the number of constraints in the schedule, but in some instances using constraints provides the best modeling of the work to be performed. All constrained activities have been listed in Attachment D and a justification has been provided in each case. Use of constraints has been done in the following cases:

- Contractual Milestone – Milestone dates have been modeled with “hard” constraints. Examples include Notice to Proceed Early Works and Project Substantial Completion.
- Modeling of MOT Requirements – MOT Contractual requirements such as road closures limited to a set number of days, have been modeled using “finish as late as possible” constraints on some activities in order to minimize the duration of the road closure.
- ROW Acquisitions - All ROW parcel acquisitions have been given a “start as late as possible” constraint.
- Material Procurement – To better model cost distribution and Vendor resources availability, material procurement activities have been given a “start as late as possible constraint”.

Other Contractual Requirements

- Activity Durations greater than 30 days – Fluor-Lane95 has maintained most of the activity durations under the 30-day requirement. Attachment H provides a list of activities with durations greater than 30 days. Fluor-Lane95 believes that at this stage of project development these durations provide adequate modeling of the work. Once this schedule is progressed, some of these activities could be further detailed if this would add value to the Schedule.

Project Milestones:

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Longest Path

Attachment F illustrates the Critical Path (Longest Path). The Longest Path is the longest chain of activities leading to Project Completion. Currently the completion of Segment 3N is on the Longest Path.

In the schedule, multiple near critical paths exists. Ties introduced due to the comment resolution process have shifted the path from 4N (which was the critical path in the baseline schedule submitted on June 12, 2012) to 3N. In the June 12, 2012 baseline submittal, 3N was the next near critical path with merely 2 days of float.

The driving activities on the longest path start with roadway design for Segment 3N. The longest path continues through construction of various elements of 3N through paving of the HOT lanes and the installation of the access gates. This is followed by the handover to Transurban for the final TTMS testing and commissioning.

Resources

Fluor-Lane95 has included material quantities for all the significant activities in its Baseline Schedule. The curves generated from these (Attachment E) provide the basis for understanding the level of resources required to adequately plan the Project.

All of the attached curves are based on early curves, if necessary, Fluor-Lane95 will utilize available project float to optimize to number of crews that will be required for each of the activities.

Resource “mapping” from P6 resources to work type are provided in Attachment J

Cost Loading

Fluor-Lane95 has cost loaded the Baseline Schedule to reflect the Contract Price. The Price Summary is reflected in Attachment I.

The cost loading process has been carried out by breaking down the Contract Price into cost categories and prorating these amounts into the activities, based on their significant quantities. Details of this process can be seen in Attachment G – Cost Loading Details.

P6 Cost Accounts (Attachment J) are utilized to summarize the details back into the categories shown in the Price Summary.
Attachments: 
Attachment A – Project Calendars 
Attachment B – Work Breakdown Structure 
Attachment C – Activity Codes 
Attachment D – Log of Constraints 
Attachment E – Resource Curves 
Attachment F – Longest Path 
Attachment G – Cost Loading Details 
Attachment H – OD Greater than 30 days 
Attachment I – Price Summary 
Attachment J – Resource / Cost Coding Maps 
Attachment K - Monthly Progress Earning Schedule. - 

P6. xer file (v7.0)
### I-95 HOT Lanes
#### Project Phase

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#### Schedule for I-95 HOT Lanes

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Schedule for I-95 HOT Lanes

Remaining Level of Effort
Critical Remaining Work
Milestone

Task filter: No LOE.
### Activity ID | Original Date | Start | Finish | Total Days | 2012 | 2013 | 2014 | 2015
--- | --- | --- | --- | --- | --- | --- | --- | ---
1.00.12720 | Constructability Review (MOT for C&G - Seg1) | 10-Apr-12 | 10-Apr-12 | 45 | Incorp. Constructability Comments (Roadway Geometrics)
1.00.12810 | Incorp. Constructability Comments (Roadway Geometrics) | 10-Apr-12 | 10-Apr-12 | 67 | Incorp. Constructability Comments (Roadway Geometrics)
1.00.12870 | Roadway Design (Initial G&D) | 65-Apr-12 | 11-Apr-12 | 67 | Roadway Design (MOT for Initial G&D)
1.00.12960 | Roadway Design (MOT for Initial G&D) | 65-Apr-12 | 11-Apr-12 | 51 | Roadway Design (MOT for Initial G&D)
1.00.13030 | Roadway Design (Final Roadway - Zone 1 & 1.2) | 150-Apr-12 | 09-Nov-13 | 66 | Roadway Design (MOT for Roadway - Zone 1 & 1.2)
1.00.13110 | Roadway Design (MOT for FR - Zone 1 & 1.2) | 120-Apr-12 | 27-Sep-12 | 68 | Roadway Design (MOT for FR - Zone 1 & 1.2)
1.00.13150 | Constructability Review. Stage 1 (B72A) | 5-Jul-12 | 23-Apr-12 | 51 | Constructability Review. Stage 1 (B72A)
1.00.13190 | Bridge Design: Stage 1 (B72) | 145-Jul-12 | 05-Jun-12 | 1 | Bridge Design: Stage 1 (B72)
1.00.13750 | Bridge Design (B72A) | 160-Jul-12 | 15-Sep-12 | 2 | Bridge Design: B72A
1.00.13830 | Retaining Wall Design (RW1, RW2 & RW3) | 135-Jul-12 | 15-Sep-12 | 132 | Retaining Wall Design (RW1, RW2 & RW3)
1.00.13920 | Incorp. Constructability Comments (C&G - Seg1) | 15-Jul-12 | 23-Apr-12 | 52 | Incorp. Constructability Comments (C&G - Seg1)
1.00.13730 | Incorp. Constructability Comments (MOT for C&G - Seg1) | 5-Jul-12 | 23-Apr-12 | 46 | Incorp. Constructability Comments (MOT for C&G - Seg1)
1.00.13820 | VDOT Final Review (Roadway Geometrics) | 21-Jul-12 | 07-May-13 | 95 | VDOT Final Review (Roadway Geometrics)
1.00.13110 | Constructability Review. Stage 1 (B69, B70 & B71) | 6-Jul-12 | 04-Jun-12 | 60 | Constructability Review: Stage 1 (B69, B70 & B71)
1.00.11190 | Bridge Design (B69) | 85-Jul-12 | 24-Apr-12 | 11 | Bridge Design: B69
1.00.11270 | Bridge Design (B70) | 85-Jul-12 | 24-Apr-12 | 11 | Bridge Design: B69
1.00.11580 | Bridge Design (B71) | 24-Jun-12 | 24-Aug-12 | 76 | Bridge Design: B71
1.00.11140 | Retaining Wall Design (RW4, RW5 & RW6) | 85-Jul-12 | 24-Aug-12 | 89 | Retaining Wall Design (RW4, RW5 & RW6)
1.00.11530 | Incorp. Constructability Comments. Stage 1 (B72A) | 5-Jul-12 | 24-Apr-12 | 135 | Incorp. Constructability Comments. Stage 1 (B72A)
1.00.12300 | VDOT Final Review (C&G - Seg1) | 24-Jun-12 | 14-May-12 | 74 | VDOT Final Review (C&G - Seg1)
1.00.12740 | VDOT Final Review (MOT for C&G - Seg1) | 24-Jun-12 | 14-May-12 | 64 | VDOT Final Review (MOT for C&G - Seg1)
1.00.11310 | Incorp. Constructability Comments. Stage 1 (B69, B70 & B71) | 5-May-12 | 04-Jun-12 | 60 | Incorp. Constructability Comments. Stage 1 (B69, B70 & B71)
1.00.11190 | VDOT Final Review. Stage 1 (B72A) | 21-May-12 | 01-May-13 | 105 | VDOT Final Review. Stage 1 (B72A)
1.00.11140 | VDOT Final Review. Stage 1 (B69, B70 & B71) | 28-May-12 | 08-May-13 | 88 | VDOT Final Review. Stage 1 (B69, B70 & B71)
1.00.12830 | Comment Resolution (Roadway Geometrics) | 7-May-12 | 14-May-12 | 95 | Comment Resolution (Roadway Geometrics)
1.00.12860 | Approved as Final Roadway Design (Roadway Geometrics) | 7-May-12 | 14-May-12 | 67 | Approved as Final Roadway Design (Roadway Geometrics)
1.00.12400 | Comment Resolution (C&G - Seg1) | 7-May-12 | 14-May-12 | 74 | Comment Resolution (C&G - Seg1)
1.00.12750 | Comment Resolution (MOT for C&G - Seg1) | 7-May-12 | 14-May-12 | 64 | Comment Resolution (MOT for C&G - Seg1)
1.00.11010 | Constructability Review. Stage 1 (B67A, B67B & B68) | 2-May-12 | 22-May-12 | 16 | Constructability Review. Stage 1 (B67A, B67B & B68)
1.00.10710 | Bridge Design: Substructure (B67A) | 4-May-12 | 22-May-12 | 5 | Bridge Design: Substructure (B67A)
1.00.10790 | Bridge Design: Superstructure (B67A) | 7-May-12 | 22-May-12 | 40 | Bridge Design: Superstructure (B67A)
1.00.10870 | Retaining Wall Design (RW8, RW9 & RW10) | 22-May-12 | 02-May-13 | 28 | Retaining Wall Design (RW8, RW9 & RW10)
1.00.10950 | Bridge Design (B68) | 102-May-12 | 12-Oct-12 | 3 | Bridge Design (B68)
1.00.11560 | Comment Resolution: Stage 1 (B72A) | 7-May-12 | 28-May-12 | 193 | Comment Resolution: Stage 1 (B72A)
1.00.12500 | VDOTComment Verification (C&G - Seg1) | 7-May-12 | 28-May-12 | 74 | VDOTComment Verification (C&G - Seg1)
1.00.12760 | VDOTComment Verification (MOT for C&G - Seg1) | 22-May-12 | 28-May-12 | 64 | VDOTComment Verification (MOT for C&G - Seg1)
1.00.11150 | Comment Resolution: Stage 1 (B69, B70 & B71) | 7-May-12 | 04-Jun-12 | 88 | Comment Resolution: Stage 1 (B69, B70 & B71)
1.00.11980 | Approved as Final Bridge Design: Stage 1 (B72A) | 7-May-12 | 04-Jun-12 | 133 | Approved as Final Bridge Design: Stage 1 (B72A)
1.00.12690 | Final Comment Resolution (C&G - Seg1) | 29-May-12 | 04-Jun-12 | 74 | Final Comment Resolution (C&G - Seg1)
1.00.12770 | Final Comment Resolution (MOT for C&G - Seg1) | 29-May-12 | 04-Jun-12 | 64 | Final Comment Resolution (MOT for C&G - Seg1)
1.00.12020 | Incorp. Constructability Comments: Stage 1 (B67A, B67B & B68) | 30-May-12 | 05-Jun-12 | 16 | Incorp. Constructability Comments: Stage 1 (B67A, B67B & B68)
1.00.11180 | Approved as Final Bridge Design: Stage 1 (B69, B70 & B71) | 0-Jun-12 | 05-Jun-12 | 61 | Approved as Final Bridge Design: Stage 1 (B67A, B67B & B68)
1.00.12700 | AFC Roadway Design (C&G - Seg1) | 0-Jun-12 | 05-Jun-12 | 53 | AFC Roadway Design (C&G - Seg1)
1.00.12780 | AFC Roadway Design (MOT for C&G - Seg1) | 0-Jun-12 | 05-Jun-12 | 45 | AFC Roadway Design (MOT for C&G - Seg1)
1.00.13030 | VDOT Final Review. Stage 1 (B67A, B67B & B68) | 26-Jun-12 | 21-Jun-12 | 22 | VDOT Final Review. Stage 1 (B67A, B67B & B68)
1.00.11030 | Bridge Design (B67B) | 20-Jun-12 | 03-Jul-12 | 283 | Bridge Design (B67B)
1.00.11660 | Constructability Review. Stage 1 (B72) | 5-Jun-12 | 12-Jun-12 | 99 | Constructability Review. Stage 1 (B72)
1.00.11670 | Bridge Design (B72) | 12-Jun-12 | 05-Dec-12 | 1 | Bridge Design (B72)
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### Schedule for I-95 HOT Lanes

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#### Utility Relocations

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### SB Lanes St. 20+00 to 69+00

#### GP Southbound

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#### Ramp GHS SB HOT Lanes to SB Lanes

##### GP Southbound

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#### Maintenance of Traffic

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#### Earthwork

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<td>Clearing, Grubbing &amp; Topsoil Stripping (RpGHS)</td>
<td>5-26 Nov-12</td>
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#### Retaining Walls

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# I-95 HOT Lanes Schedule

## Baseline Schedule

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### I-95 HOT Lanes Baseline Schedule

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**NB Lanes St. 91+00 to Aquia Crk**

- **(P)** Parallel
- **(D)** Design

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**No Lane Phase**

- **(D)** Design

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**High Occupancy Toll Lanes**

- **(D)** Design

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**Baseline Schedule**

**GP Northbound**

**Maintenance of Traffic**

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**Roadway**

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**Noise Walls**

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**NB Lanes Aqua Axle to 134+00**

**Roadway**

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**Traffic & Tolling Management Systems**

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<td>Poles &amp; Term Wire, Service Panel (1.2HOT)</td>
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**Landscape**

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**NB Lanes Aqua Axle to 134+00**

**Roadway**

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**Noise Walls**

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**Integral Remaining Work**

**Critical Remaining Work**

**Remaining Level of Effort**

**Task Filter: No LOE.**

**Schedule for I-95 HOT Lanes**

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<thead>
<tr>
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**Traffic & Tolling Management Systems**

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**No Lane Phase**

**Maintenance of Traffic**

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**Demolitions**

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**Bridges**

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<td>Sleeper Slab (B71)</td>
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<td>Bridge Painting (B71)</td>
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| 1.037900    | Relocation of utility Complete: T/F/G Telephone @ St 249+22 (1.3 HOT) - V. | 01-Oct-12 to 20-Nov-12 | 11-Jan-13 to 20-Nov-12 | 16
| 1.037900    | Relocation of utility Complete: T/F/G Telephone @ St 249+22 (1.3 HOT) - DOM. | 01-Oct-12 to 20-Nov-12 | 11-Jan-13 to 20-Nov-12 | 16

**Bridge HOT Lanes over Choppawamsic Crk (B70)**

**High Occupancy Toll Lanes**

**Maintenance of Traffic**

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| 1.037914    | Bridge Ready for Traffic (B70) | 01-Oct-12 to 15-Nov-12 | 25-Nov-12 to 15-Nov-12 | 24

**Bridges**

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| 1.038100    | Procurement Girders (Steel): Bridge HOT Lanes over Choppawamsic Crk (B70) | 01-Oct-12 to 20-Nov-12 | 25-Nov-12 to 20-Nov-12 | 16

**Substructures: F&P Abutment A - Seat (B70) | 10-Jan-12 to 03-Mar-12 | 03-Mar-12 to 10-Jan-12 | 16**

**Substructures: F&P Abutment A - Backwall (B70) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**Substructures: F&P Abutment B - Seat (B70) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**Substructures: F&P Abutment B - Backwall (B70) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**Girder Installation (B70) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**Bridge Ready for Traffic (B70) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**Bridge Painting (B70) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**No Lane Phase**

**Bridges**

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| 1.037914    | Bridge Ready for Traffic (B70) | 01-Oct-12 to 15-Nov-12 | 25-Nov-12 to 15-Nov-12 | 24

**Superstructure: SIP Forms (B70) | 08-Jan-13 to 18-Jan-13 | 18-Jan-13 to 08-Jan-13 | 16**

**Superstructure: Rebar (B70) | 15-Feb-13 to 18-Feb-13 | 18-Feb-13 to 15-Feb-13 | 16**

**Superstructure: Pour Deck (B70) | 08-Sep-13 to 15-Sep-13 | 15-Sep-13 to 08-Sep-13 | 16**

**Superstructure: Deck Cure & Strip (B70) | 08-Sep-13 to 15-Sep-13 | 15-Sep-13 to 08-Sep-13 | 16**

**Superstructure: Overhang (B70) | 08-Sep-13 to 15-Sep-13 | 15-Sep-13 to 08-Sep-13 | 16**

**Approach Slabs (B70) | 08-Sep-13 to 15-Sep-13 | 15-Sep-13 to 08-Sep-13 | 16**

**Bridge Deck Joints (B70) | 25-Sep-13 to 03-Oct-13 | 03-Oct-13 to 25-Sep-13 | 16**

**Bridge Deck Joints (B70) | 25-Sep-13 to 03-Oct-13 | 03-Oct-13 to 25-Sep-13 | 16**

**Bridge Deck Grooving (B70) | 25-Sep-13 to 03-Oct-13 | 03-Oct-13 to 25-Sep-13 | 16**

**Bridge HOT Lanes over Russel Rd (B69)**

**GP Southbound**

**Maintenance of Traffic**

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| 1.037914    | Bridge Ready for Traffic (B70) | 01-Oct-12 to 15-Nov-12 | 25-Nov-12 to 15-Nov-12 | 24

**Substructures: F&P Abutment A - Seat (B69) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**Substructures: F&P Abutment A - Backwall (B69) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**Girder Installation (B69) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**Bridge Ready for Traffic (B69) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**Bridge Painting (B69) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**High Occupancy Toll Lanes**

**Maintenance of Traffic**

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| 1.037914    | Bridge Ready for Traffic (B70) | 01-Oct-12 to 15-Nov-12 | 25-Nov-12 to 15-Nov-12 | 24

**Girder Installation (B69) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**Girder Installation (B69) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**Bridge Ready for Traffic (B69) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**

**Bridge Painting (B69) | 08-Dec-12 to 15-May-12 | 15-May-12 to 08-Dec-12 | 16**
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### HOT Lanes Choppedawamsic Crk to Joplin Rd

#### GP Northbound

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<td>1.03.60500</td>
<td>Install Service Panel (w/o Generator) @ St.302/356: GP NB (1.3.HOT)</td>
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<td>1.03.60504</td>
<td>Install GM Signs: GP NB (1.3.HOT)</td>
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<td>Pull &amp; Term Service Panel Wire &amp; Cable (1.3.HOT)</td>
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#### GP Southbound

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<td>Erosion Control Setup: SWM Pond @ Russel Rd (1.3.HOT)</td>
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<td>Temporary Barrier: GP Lanes for SWM Pond @ Russel Rd (1.3.HOT)</td>
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<td>1.03.65013</td>
<td>Clearing, Grubbing &amp; Topsoil Stripping: SWM Pond @ Russel Rd (1.3.HOT)</td>
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### High Occupancy Toll Lanes

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<td>Roadway Ready for Traffic (1.3.HOT)</td>
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<td>Earthwork: Undercut - at Bridge Abutment B</td>
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<td>Earthwork: Refill Undercut - at Bridge Abutment B</td>
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### Traffic & Tonnage Management Systems

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### Work Area Joplin Rd to Segment 1 Limits

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<td>75-10-12</td>
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<td>1.05.49672</td>
<td>Substructures: F&amp;P Pier 2 - Column (B67a)</td>
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<td>Substructures: F&amp;P Pier 2 - Cap (B67a)</td>
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<td>1.05.64962</td>
<td>Substructures: F&amp;P Pier 1 - Column (B67a)</td>
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<td>Substructures: F&amp;P Pier 1 - Footing (B67a)</td>
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<td>1.05.52450</td>
<td>Substructures: F&amp;P Abutment B (B67a)</td>
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<td>1.05.52470</td>
<td>Girder Installation: Span B (B67a)</td>
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<td>1.05.52480</td>
<td>Girder Installation: Span C (B67a)</td>
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<td>1.05.52500</td>
<td>Girder Installation: Span C (B67a)</td>
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<td>1.05.52820</td>
<td>Bridge Painting (B67a)</td>
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<td>1.06.52826</td>
<td>Slope Paving (B67a)</td>
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<td>1.06.65152</td>
<td>Superstructure: SIP Forms (B67a)</td>
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<td>Superstructure: Overhang (B67a)</td>
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<td>1.06.55182</td>
<td>Superstructure: Retainer (B67a)</td>
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<td>1.06.55192</td>
<td>Superstructure: Pile Deck (B67a)</td>
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<td>1.06.55202</td>
<td>Superstructure: Deck Cure &amp; Strip (B67a)</td>
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<td>Approach Slab (B67a)</td>
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<td>1.06.55322</td>
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<td>1.04.63992</td>
<td>Sound Wall: Place Temp Barrier &amp; Clear (SWP31)</td>
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<td>1.04.64072</td>
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<td>1.45.51040</td>
<td>Sound Wall: Install Posts - S of Quantico Crk (SWP30)</td>
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<td>1.04.64002</td>
<td>Sound Wall: Final Grading &amp; Cleanup (SWP31)</td>
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<td>1.04.64102</td>
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<td>1.45.51050</td>
<td>Sound Wall: Install Posts - On NB GP Bridge (SWP30)</td>
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<tr>
<td>1.04.64132</td>
<td>Sound Wall: Install Panels - On NB GP Bridge (SWP30)</td>
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**Traffic & Tunnelling Management Systems**

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<tr>
<td>1.04.63118</td>
<td>Drill Shafts GP NB</td>
<td>02-Apr-14</td>
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<td>1.04.63169</td>
<td>Install Poles/Gantry &amp; Associated Equip: GP NB (1.4.HOT)</td>
<td>21-Apr-14</td>
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**High Occupancy Toll Lanes**

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<tr>
<td>1.03.605163</td>
<td>Temporary Barrier: GP Inside lanes (1.4.HOT)</td>
<td>31-Jul-12</td>
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**Earthwork**

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<tr>
<td>1.04.10020</td>
<td>Clearing, Grubbing &amp; Topping Stripping (1.4.HOT)</td>
<td>17-Aug-12</td>
<td>18-Sep-12</td>
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<td>1.04.10000</td>
<td>Earthwork (1.4.HOT)</td>
<td>22-Oct-12</td>
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<td>1.04.63100</td>
<td>Earthwork: E. Ph. - Toll Gantry @ SI.417 (1.4.HOT)</td>
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**Drainage**

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<td>1.04.75262</td>
<td>Drainage: box culverts (1.4.HOT)</td>
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<td>1.04.10040</td>
<td>Drainage: deep (1.4.HOT)</td>
<td>22-Oct-12</td>
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<td>1.04.63165</td>
<td>Drainage: shallow (1.4.HOT)</td>
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**Roadway**

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<td>1.04.63115</td>
<td>Subbase: E. Ph. - Toll Gantry @ SI.417 (1.4.HOT)</td>
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<td>04-Sep-13</td>
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<td>1.04.10060</td>
<td>Paving (1.4.HOT)</td>
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<td>20-Sep-13</td>
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<td>1.04.63125</td>
<td>Concrete Pad: E. Ph. - Toll Gantry @ SI.417 (1.4.HOT)</td>
<td>05-Sep-13</td>
<td>10-Sep-13</td>
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<td>1.04.63135</td>
<td>Paving Intermediate: E. Ph. - Toll Gantry @ SI.417 (1.4.HOT)</td>
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<td>1.01.85125</td>
<td>Guardrail (1.4.HOT)</td>
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<td>1.04.75282</td>
<td>Permanent Barrier (1.4.HOT)</td>
<td>21-Oct-13</td>
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**Lighting**

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<td>1.04.10070</td>
<td>Roadway Lighting (1.4.HOT)</td>
<td>21-Nov-13</td>
<td>10-Dec-13</td>
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**Traffic & Tunnelling Management Systems**

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<td>1.04.63112</td>
<td>Install Ductbank (1.4.HOT)</td>
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<td>1.04.63116</td>
<td>Drill Shafts (1.4.HOT)</td>
<td>29-Aug-13</td>
<td>18-Oct-13</td>
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<td>1.04.75332</td>
<td>Install Access Gates (1.4.HOT)</td>
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<td>1.04.63109</td>
<td>Pull &amp; Term Tech Shelter Wire &amp; Cable (1.4.HOT)</td>
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<td>1.04.63119</td>
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<td>1.05.52880</td>
<td>Foundations: Piling - Pier 1 (B68)</td>
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<td>1.05.52740</td>
<td>Substructures: F&amp;P Abutment A - Seat (B68)</td>
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<td>1.05.67570</td>
<td>Substructures: F&amp;P Abutment B - Seat (B68)</td>
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<td>Girders Installation (B68)</td>
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<td>Substructures: F&amp;P Abutment A - Backwall (B68)</td>
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<td>1.05.52830</td>
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### No Lane Phase

#### Bridges

- **1.05.75332** Slope Paving (B68) | 10-Mar-13 to 17-Apr-13 | 16
- **1.05.66212** Superstructure: SIP Forms (B68) | 10-Jul-13 to 21-Aug-13 | 30
- **1.05.66222** Superstructure: Stubs (B68) | 05-Aug-13 to 21-Aug-13 | 30
- **1.05.66232** Superstructure: Overhang (B68) | 10-Aug-13 to 29-Aug-13 | 30
- **1.05.66242** Superstructure: Rebar (B68) | 15-Aug-13 to 16-Sep-13 | 30
- **1.05.66252** Superstructure: Pour Deck (B68) | 08-Sep-13 to 07-Oct-13 | 24
- **1.05.66262** Superstructure: Deck Cure & Strip (B68) | 08-Oct-13 to 23-Oct-13 | 23
- **1.05.75342** Slope Paving (B68) | 10-Oct-13 to 22-Oct-13 | 30
- **1.05.75352** Approach Slabs (B68) | 10-Oct-13 to 07-Nov-13 | 30
- **1.05.75372** Bridge Deck Joints (B68) | 08-Nov-13 to 18-Nov-13 | 25
- **1.05.75382** Bridge Barriers (B68) | 09-Nov-13 to 25-Nov-13 | 25
- **1.05.75362** Bridge Drainage & Lighting (B68) | 09-Nov-13 to 06-Dec-13 | 25
- **1.05.75392** Bridge Deck Grooving (B68) | 09-Nov-13 to 13-Dec-13 | 25

### Trends

- **High Occupancy Toll Lanes**
  - **East Phase**
  - **2018-03-110** Roadway Ready for Traffic: E. Ph. (Segment 2) | 0 to 10-Oct-13 | 0

- **No Lane Phase**
  - **Milestones**
    - **0.00.00120** Segment 2 Roadway Complete | 0 to 30-Jun-14 | 113

### Design Segment 2

- **No Lane Phase**
  - **Design**
    - **2.00.15160** Roadway Design (B60A, 60B, 63, 63A & 65) | 27-Mar-12 to 22-Aug-12 | 518
    - **2.00.15240** Roadway Design (C&G, Duct Banks & MOT Ph.1 - Seg 2N) | 27-Mar-12 to 21-May-12 | 1
    - **2.00.15250** Constructability Review (C&G, Duct Banks & MOT Ph.1 - Seg 2N) | 22-May-12 to 26-May-12 | 181
    - **2.00.15250** Roadway Design (Misc. Roadway - Seg 2N) | 22-May-12 to 19-Oct-12 | 52
    - **2.00.15560** Roadway Design (Roadway, Drainage & MOT Ph.2 - Seg 2N) | 25-Jul-12 to 22-Aug-12 | 1
    - **2.00.15620** Incorp. Constructability Comments (C&G, Duct Banks & MOT Ph.1 - Seg 2N) | 30-May-12 to 05-Jun-12 | 181
    - **2.00.15720** VDOT Final Review (C&G, Duct Banks & MOT Ph.1 - Seg 2N) | 06-Jun-12 to 26-Jun-12 | 268
    - **2.00.15820** Comment Resolution (C&G, Duct Banks & MOT Ph.1 - Seg 2N) | 07-Jun-12 to 03-Jul-12 | 268

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**Note:** The above table includes various construction activities and milestones for the Bridge HOT Lanes project, including procurement, substructure and superstructure installation, and roadway and drainage work. The schedule is detailed by milestones, with specific dates and durations provided. The data is organized to reflect the project timeline and critical path for completion.
<table>
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<th>Activity Name</th>
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<td>5-28-Aug</td>
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<td>Constructability Review (Roadway, Drainage &amp; MOT Ph.2 - Seg 2N)</td>
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<td>5-28-Aug</td>
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### I-95 HOT Lanes Baseline Schedule

**Task filter: No LOE.**

**Remaining Level of Effort**

**Remaining Work**

**Critical Remaining Work**

**Milestone**

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### Work Area 8: Quantico Crk to Neabsco Crk

#### Hot Lanes Quantico Crk to Neabsco Crk

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<td>2.01.84242</td>
<td>Clearing, Grubbing &amp; Topsoil Stripping: SWM Pond 2-3 @ St.512 (2.1.HOT)</td>
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<td>Earthwork: Finishes - SWM Pond 2-3 @ St.512 (2.1.HOT)</td>
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#### Noise Walls

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<td>2.01.64152</td>
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<td>5-Nov-13</td>
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<td>2.01.64172</td>
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<td>2.01.64192</td>
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<td>2.04.64032</td>
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<td>2.45.60102</td>
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#### Traffic & Tolling Management Systems

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<td>2.01.60070</td>
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<td>06-Jan-14</td>
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<td>2.01.60080</td>
<td>Install Poles/Gantry &amp; Associated Equipment GP NB (2.1.HOT)</td>
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**Schedule for I-95 HOT Lanes**

**Date**

**Revision**

**Checked**

**Approved**

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<td>2.01.60094</td>
<td>Install Gantry Cross Member w/Associated Equip &amp; Signs (2.1.HOT)</td>
<td>15-Apr-14</td>
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<td>2.01.65133</td>
<td>Install Access Gates (2.1.HOT)</td>
<td>01-May-14</td>
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<td>2.01.60096</td>
<td>Construction Testing (2.1.HOT)</td>
<td>25-May-14</td>
<td>06-Jun-14</td>
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<td>2.01.60188</td>
<td>Tolling/TIS/OS Signs Released to Trans Urban (2.1.HOT)</td>
<td>10-Jun-14</td>
<td>17-Jun-14</td>
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<td>2.01.65123</td>
<td>Topsoil Placement &amp; Landscaping (2.1.HOT)</td>
<td>12-Nov-13</td>
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<td>2.01.60000</td>
<td>Reroute Traffic to East Side (2.1.HOT)</td>
<td>11-Oct-13</td>
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<td>2.01.60573</td>
<td>Temporary Barrier: For HOT West Phase (2.1.HOT)</td>
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<td>2.01.60290</td>
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<td>Paving Intermediate W. Ph. - Emergency Access @ St.500 (2.1.HOT)</td>
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**Traffic & Tolling Management Systems**

- **2.01.60072** Drill Shafts: W. Ph. (2.1.HOT)
- **2.01.60092** Install Poles/Gantry Legs & Associated Equip: W. Ph. (2.1.HOT)

**East Phase**

**Maintenance of Traffic**

- **2.01.63010** Relocate Traffic to West Side (2.1.HOT)
- **2.01.65083** Temporary Barrier: For HOT East Phase (2.1.HOT)
- **2.01.62870** Roadway Ready for Traffic: E. Ph. (2.1.HOT)

**Earthwork**

- **2.01.62880** Earthwork: E. Ph. - Emergency Access @ St.500 (2.1.HOT)
- **2.01.63020** Earthwork: E. Ph. - Toll Gantry @ St.569 (2.1.HOT)
- **2.01.62900** Earthwork: E. Ph. - Emergency Access @ St.602 (2.1.HOT)

**Drainage**

- **2.01.40000** Drainage: E. Ph. (2.1.HOT)

**Roadway**

- **2.01.62890** Subbase: E. Ph. - Emergency Access @ St.500 (2.1.HOT)
- **2.01.62900** Paving Intermediate E. Ph. - Emergency Access @ St.500 (2.1.HOT)
- **2.01.62910** Permanent Barrier: E. Ph. - Emergency Access @ St.500 (2.1.HOT)
- **2.01.63030** Concrete Pad: E. Ph. - Toll Gantry @ St.569 (2.1.HOT)
- **2.01.62870** Subbase: E. Ph. - Emergency Access @ St.602 (2.1.HOT)
- **2.01.62900** Paving Intermediate E. Ph. - Emergency Access @ St.602 (2.1.HOT)
- **2.01.62990** Permanent Barrier: E. Ph. - Emergency Access @ St.602 (2.1.HOT)
- **2.01.63040** Paving Intermediate E. Ph. - Toll Gantry @ St.569 (2.1.HOT)
- **2.01.66162** Guardrail: E. Ph. (2.1.HOT)

**Drainage**

- **2.01.40000** Drainage: E. Ph. (2.1.HOT)

**Lighting**

- **2.01.62830** Roadway Lighting: E. Ph. (2.1.HOT)

**Traffic & Tolling Management Systems**

- **2.01.60104** Set Tech Shelf @ St.569 E. Ph. (2.1.HOT)
- **2.01.60114** Install Service Panel & Emergency Generator (2.1.HOT)
- **2.01.60074** Drill Shafts: E. Ph. (2.1.HOT)
- **2.01.60090** Install Poles/Gantry Legs & Associated Equip: E. Ph. (2.1.HOT)

**No Lane Phase**

**Environmental**

- **2.01.31330** Swans Creek Restoration: Bonds & Permits
- **2.01.65143** Swans Creek Restoration: Earthwork
- **2.01.65153** Swans Creek Restoration: Plantings
- **2.01.65163** Swans Creek Restoration: Maintenance & Monitoring (2013)
- **2.01.65183** Swans Creek Restoration: Maintenance & Monitoring (2014)

**Utility Relocations**

- **2.00.70220** Design Utility: Oh (in ROW 155' Rt) @ SI.449+05 (2.1.HOT) - DOMD-6
- **2.00.70250** Design Utility: Oh-X ing @ SI.451+20 (2.1.HOT) - DOMD-7
- **2.00.70300** FIP Utility: gas main @ SI.452+15 (2.1.HOT) - CG-2
- **2.00.70310** Design Utility: Oh-X ing @ SI.475+80 (2.1.HOT) - DOMD-8
- **2.00.70340** FIP Utility: Telecommunications @ SI.500+30 to 1238+00 (2.1.HOT) - DOMD-4
- **2.00.70350** Design Utility: VDOT Telecom @ SI.566+20 (2.1.HOT) - VDOT-1
- **2.00.70210** Field Utility Complete: gas main @ SI.452+15 (2.1.HOT) - CG-2
- **2.00.70701** FIP Utility Complete: Telecommunications @ SI.500+30 to 1238+00 (2.1.HOT)

**Swans Creek Restoration**

- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)
- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)
- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)
- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)
- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)

**Swans Creek Restoration**

- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)
- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)
- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)
- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)
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**Swans Creek Restoration**

- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)
- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)
- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)
- **2.01.65193** Swans Creek Restoration: Maintenance & Monitoring (2015-2017)
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**Bridge (existing) HOT Lanes over Powells Crk (B65)**

**High Occupancy Toll Lanes**

- **Maintenance of Traffic**
  - **West Phase Bridges**
    - 2.01.64520: Bridge Ready for Traffic (B65) | 08-13-13 | 254 |
  - **East Phase Bridges**
    - 2.01.64312: Superstructure: Misc. Repairs - West Ph.(B65) | 25-10-13 | 08-13-13 | 207 |

**Work Area Neabsco Crk to Segment 2 N. Limits**

**No Lane Phase Utility Relocations**

- 2.00.70500: VDOT Review Utility Design: Telephone @ St.712+05 (2.2 HOT) - VRZ-7 | 21-12-12 | 11-12-13 | 544 |
- 2.00.70640: VDOT Review Utility Design: Telecommunications in Steel Casing @ St.713... | 21-12-12 | 11-12-13 | 544 |
- 2.00.70670: VDOT Review Utility Design: UG Service @ St.765+10 (2.2 HOT) - NOVEC-2 | 21-12-12 | 18-12-12 | 537 |
- 2.00.70760: VDOT Review Utility Design: OH X-ing @ St.800+25 (2.2 HOT) - DOMD-11 | 21-12-12 | 18-12-12 | 530 |
- 2.00.70790: VDOT Review Utility Design: Cable OH X-ing @ St.800+80 (2.2 HOT) - CO... | 21-12-12 | 03-12-12 | 505 |
- 2.00.70820: VDOT Review Utility Design: Complete: OH X-ing (2X Ckt) @ St.800+85 .. | 21-12-12 | 03-12-12 | 505 |
- 2.00.70900: VDOT Review Utility Design: OX X-ing @ St.687+60 (2.2 HOT) - NOVEC-1 | 21-12-12 | 09-12-12 | 296 |
- 2.00.70700: VDOT Review Utility Design: Telephone @ St.709+35 (2.2 HOT) - VRZ-9 | 03-12-12 | 23-12-12 | 485 |
- 2.00.70902: Relocation of utility Complete: UG Service @ St.765+10 (2.2 HOT) - NOVE... | 05-12-12 | 06-12-12 | 327 |
- 2.00.70920: Relocation of utility Complete: OX X-ing @ St.687+60 (2.2 HOT) - NOVEC-1 | 29-12-12 | 182 |

**Bridge (existing) NB GP Lanes over Neabsco Crk (B63a)**

- **GP Northbound**
  - **Maintenance of Traffic**
    - 2.02.55590: Bridge Ready for Traffic (B63A) | 13-13-13 | 367 |
  - **Bridges**
    - 2.02.55250: Superstructure: Modifications due to soundwall (B63A) | 20-10-12 | 07-12-12 | 770 |

**Noise Walls**

- 2.00.60300: Sound Wall: Install Posts - On NB GP Bridge (SWP24) | 02-08-13 | 09-08-13 | 370 |
- 2.00.60502: Sound Wall: Install Panels - On NB GP Bridge (SWP24) | 10-08-13 | 13-08-13 | 370 |
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### GP Northbound

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<td>Procure Panels (SWP24)</td>
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#### Traffic & Tolling Management Systems

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<td>2.02.60158</td>
<td>Drill Shafts GP NB (2.2.HOT)</td>
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### GP Southbound

#### Environmental

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<td>Erosion Control Setup: SWM Pond 2-1 @ St.691 (2.2.HOT)</td>
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#### Maintenance of Traffic

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#### Traffic & Tolling Management Systems

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#### High Occupancy Toll Lanes

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#### Traffic & Tolling Management Systems

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### Remaining Work

- Bridge Ready for Traffic (B63)
- Bridge Finishes Misc. Repairs (B63)

**Task Filter:** No LOE

**Schedule for I-95 HOT Lanes**

**Date:** 11-Jul-12

**Baseline Schedule:** Page 31 of 72
<table>
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<th>Activity ID</th>
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<td>2.02.80130</td>
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**Baseline Schedule**

**Task Filter:** No LOE.
### Ramp OSH SB to HOT Lanes
#### High Occupancy Toll Lanes

**Week Phase**

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<td>Asphalt Demo (RpOSH)</td>
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**Earthwork**

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**Roadway**

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**Bridge (existing) NB Flyover over I-95 NB**

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**GP Northbound**

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**Bridge (existing) SB Flyover over I-95 SB**

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**GP Southbound**

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**Ramp PWHN HOT to NB Lanes**

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**High Occupancy Toll Lanes**

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### Baseline Schedule

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<td>Install Ductbank (3S.1.HOT)</td>
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<td>3S.01.6038</td>
<td>Install Cross Bore/Connect Duct Sys To &amp; Complete Shaft Fdns. (3S.1.HOT)</td>
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<td>Pull &amp; Term Wires: Service Panel (3S.1.HOT)</td>
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<td>Towing/TS/HS Signs Released to Trans Urban (3S.1.HOT)</td>
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<td>18-May-14</td>
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<td>22-Apr-14</td>
<td>21-Apr-14</td>
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<td>3S.01.6610</td>
<td>Roadway Ready for Traffic: E. Ph. (3S.1.HOT)</td>
<td>22-Apr-14</td>
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<td>3S.01.6513</td>
<td>Temporary Barrier: Final Removal (3S.1.HOT)</td>
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<td>3S.01.6504</td>
<td>Install Poles/Gantry Legs &amp; Associated Equip - E. Ph. (3S.1.HOT)</td>
<td>27-Dec-13</td>
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<td>Drill Shafts (Barrier): E. Ph. (3S.1.HOT)</td>
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<td>3S.01.6534</td>
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<td>Install Poles/Gantry Legs &amp; Associated Equip - E. Ph. (3S.1.HOT)</td>
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#### Schedule for I-95 HOT Lanes

**Date**: 11-Jul-12 to 12-Jul-15

**Remaining Level of Effort**

- **No Lane Phase**

- **Utility Relocations**

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<th>Activity ID</th>
<th>Utility Relocations</th>
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<tr>
<td>3S.00.7074</td>
<td>PIP Utility: Sanitary Sewer @ St.849+60 (3S.1.HOT) - PWSCA-17</td>
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<tr>
<td>3S.00.7077</td>
<td>Relocation of utility Complete: Sanitary Sewer @ St.849+60 (3S.1.HOT) - P..</td>
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**T A S K** filter: No LOE.

**Page 37 of 72**
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<thead>
<tr>
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<th>Start</th>
<th>Finish</th>
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<tr>
<td>3S.00.7020</td>
<td>PIP Utility: water main @ St.849+40 (3S.1.HOT) - PWSCA-16</td>
<td>5-01-Jul-13</td>
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<td>PIP utility Complete: water main @ St.849+40 (3S.1.HOT) - PWSCA-16</td>
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### Ramp: PWSH HOT Lanes

#### High Occupancy Toll Lanes

**Environmental**

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<td>3S.01.6508</td>
<td>Erosion Control Setup (RpPWSH)</td>
<td>3-18-Mar-13</td>
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**Maintenance of Traffic**

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<td>3S.01.6514</td>
<td>Temporary Barrier (RpPWSH)</td>
<td>2-14-Mar-13</td>
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**Earthwork**

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<td>3S.01.6317</td>
<td>Earthwork: Toll Gantry @ St.18 (RpPWSH)</td>
<td>5-15-Mar-13</td>
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<td>3S.01.6304</td>
<td>Clearing, Grubbing &amp; Topsoil Stripping (RpPWSH)</td>
<td>5-18-Mar-13</td>
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<td>3S.01.5350</td>
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<td>Earthwork: Toll Gantry @ St.20 (RpPWSH)</td>
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#### Drainage

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<td>3S.01.5300</td>
<td>Drainage (RpPWSH)</td>
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**Retaining Walls**

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<td>3S.01.6000</td>
<td>Procure Panels: Post &amp; Panel (RW830-1)</td>
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<td>25-Apr-13</td>
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<td>3S.01.6000</td>
<td>Retaining Wall Construction: Post &amp; Panel (RW830-1)</td>
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**Roadway**

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<td>3S.01.6515</td>
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<td>3S.01.6320</td>
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**Traffic & Tolling Management Systems**

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<td>Drill Shafts (RpPWSH)</td>
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<td>2S.02.6032</td>
<td>Set Tech Shelter @ Toll Ext Ramp: E. Ph. (RpPWSN)</td>
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<td>3S.01.6033</td>
<td>Install Toll Gantry (RpPWSN)</td>
<td>12-03-May-13</td>
<td>21-May-13</td>
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**Occoquan Rd to Occoquan River**

### Bridge (existing) HOT Lanes over Occoquan Rd (B59)

#### High Occupancy Toll Lanes

**Maintenance of Traffic**

<table>
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<tr>
<th>Activity ID</th>
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**West Phase**

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<td>3S.01.6435</td>
<td>Superstructure: Misc. Repairs - West Ph. (B59)</td>
<td>15-26-Mar-13</td>
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**East Phase**

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<td>Superstructure: Misc. Repairs - East Ph. (B59)</td>
<td>15-19-Dec-13</td>
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**HOT Lanes Occoquan Rd to Occoquan River**

### GP Northbound

**Noise Walls**

### Baseline Schedule

<table>
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<td>Roadway Ready for Traffic (RpPWSH)</td>
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**Erosion Control Setup (RpPWSH)**

**Temporary Barrier (RpPWSH)**

**Roadway Ready for Traffic (RpPWSH)**

**Drill Shafts (RpPWSH)**

**Set Tech Shelter @ Toll Ext Ramp: E. Ph. (RpPWSN)**

**Install Toll Gantry (RpPWSN)**

**Bridge Ready for Traffic (B59)**

**Superstructure: Misc. Repairs - West Ph. (B59)**

**Superstructure: Misc. Repairs - East Ph. (B59)**

**Superstructure: Misc. Repairs - East Ph. (B59)**

**Bridge Ready for Traffic (B59)**

**Critical Remaining Work**

**Remaining Level of Effort**

**Remaining Work**

**Milestones**

**TASK filter: No LOE.**
### 3S.02.60060
- Procure Panels (SWP33)
- Original Duration: 9 May 2013 – 24 Jun 2013
- Start Date: 24 Jun 2013
- Finish Date: 21 Jul 2013
- Total Duration: 17 days

### 3S.02.64352
- Sound Wall: Place Temp Barrier & Clear - Rpt NB GP to Gordon Blvd (SWP33)
- Original Duration: 24 Apr 2013 – 5 May 2013
- Start Date: 5 May 2013
- Finish Date: 19 May 2013
- Total Duration: 15 days

### Activity 1
- GP Southbound
- Noise Walls
- Original Duration: 24 Apr 2013 – 21 May 2013
- Start Date: 24 Apr 2013
- Finish Date: 21 May 2013
- Total Duration: 28 days

### Activity 2
- High Occupancy Toll Lanes
- Original Duration: 20 Mar 2013 – 7 Apr 2013
- Start Date: 20 Mar 2013
- Finish Date: 7 Apr 2013
- Total Duration: 28 days

### Activity 3
- Roadway Ready for Mill & Overlay (3S.2.HOT)
- Original Duration: 16 Mar 2013 – 2 Apr 2013
- Start Date: 16 Mar 2013
- Finish Date: 2 Apr 2013
- Total Duration: 28 days

### Activity 4
- West Phase
- Maintenance of Traffic
- Original Duration: 16 Mar 2013 – 2 Apr 2013
- Start Date: 16 Mar 2013
- Finish Date: 2 Apr 2013
- Total Duration: 28 days

### Activity 5
- Drainage: W. Ph. (3S.2.HOT)
- Original Duration: 17 Mar 2013 – 12 Apr 2013
- Start Date: 17 Mar 2013
- Finish Date: 12 Apr 2013
- Total Duration: 28 days

### Activity 6
- Lighting: W. Ph. (3S.2.HOT)
- Original Duration: 1 Apr 2013 – 20 Apr 2013
- Start Date: 1 Apr 2013
- Finish Date: 20 Apr 2013
- Total Duration: 28 days

### Activity 7
- East Phase
- Maintenance of Traffic
- Original Duration: 17 Mar 2013 – 14 Apr 2013
- Start Date: 17 Mar 2013
- Finish Date: 14 Apr 2013
- Total Duration: 28 days
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<td>Remote Traffic to West Side (3S.2.HOT)</td>
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<td>Temporary Barrier: For HOT East Phase (3S.2.HOT)</td>
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<td>Subbase: W. Ph. - Emergency Access @ St.915 (3S.2.HOT)</td>
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<tr>
<td>35.00.70590</td>
<td>VDOT Review Utility Design: Cable TV @ St.950+15 (3S.4.HOT) - COM-7</td>
<td>21-Aug-12</td>
<td>12-Sep-12</td>
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<td>35.00.70700</td>
<td>VDOT Review Utility Design: Gas @ B50+20 (3S.4.HOT) - WGL-5</td>
<td>21-Aug-12</td>
<td>18-Sep-12</td>
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### Bridge (existing) HOT Lanes over Furnace Rd - widening (B56)

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<tr>
<td>35.04.55610</td>
<td>Bridge Ready for Traffic (B56)</td>
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<td>0 Days</td>
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<td>35.04.63962</td>
<td>Demolition: Existing Barrier &amp; Overhang (B56)</td>
<td>10</td>
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### Demolition

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<td>Procurement Girders (Steel): HOT Lanes over Furnace Rd (B56)</td>
<td>150</td>
<td>08-Jun-13</td>
<td>44 Days</td>
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<td>35.05.64552</td>
<td>Procurement Piling: HOT Lanes over Furnace Rd (B56)</td>
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<td>17-Apr-13</td>
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<td>35.04.63672</td>
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<td>35.04.55560</td>
<td>Foundations: Piling - Pier 1 (B56)</td>
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<td>35.04.64322</td>
<td>Substructures: F&amp;P Pier 1 - Footing (B56)</td>
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<td>35.04.55680</td>
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<td>35.04.64312</td>
<td>Substructures: F&amp;P Pier 1 - Column / Collar (B56)</td>
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<td>35.04.55640</td>
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<td>35.04.64342</td>
<td>Substructures: F&amp;P Pier 2 - Footing (B56)</td>
<td>5 May-13</td>
<td>22 May-13</td>
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<td>35.04.64352</td>
<td>Substructures: F&amp;P Pier 2 - Column / Collar (B56)</td>
<td>9 May-13</td>
<td>06 Jun-13</td>
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<td>35.04.55650</td>
<td>Substructures: F&amp;P Abutment A (B56)</td>
<td>7 Jun-13</td>
<td>20 Jun-13</td>
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<td>35.04.55660</td>
<td>Substructures: F&amp;P Abutment B (B56)</td>
<td>21 Jun-13</td>
<td>05 Jul-13</td>
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<td>35.04.55680</td>
<td>Girder Installation: Span A (B56)</td>
<td>23 Jul-13</td>
<td>24 Jul-13</td>
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<td>35.04.55570</td>
<td>Girder Installation: Span B (B56)</td>
<td>25 Jul-13</td>
<td>26 Jul-13</td>
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<td>35.04.55700</td>
<td>Girder Installation: Span C (B56)</td>
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<td>30 Jul-13</td>
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<td>35.04.63652</td>
<td>Bridge Painting (B56)</td>
<td>15 Sep-13</td>
<td>09 Oct-13</td>
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**No Lane Phase Bridges**

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<tr>
<td>35.04.74502</td>
<td>Slope Paving (B56)</td>
<td>10 Jul-13</td>
<td>22 Jul-13</td>
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<td>0 Days</td>
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<td>35.04.65272</td>
<td>Superstructure: SIP Forms (B56)</td>
<td>7 Aug-13</td>
<td>09 Aug-13</td>
<td>2 Days</td>
<td>0 Days</td>
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<tr>
<td>35.04.65282</td>
<td>Superstructure: Studs (B56)</td>
<td>6 Aug-13</td>
<td>09 Aug-13</td>
<td>2 Days</td>
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<tr>
<td>35.04.65292</td>
<td>Superstructure: Overhang (B56)</td>
<td>10 Aug-13</td>
<td>16 Aug-13</td>
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<td>35.04.65302</td>
<td>Superstructure: Relar (B56)</td>
<td>10 Aug-13</td>
<td>23 Aug-13</td>
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<td>35.04.65312</td>
<td>Superstructure: Pour Deck (B56)</td>
<td>5 Sep-13</td>
<td>03 Sep-13</td>
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<tr>
<td>35.04.65322</td>
<td>Superstructure: Deck Cure &amp; Strip (B56)</td>
<td>14 Sep-13</td>
<td>17 Sep-13</td>
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<td>35.04.74542</td>
<td>Bridge Deck Joints (B56)</td>
<td>5 Sep-13</td>
<td>24 Sep-13</td>
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<td>35.04.74552</td>
<td>Bridge Barriers (B56)</td>
<td>5 Sep-13</td>
<td>02 Oct-13</td>
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<td>35.04.74532</td>
<td>Bridge Drainage &amp; Lighting (B56)</td>
<td>5 Oct-13</td>
<td>08 Oct-13</td>
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<td>13 Days</td>
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<td>35.04.74542</td>
<td>Bridge Deck Grooving (B56)</td>
<td>5 Oct-13</td>
<td>19 Oct-13</td>
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**HOT Lanes Furnace Rd to Bridge 54**

**Environmental**

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<tr>
<td>35.01.65002</td>
<td>Erosion Control Setup: SWM Pond 3-1 @ St.953 (3S.4.HOT)</td>
<td>3 Mar-13</td>
<td>20 Mar-13</td>
<td>17 Days</td>
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**Maintenance of Traffic**

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<tr>
<td>35.04.65123</td>
<td>Temporary Barrier: GP SB Outside for SWM Pond 3-1 (3S.4.HOT)</td>
<td>2 Mar-13</td>
<td>15 Mar-13</td>
<td>127 Days</td>
<td>127 Days</td>
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<tr>
<td>35.04.64032</td>
<td>Clearing, Grubbing &amp; Topping Stripping: SWM Pond 3-1 @ St.953 (3S.4.HOT)</td>
<td>5 Mar-13</td>
<td>22 Mar-13</td>
<td>127 Days</td>
<td>127 Days</td>
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<tr>
<td>35.04.63880</td>
<td>Earthwork: SWM Pond 3-1 @ St.953 (3S.4.HOT)</td>
<td>6 Mar-13</td>
<td>02 Apr-13</td>
<td>127 Days</td>
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<tr>
<td>35.04.62942</td>
<td>Earthwork: Finishes - SWM Pond 3-1 @ St.953 (3S.4.HOT)</td>
<td>3 Apr-13</td>
<td>05 Apr-13</td>
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**Traffic & Tolling Management Systems**

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**High Occupancy Toll Lanes**

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<tr>
<td>35.04.63792</td>
<td>Roadway Ready for Mill &amp; Overlay (3S.4.HOT)</td>
<td>0 Apr-14</td>
<td>04 Apr-14</td>
<td>40 Days</td>
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<tr>
<td>35.04.63290</td>
<td>Mill &amp; Overlay (3S.4.HOT)</td>
<td>3 Jul-14</td>
<td>24 Jul-14</td>
<td>0 Days</td>
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<tr>
<td>35.04.75502</td>
<td>Permanent Stripping (3S.4.HOT)</td>
<td>1 Jul-14</td>
<td>25 Jul-14</td>
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**Traffic & Tolling Management Systems**

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<tr>
<td>35.04.63311</td>
<td>Install Ductbank (3S.4.HOT)</td>
<td>8 Apr-13</td>
<td>22 Apr-13</td>
<td>144 Days</td>
<td>144 Days</td>
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<tr>
<td>35.04.60060</td>
<td>Service Panel Released to Trans Urban (3S.4.HOT)</td>
<td>0 May-13</td>
<td>02 May-13</td>
<td>261 Days</td>
<td>261 Days</td>
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<tr>
<td>35.04.63310</td>
<td>Install Cross Bone/Connect Duct Sys To &amp; Complete Shaft Fstns. (3S.4.HOT)</td>
<td>22 Nov-13</td>
<td>24 Dec-13</td>
<td>100 Days</td>
<td>100 Days</td>
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<tr>
<td>35.04.63328</td>
<td>Pull &amp; Term Wire &amp; Cable (3S.4.HOT)</td>
<td>20 Dec-13</td>
<td>09 Jan-14</td>
<td>101 Days</td>
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<tr>
<td>35.04.63326</td>
<td>Install Gantry Cross Member w/Associated Equip &amp; Signs (3S.4.HOT)</td>
<td>17 Dec-13</td>
<td>02 Jan-14</td>
<td>101 Days</td>
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<td>35.04.75532</td>
<td>Install Access Gates (3S.4.HOT)</td>
<td>5 Apr-14</td>
<td>10 Apr-14</td>
<td>40 Days</td>
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<tr>
<td>35.04.63330</td>
<td>Construction Testing (3S.4.HOT)</td>
<td>10 Apr-14</td>
<td>25 Apr-14</td>
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<tr>
<td>35.04.63332</td>
<td>Tolling/TIS/SH Signs Released to Trans Urban (3S.4.HOT)</td>
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**Remaining Level of Effort**

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**Critical Remaining Work**

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<td>3S.04.75522</td>
<td>Topsoil Placement &amp; Landscaping (3S.4.HOT)</td>
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<td>3S.04.63100</td>
<td>Reroute Traffic to East Side (3S.4.HOT)</td>
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<td>14-Mar-13</td>
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<td>3S.04.65183</td>
<td>Temporary Barrier: For HOT West Phase (3S.4.HOT)</td>
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<td>Drainage: W. Ph. (3S.4.HOT)</td>
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<td>1.01.6626</td>
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<td>3S.04.66034</td>
<td>Install Service Panel &amp; Emergency Generator @ St. 946 &amp; 962: W. Ph. (3S.4.HOT)</td>
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<td>Pull &amp; Term Wires - Service Panel to Tech Shelter (3S.4.HOT)</td>
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<td>02-May-13</td>
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<td>Install Poles/Gantry Legs &amp; Associated Equip - W. Ph. (3S.4.HOT)</td>
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<td>Roadway Ready for Traffic: E. Ph. (3S.4.HOT)</td>
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<td>Temporary Barrier: Final Removal (3S.4.HOT)</td>
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<td>01-Nov-13</td>
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<td>Permanent Barrier: E. Ph. (3S.4.HOT)</td>
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<td>Drill Shafts (Barrier): E. Ph. (3S.4.HOT)</td>
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<td>Install Poles/Gantry Legs &amp; Associated Equip - E. Ph. (3S.4.HOT)</td>
<td>4</td>
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<td>16-Dec-13</td>
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<td>35.00.70580</td>
<td>Design Utility: Cable TV @ St.960+05 (3S.4.HOT) - COM-7</td>
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<td>PIP Utility: 12' DIP @ St950+25 (35.4.HOT) - FW-3</td>
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**Legend:**
- **M:** Milestone
- **A:** Activity
- **S:** Start Date
- **D:** Duration
- **N:** Notes
- **F:** Finish Date
- **M:** Milestone
- **A:** Activity
- **S:** Start Date
- **D:** Duration
- **N:** Notes
- **F:** Finish Date

**Remaining Level of Effort:**
- **No LOE.**

**Remaining Work:**
- **No remaining work.**

**Critical Remaining Work:**
- **No critical remaining work.**

**Milestone:**
- **No milestones.**

**Schedule for I-95 HOT Lanes:**

**Date:**
- **11-Jul-12**

**Revision:**
- **Baseline Schedule**

**Checked:**
- **No checks.**

**Approved:**
- **No approvals.**

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**Bridge 54 to Lorton Rd**

**No Lane Phase**

**Utility Relocations**

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**Bridge (existing) HOT Lanes over Ramp Inc. - widening (B54)**

**Maintenance of Traffic**

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**High Occupancy Toll Lanes**

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**Bridges**

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**No Lane Phase**

**Bridges**

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### I-95 HOT Lanes Schedule

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<td>PIP Utility: Sanitary Sewer @ 1117+15 (3S.4.HOT) - DPWES-4</td>
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<td>PIP Utility: Gas -8&quot; HDPE + 10&quot; Steel Casing @ St.1054+05 (3S.5.HOT) - LORTRON</td>
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### High Occupancy Toll Lanes

#### West Phase

**Environmental**
- 35.05.65112 Erosion Control Setup (RpRISS)
  - 03-Apr-13 - 04-Apr-13
- 35.05.53240 Roadway Ready for Traffic (RpRISS)
  - 03-Apr-13 - 04-Apr-13

**Earthwork**
- 35.05.53180 Clearing, Grubbing & Topsoil Stripping (RpRISS)
  - 15-Apr-13 - 14-May-13
- 35.05.53190 Earthwork (RpRISS)
  - 15-Apr-13 - 08-May-13

**Drainage**
- 35.05.53200 Drainage (RpRISS)
  - 03-May-13 - 13-May-13

**Roadway**
- 35.05.53210 Subbase (RpRISS)
  - 14-May-13 - 14-May-13
- 35.05.53220 Paving (RpRISS)
  - 16-May-13 - 17-May-13
- 35.05.53230 Permanent Barrier (RpRISS)
  - 20-May-13 - 21-May-13
- 35.05.75662 Permanent Stripping: E. Ph. (RpRISS)
  - 20-May-13 - 21-May-13

**Ramp RIHN from Richmond Hwy to HOT Lanes**

**High Occupancy Toll Lanes**

**Maintenance of Traffic**
- 35.05.75452 Temporary Barrier (RpRIHN)
  - 14-Mar-13 - 14-Mar-13

**Earthwork**
- 35.05.63231 Earthwork: Emergency Access @ St.82 (RpRIHN)
- 35.05.63332 Subbase: Emergency Access @ St.82 (RpRIHN)
- 35.05.63342 Paving Intermediate: Emergency Access @ St.82 (RpRIHN)
- 35.05.63352 Permanent Barrier: Emergency Access @ St.82 (RpRIHN)
  - 05-Apr-13 - 15-Apr-13

**Traffic & Tolling Management Systems**
- 35.05.60648 Install Shaltas/Poles/Gardens (RpRIHN)
  - 09-Sep-13 - 17-Oct-13

### Reminders

- **Task Filter:** No LOE.
- **Remaining Level of Effort:** Critical Remaining Work
- **Remaining Work:** Milestone
- **Milestone:** Summer/High Occupancy Toll Lanes
- **Date:** 11-Jul-12
- **Baseline Schedule:** 11-Jul-12 Schedule for I-95 HOT Lanes

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**Schedule for I-95 HOT Lanes**

- **Date:** 11-Jul-12
- **Baseline Schedule:** 11-Jul-12 Schedule for I-95 HOT Lanes

**Notes:**
- **Remaining Level of Effort:** Critical Remaining Work
- **Remaining Work:** Milestone
- **Milestone:** Summer/High Occupancy Toll Lanes

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**GP Southbound**

- **Noise Walls**
  - Sound Wall: Place Temp Barrier & Clear - S. of Pohick Crk (SWP18)
    - 30-Apr-13
  - Sound Wall: Install Posts - S. of Pohick Crk (SWP18)
    - 18-Jul-13
  - Sound Wall: Install Panels - S. of Pohick Crk (SWP18)
    - 18-Jul-13

- **High Occupancy Toll Lanes**
  - Maintenance of Traffic
    - Roadway Ready for MII & Overlay (3S.6.HOT)
      - 3S.06.63682

- **Traffic & Tolling Management Systems**
  - Install DuctBank (3S.6.HOT)
    - 3S.06.63374
  - Install Gantry Cross Member w/Associated Equip & Signs (3S.6.HOT)
    - 3S.06.63386
  - Install Cross Box/Conduit Duct Sys To & Complete Shaft Fdns. (3S.6.HOT)
    - 3S.06.65773
  - Sound Wall: Final Grading & Cleanup - S. of Pohick Crk (SWP18)
    - 3S.06.64552

- **Landscape**
  - Topsoil Placement & Landscaping (3S.6.HOT)
    - 3S.06.65763

**West Phase**

- **Maintenance of Traffic**
  - Reroute Traffic to East Side (3S.6.HOT)
    - 3S.06.63140
  - Roadway: West Phase (3S.6.HOT)
    - 3S.06.63440

- **Drainage**
  - Drainage: W. Ph. - Emergency Access @ St.1097 (3S.6.HOT)
    - 3S.06.63440

- **Lighting**
  - Roadway Lighting: W. Ph. (3S.6.HOT)
    - 3S.06.63460

- **Traffic & Tolling Management Systems**
  - Drill Shafts: W. Ph. - 7 a/a (in new barrier) (3S.6.HOT)
    - 3S.06.63378
  - Drill Shafts: W. Ph. (3S.6.HOT)
    - 3S.06.63384
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### East Phase

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### Traffic & Tolling Management Systems
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<td>Install Poles/Gantry Legs &amp; Associated Equip: E. Ph. (3S.6.HOT)</td>
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### Polarch City to Accotink Creek

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#### HOT Lanes

##### Polarch City to Accotink Creek

#### Traffic & Tolling Management Systems
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<td>35.07.60724</td>
<td>Install Service Panel &amp; Emergency Generator @ St.1126: GP NB</td>
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<td>Pull &amp; Term Wires - Service Panel (3S.7.HOT)</td>
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#### Noise Walls
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<td>Procure Panels (SWP18)</td>
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<td>Sound Wall: Place Temp Barrier &amp; Clear - N. of Potomac Crk (SWP18)</td>
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### High Occupancy Toll Lanes

#### Maintenance of Traffic
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#### Traffic & Tolling Management Systems
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**Baseline Schedule**

**I-95 HOT Lanes**

**Activity ID**

**Activity Name**

**Original Duration**

**Start**

**Finish**

**Total Float**

**Milestones**

**Remaining Level of Effort**

**Critical Remaining Work**

**Milestone**

**Notes**

1. **Task filter:** No LOE.
2. **Remaining Work:**
3. **Milestone:**
4. **Notes:**

**Schedule for I-95 HOT Lanes**

**Date**

**Revision**

**Checked**

**Approved**

**Page 52 of 72**

---

**Remainder of Level Effort**

**Critical Remaining Work**

**Milestone**

**Notes:**

1. **Activity ID**
2. **Activity Name**
3. **Original Duration**
4. **Start**
5. **Finish**
6. **Total Float**
7. **Milestones**
8. **Remaining Level of Effort**
9. **Critical Remaining Work**
10. **Milestone**
11. **Notes:**

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**Tasks:**

- **11-Jul-12 Baseline Schedule**
- **Schedules**
- **11-Jul-12**
- **Baseline Schedule**
- **Signed**
- **Revised**
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**Remaining Level of Effort**

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**Schedule for I-95 HOT Lanes**

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### I-95 HOT Lanes Baseline Schedule

**Activity ID** | **Activity Name** | **Original Duration** | **Start** | **Finish** | **Total Duration** | **Notes**
--- | --- | --- | --- | --- | --- | ---
3N.00.70820 | VDOT Review Utility Design: 8" DIP + 20' Casing @ St.1372+25 (3N.1.HOT) | | 21-Aug-12 | 18-Sep-12 | 107 | 
3N.01.68273 | Demo Barrier: GP NB (3N.1.HOT) | 3 | 14-Dec-12 | 18-Dec-12 | 240 | 
3N.01.63852 | Sound Wall: Place Temp Barrier & Clear (SWP17) | 9 | 10-Mar-14 | 21-Mar-14 | 121 | 
3N.01.63852 | Sound Wall: Final Gradning & Cleanup (SWP17) | 6 | 10-Jun-14 | 17-Jun-14 | 121 | 
3N.01.63444 | Drill Shafts GP NB (3N.1.HOT) | 6 | 19-Sep-13 | 27-Sep-13 | 105 | 
3N.01.63444 | Drill Shafts GP SB (3N.1.HOT) | 21 | 30-Sep-13 | 31-Oct-13 | 105 | 
3N.01.63444 | Install Poles/Gantry & Associated Equip: GP SB (3N.1.HOT) | 27 | 01-Nov-13 | 17-Dec-13 | 105 | 
3N.01.63652 | Roadway Ready for Mill & Overlay (3N.1.HOT) | 0 | 20-May-14 | 20-May-14 | 0 | Milestone
3N.01.63610 | Mill & Overlay (3N.1.HOT) | 30 | 03-Sep-14 | 20-Oct-14 | 0 | Milestone
3N.01.67802 | Permanent Stripping (3N.1.HOT) | 2 | 21-Oct-14 | 22-Oct-14 | 0 | Milestone
3N.01.63436 | Install Dustbark (3N.1.HOT) | 35 | 28-Sep-12 | 26-Nov-12 | 57 | Milestone
3N.01.64812 | Pull & Term Wire & Cable: Fiber Optics for HOT (3N.1.HOT) | 60 | 08-Jan-13 | 15-Oct-13 | 115 | 
3N.01.60811 | Pull & Term Wire: Service Panel to Tech Shelter (3N.1.HOT) | 20 | 27-Sep-13 | 31-Oct-13 | 29 | 
3N.01.63448 | Cross Bore/Connect Duct Sys To & Complete Shaft Fibs. (3N.1.HOT) | 22 | 27-Sep-13 | 31-Oct-13 | 89 | 
3N.01.60813 | Tech Shelter Released to Trans Urban (3N.1.HOT) | 0 | 28-Oct-13 | 28-Oct-13 | 0 | Milestone
3N.01.63458 | Pull & Term Wire & Cable (3N.1.HOT) | 60 | 19-Feb-14 | 21-May-14 | 14 | Milestone
3N.01.63466 | Install Gantry Cross Member w/Associated Equipment & Signs (3N.1.HOT) | 45 | 06-Mar-14 | 13-Mar-14 | 14 | Milestone
3N.01.67792 | Install Access Gates (3N.1.HOT) | 20 | 21-May-14 | 20-Jun-14 | 0 | Milestone
3N.01.63461 | Construction Testing (3N.1.HOT) | 10 | 16-Jun-14 | 30-Jun-14 | 0 | Milestone
3N.01.75782 | Topsoil Placement & Landscaping (3N.1.HOT) | 25 | 21-Oct-13 | 02-Dec-13 | 243 | Milestone
3N.01.63380 | Recruit Traffic to East Side (3N.1.HOT) | 5 | 31-Jul-12 | 06-Aug-12 | 80 | Milestone
3N.01.65263 | Temporary Barrier: For HOT West Phase * (3N.1.HOT) | 10 | 07-Aug-12 | 21-Aug-12 | 80 | Milestone
3N.01.63630 | Roadway Ready for Traffic: W. Ph. (3N.1.HOT) | 0 | 30-Aug-13 | 0 | Milestone

---

**Notes:**
- **Utility Relocations**
- **HOT Lanes Accotink Crk to Bridge 32**
- **GP Northbound**
- **Traffic & Tolling Management Systems**
- **Sound Wall: Install Posts (SWP17)**
- **Sound Wall: Install Panels (SWP17)**
- **Drill Shafts (Barrier): GP NB (3N.1.HOT)**
- **Drill Shaft (Barrier): GP NB (3N.1.HOT)**
- **Sound Wall: Final Gradning & Cleanup (SWP17)**
- **Drill Shafts GP NB (3N.1.HOT)**
- **Drill Shafts GP SB (3N.1.HOT)**
- **Install Poles/Gantry & Associated Equip: GP SB (3N.1.HOT)**
- **Demo Barrier: GP NB (3N.1.HOT)**
- **Demo Barrier: GP SB (3N.1.HOT)**
- **Pull & Term Wire & Cable (3N.1.HOT)**
- **Pull & Term Wire: Service Panel to Tech Shelter (3N.1.HOT)**
- **Tech Shelter Released to Trans Urban (3N.1.HOT)**
- **Install Access Gates (3N.1.HOT)**
- **Construction Testing (3N.1.HOT)**
- **Topsoil Placement & Landscaping (3N.1.HOT)**
- **Roadway Ready for Traffic: W. Ph. (3N.1.HOT)**

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- **Start**
- **Finish**
- **Total Duration**
- **Notes**
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### Baseline Schedule

#### 11-Jul-12 1:56

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#### Ramp FXNH NB to HOT Lanes

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#### Traffic & Tolling Management Systems

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### Critical Remaining Work

- Critical Remaining Work
- Remaining Work
- Remaining Level of Effort

**Task filter: No LOE.**

### Schedule for I-95 HOT Lanes

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**Environmental**

- **3N.01.65132** Erosion Control Setup (RpFXEH/S): SWM Pond 3-2 (RpFXEH/S)
  - Start: 22-Aug-12
  - Finish: 24-Aug-12
  - Duration: 271

- **3N.01.65142** Erosion Control Setup (RpFXEH/S): SWM Pond 3-2 (RpFXEH/S)
  - Start: 19-Oct-12
  - Finish: 23-Oct-12
  - Duration: 224

**Maintenance of Traffic**

- **3N.01.75952** Close Existing Ramp At Boudinot Dr
  - Start: 06-Jul-12
  - Finish: 27-Jul-12
  - Duration: 272

**Ground Improvements**

- **3N.01.63872** Settlement Monitoring (RpFXEH/S)
  - Start: 08-Feb-14
  - Finish: 09-Aug-14
  - Duration: 59

**Drainage**

- **3N.01.64762** Drainage: deep (RpFXEH/S): S. of B49A
  - Start: 19-Oct-12
  - Finish: 25-Oct-12
  - Duration: 419

- **3N.01.64772** Drainage: shallow (RpFXEH/S): S. of B49A
  - Start: 13-Oct-12
  - Finish: 04-Dec-12
  - Duration: 419

**Retaining Walls**

- **3N.01.63700** Procure Panels: MSE (RW1220-1)
  - Start: 10-Nov-12
  - Finish: 05-Dec-12
  - Duration: 32

- **3N.01.63710** Procure Panels: MSE (RW1220-2)
  - Start: 27-Nov-12
  - Finish: 27-Dec-12
  - Duration: 46

- **3N.01.64333** Retaining Wall: Excavation MSE (RW1220-1) - at Bridge Abutment
  - Start: 27-Nov-12
  - Finish: 26-Dec-12
  - Duration: 25

- **3N.01.64332** Retaining Wall: Levelling Pad MSE (RW1220-1) - at Bridge Abutment
  - Start: 10-Nov-12
  - Finish: 09-Dec-12
  - Duration: 29

- **3N.01.64331** Retaining Wall: Panels & Backfill MSE (RW1220-1) - at Bridge Abutment
  - Start: 27-Dec-12
  - Finish: 27-Dec-12
  - Duration: 29

- **3N.01.64330** Retaining Wall: Excavation MSE (RW1220-2) - at Bridge Abutment
  - Start: 28-Dec-12
  - Finish: 27-Dec-12
  - Duration: 29

- **3N.01.64329** Retaining Wall: Levelling Pad MSE (RW1220-2) - at Bridge Abutment
  - Start: 30-Dec-12
  - Finish: 27-Dec-12
  - Duration: 29

- **3N.01.64328** Retaining Wall: Panels & Backfill MSE (RW1220-2) - at Bridge Abutment
  - Start: 28-Dec-12
  - Finish: 27-Dec-12
  - Duration: 29

- **3N.01.64327** Retaining Wall: Excavation MSE (RW1220-2) - Roadway
  - Start: 10-Nov-12
  - Finish: 09-Dec-12
  - Duration: 29

- **3N.01.64403** Retaining Wall: Levelling Pad MSE (RW1220-1) - Roadway
  - Start: 10-Nov-12
  - Finish: 09-Dec-12
  - Duration: 29

- **3N.01.64422** Retaining Wall: Levelling Pad MSE (RW1220-2) - Roadway
  - Start: 10-Nov-12
  - Finish: 09-Dec-12
  - Duration: 29

- **3N.01.64412** Retaining Wall: Panels & Backfill MSE (RW1220-1) - Roadway
  - Start: 10-Nov-12
  - Finish: 09-Dec-12
  - Duration: 29

- **3N.01.64401** Retaining Wall: Panels & Backfill MSE (RW1220-2) - Roadway
  - Start: 10-Nov-12
  - Finish: 09-Dec-12
  - Duration: 29

- **3N.01.64423** Retaining Wall: Moment Slab & Barrier MSE (RW1220-1) - Roadway
  - Start: 10-Nov-12
  - Finish: 09-Dec-12
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11-Jul-12 12:56

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**Schedule for I-95 HOT Lanes**

**Remaining Level of Effort**

**Critical Remaining Work**

**Remaining Work**

**Milestone**

**Task Filter: No DOE.**

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### Milestones

- **Sta 1445+00 to Sta 1559+00 North Project Limits**
- **No Lane Phase**
- **Utility Relocations**
- **Noise Walls**
- **Traffic & Tolling Management Systems**
- **Environmental**
- **GP Northbound**
- **GP Southbound**

### Task Filter: No LOE

**Remaining Level of Effort**

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**Checklist**

- **Traffic & Tolling Management Systems**
- **Environmental**
- **No Lane Phase**
- **Noise Walls**
- **Utility Relocations**
- **GP Northbound**
- **GP Southbound**

**Schedule for I-95 HOT Lanes**

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<td>4.00 9002</td>
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**Remaining Level of Effort**

**Critical Remaining Work**

**Remaining Work**

**Milestone**

**Task Filter: No DOE.**

**Schedule for I-95 HOT Lanes**

**Date**

**Revision**

**Checked**

**Approved**

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- Critical Remaining Work
- Milestone

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**Schedule for I-95 HOT Lanes**

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**Remaining Level of Effort**

**Critical Remaining Work**

**Remaining Work**

**Milestone**

**Schedule for I-95 HOT Lanes**

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Segment 2 - N. Of Quantico Creek to N. of Prince William Pkwy (St.449 to St.824)

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Virginia Department of Transportation

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Comcast

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Dominion Virginia Power - Distribution

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**Prince William County Service Authority**

### Utility Relocations

#### Water

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**Dominion Virginia Power - Distribution**

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**Northern Virginia Electric Cooperative**

### Utility Relocations

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**Task filter: I95 Type of Work = Utilities.**
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**Total Float**

**Total Cost**

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**VDOT Review Utility Design: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

**Construct Utility: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

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**Total Float**

**Total Cost**

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**Design Utility: VDOT Review Utility Design: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

**Construct Utility: VDOT Review Utility Design: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

**Relocation of utility Complete: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

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**Total Float**

**Total Cost**

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**Design Utility: VDOT Review Utility Design: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

**Construct Utility: VDOT Review Utility Design: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

**Relocation of utility Complete: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

---

**Total Float**

**Total Cost**

---

**Design Utility: VDOT Review Utility Design: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

**Construct Utility: VDOT Review Utility Design: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

**Relocation of utility Complete: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

---

**Total Float**

**Total Cost**

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**Design Utility: VDOT Review Utility Design: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

**Construct Utility: VDOT Review Utility Design: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

**Relocation of utility Complete: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

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**Total Float**

**Total Cost**

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**Design Utility: VDOT Review Utility Design: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

**Construct Utility: VDOT Review Utility Design: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

**Relocation of utility Complete: OX X-ing @ St.867+60 (2.2 HOT) - NOVEC-1**

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**Total Float**

**Total Cost**
### Activity Log

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<th>Activity ID</th>
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### Activity Log (Continued)

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### Furnace Rd to Bridge 54

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### Fairfax Water

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### Washington Gas

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### Bridge 54 to Lorton Rd

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<td>Design Utility: Telephone @ St.1055+10 (3S.5.HOT) - ATT-1</td>
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**Dominion Virginia Power - Distribution**

**Utility Relocations**

**Overhead Electrical**

38.00.70610 Design Utility: OH X-ing @ St.967+45 (3S.5.HOT) - DOMD-16

38.00.70620 VDOT Review Utility Design: OH X-ing @ St.967+45 (3S.5.HOT) - DOMD-16

38.00.70630 Construct Utility: OH X-ing @ St.967+45 (3S.5.HOT) - DOMD-16

38.00.70130 Relocation of utility complete: OH X-ing @ St.967+45 (3S.5.HOT) - DOMD-16

**Dominion Transmission Gas**

**Utility Relocations**

**Gas**

38.00.70880 PIP Utility: 36" Gas Line + 42" Steel casing @ 1033+75 (3S.4.HOT) - DTI-2

38.00.70890 PIP Utility Complete: 36" Gas Line + 42" Steel casing @ 1033+75 (3S.4.HOT) - DTI-2

**Fairfax Public Works**

**Utility Relocations**

**Sewer**

38.00.70900 PIP Utility: Sanitary Sewer @ 1117+15 (3S.4.HOT) - DPWES-4

38.00.70906 PIP Utility Complete: Sanitary Sewer @ 1117+15 (3S.4.HOT) - DPWES-4

38.00.70820 PIP Utility: 10" FM in casing @ St.1048+05 (3S.5.HOT) - DPWES-2

38.00.70850 PIP Utility Complete: 10" FM in casing @ St.1048+05 (3S.5.HOT) - DPWES-2

**Landfill Energy System**

**Utility Relocations**

**Gas**

38.00.70800 PIP Utility: Gas-8" HDPE + 10" Steel casing @ St.1055.55 (3S.5.HOT) - LES-1

38.00.70910 PIP Utility Complete: Gas-8" HDPE + 10" Steel casing @ St.1055.55 (3S.5.HOT) - LES-1

**Washington Gas**

**Utility Relocations**

**Gas**

38.00.70900 PIP Utility: 30" Gas Line + 36" Steel casing @ 1033+80 (3S.4.HOT) - WGL-6

38.00.70910 PIP Utility Complete: 30" Gas Line + 36" Steel casing @ 1033+80 (3S.4.HOT) - WGL-6

**Verizon**

**Utility Relocations**

**Telecommunications**

38.00.70920 Design Utility: T/TG Telephone (Parallel) @ St.1086+00 (3S.5.HOT) - VRZ-6

38.00.70930 VDOT Review Utility Design: T/TG Telephone (Parallel) @ St.1086+00 (3S.5.HOT) - VRZ-6

38.00.70940 Construct Utility: T/TG Telephone (Parallel) @ St.1086+00 (3S.5.HOT) - VRZ-6

38.00.70970 Construct Utility Complete: T/TG Telephone (Parallel) @ St.1086+00 (3S.5.HOT) - VRZ-6

**Pohick Crk to Accotink Crk**

**Dominion Virginia Power - Distribution**

**Utility Relocations**

**Overhead Electrical**

38.00.70730 PIP Utility: OH X-ing @ St.1147+90 (3S.7.HOT)

38.00.70210 PIP Utility Complete: OH X-ing @ St.1147+90 (3S.7.HOT)

**Accotink Crk to Springfield Interchange (St.1171 to St.1440)**

**Century Link**

**Utility Relocations**

**Telecommunications**

**Remaining Level of Effort** **Critical Remaining Work** **Remaining Work** **Milestone** **TASK filter: I55 Type of Work = Utilities.**
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### Fairview Utility Relocations

#### Water

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<tr>
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#### Fairview Public Works

#### Utility Relocations

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<th>Budgeted Total Cost</th>
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<tr>
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<td>03-Apr-13</td>
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### Contractor Line

#### Utility Relocations

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<tr>
<td>3N.00.70700</td>
<td>PIP Utility: 24&quot; Gas + 30&quot; Casing @ St.1354+65 (3N.1.HOT) - WGL-10</td>
<td>19-Sep-13</td>
<td>26-Sep-13</td>
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<td>3N.00.70960</td>
<td>PIP Utility Complete: 24&quot; Gas + 30&quot; Casing @ St.1354+65 (3N.1.HOT) - WGL-10</td>
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<td>3N.00.70890</td>
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<td>07-Mar-14</td>
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### Segment 4 - N. of Springfield Interchange to North Project Limits (St.1440 to St.1559)

#### Sla 1445+00 to Sla 1559+50 North Project Limits

#### Century Link

#### Communication

#### Utility Relocations

<table>
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<tbody>
<tr>
<td>4.00.70100</td>
<td>PIP Utility: Telecommunications @ St.1458+00 (4.1.HOT) - CL-4</td>
<td>11-Mar-13</td>
<td>18-Mar-13</td>
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<tr>
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<th>Budgeted Total Cost</th>
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<tbody>
<tr>
<td>4.00.70270</td>
<td>Design Utility: Cable OH X-ing @ St.1554+90 (4.1.HOT) - COM-13</td>
<td>03-Jul-12</td>
<td>12-Sep-12</td>
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<td>4.00.70330</td>
<td>Design Utility: Cable TV @ St.1558+65 (4.1.HOT) - COM-14</td>
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<td>28-Aug-12</td>
<td>114</td>
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<td>4.00.70100</td>
<td>PIP Utility: Cable TV @ St.1474+40 (4.1.HOT) - COM-12</td>
<td>20-Aug-12</td>
<td>24-Aug-12</td>
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<td>$10,000.00</td>
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<td>24-Aug-12</td>
<td>112</td>
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**Task Filter:** IBS Type of Work = Utilities.

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### Notes

- **Baseline Schedule:**
  - Page 8 of 9
<table>
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<tr>
<th>Activity ID</th>
<th>Activity Name</th>
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<th>Start</th>
<th>End</th>
<th>Total Float</th>
<th>Original Duration</th>
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</thead>
<tbody>
<tr>
<td>4.00.70340</td>
<td>VDOT Review Utility Design: Cable TV @ St.1558+50 (4.1.HOT) - COM-14</td>
<td>27-Aug-12</td>
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<td>174</td>
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<tr>
<td>4.00.70280</td>
<td>VDOT Review Utility Design: Cable OH X-ing @ St.1554+90 (4.1.HOT) - COM-13</td>
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<td>4.00.70350</td>
<td>Construct Utility: Cable TV @ St.1558+55 (4.1.HOT) - CM-14</td>
<td>27-Sep-12</td>
<td>13-Nov-12</td>
<td>104</td>
<td>$70,000.00</td>
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<td>19-Sep-12</td>
<td>14</td>
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<tr>
<td>4.00.70290</td>
<td>Construct Utility: Cable OH X-ing @ St.1558+60 (4.1.HOT) - COM-13</td>
<td>04-Oct-12</td>
<td>16-Dec-12</td>
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<td>13-Nov-12</td>
<td>8</td>
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**Dominion Virginia Power - Distribution**

**Utility Relocations**

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<th>Original Duration</th>
<th>Start</th>
<th>End</th>
<th>Total Float</th>
<th>Original Duration</th>
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<tbody>
<tr>
<td>4.00.70160</td>
<td>PIP Utility: Underground crossing @ St.1483+80 (4.1.HOT) - DOMD-24</td>
<td>31-Jul-12</td>
<td>06-Aug-12</td>
<td>208</td>
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<td>31-Jul-12</td>
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<td>4.00.70190</td>
<td>PIP Utility: Underground crossing @ St.1483+90 (4.1.HOT) - DOMD-25</td>
<td>20-Aug-12</td>
<td>24-Aug-12</td>
<td>112</td>
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<td>20-Aug-12</td>
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<tr>
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<td>PIP utility Complete: Underground crossing @ St.1483+90 (4.1.HOT) - DOMD-25</td>
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<td>18-Mar-13</td>
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**Overhead Electrical**

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<th>Start</th>
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<th>Total Float</th>
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<tr>
<td>4.00.70240</td>
<td>Design Utility: OH X-ing @ St.1554+80 (4.1.HOT) - DOMD-26</td>
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<td>VDOT Review Utility Design: OH X-ing @ St.1554+90 (4.1.HOT) - DOMD-26</td>
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<td>31-Oct-12</td>
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<tr>
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<td>Construct Utility: OH X-ing @ St.1554+90 (4.1.HOT) - DOMD-26</td>
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**Fairfax Water**

**Utility Relocations**

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<th>Original Duration</th>
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<td>4.00.70300</td>
<td>PIP Utility: 20&quot; @ St.1558+50 (4.1.HOT) - FW-17</td>
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<td>PIP Utility: 16&quot; PCCP in 24&quot; Casing @ St. 1497+45 (4.1.HOT) - FW-15</td>
<td>24-May-13</td>
<td>03-Jun-13</td>
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<td>24-May-13</td>
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<td>03-Jun-13</td>
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**Fairfax Public Works**

**Utility Relocations**

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<td>PIP Utility: 18&quot; Sanitary in Casing @ St.1530+60 (4.1.HOT) - DPWES-10</td>
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<td>03-Jun-13</td>
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<td>24-May-13</td>
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<td>PIP Utility Complete: 18&quot; Sanitary in Casing @ St. 1570+00 (4.1.HOT) - DPWES-9</td>
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<td>PIP Utility: 18&quot; Sanitary in Casing @ St. 1570+00 (4.1.HOT) - DPWES-11</td>
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### Attachment A - Calendars

<table>
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<th>Calendar Name</th>
<th>Default</th>
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<tr>
<td>VDOT(0) - Std 5d week VDOT Holidays</td>
<td>Yes</td>
</tr>
<tr>
<td>This is the standard administrative Calendar; it is utilized for all &quot;office&quot; work, is on a 5 day work week and includes all standard VDOT holidays.</td>
<td></td>
</tr>
<tr>
<td>VDOT(1) - 7d week no Holidays</td>
<td>No</td>
</tr>
<tr>
<td>7 day a week Calendar use when &quot;Calendar Day&quot; durations are required.</td>
<td></td>
</tr>
<tr>
<td>VDOT(2) - Construction Std 5d week + Rain days</td>
<td>No</td>
</tr>
<tr>
<td>This is the standard construction Calendar; it is utilized for miscellaneous construction work that is not temperature sensitive, includes weather days, is on a 5 day work week and includes all standard VDOT holidays.</td>
<td></td>
</tr>
<tr>
<td>VDOT(3) - Earthwork</td>
<td>No</td>
</tr>
<tr>
<td>Calendar used by all earthmoving activities. Based on the Construction Calendar, is has no work from late November to Mid March. This Calendar is on a 5 day work week and includes all standard VDOT holidays.</td>
<td></td>
</tr>
<tr>
<td>VDOT(4d) - Paving (base &amp; intermediate)</td>
<td>No</td>
</tr>
<tr>
<td>This Calendar is utilized for all Asphalt Paving daytime activities with work suspended from late November to Mid March. This Calendar is on a 5 day work week and includes all standard VDOT holidays.</td>
<td></td>
</tr>
<tr>
<td>VDOT(5) - Bridge Deck Pours</td>
<td>No</td>
</tr>
<tr>
<td>This Calendar is utilized for Bridge Deck concrete pour activities with work suspended from late December to late February. This Calendar is on a 5 day work week and includes all standard VDOT holidays.</td>
<td></td>
</tr>
<tr>
<td>VDOT(4n) - Paving (surface)</td>
<td>No</td>
</tr>
<tr>
<td>This Calendar is utilized for all nighttime Asphalt Paving activities with work suspended from the first week in November to the middle of April. This Calendar is on a 5 day work week and includes all standard VDOT holidays.</td>
<td></td>
</tr>
<tr>
<td>VDOT(6) - MOT Operations</td>
<td>No</td>
</tr>
<tr>
<td>This Calendar is utilized for Maintenance of Traffic activities with work suspended for the months of January and February. This Calendar is on a 5 day work week and includes all standard VDOT holidays.</td>
<td></td>
</tr>
<tr>
<td>VDOT(7) - Bridge Painting</td>
<td>No</td>
</tr>
<tr>
<td>This Calendar is utilized for Bridge Painting activities with work suspended from early November to late March. This Calendar is on a 5 day work week and includes all standard VDOT holidays.</td>
<td></td>
</tr>
<tr>
<td>VDOT(3a) - Fish Spawn Limits</td>
<td>No</td>
</tr>
<tr>
<td>This Calendar is utilized for all activities that could impact the spawning in the Aquia Creek. Work is suspended from mid February to the end of June. This Calendar is on a 5 day work week and includes all standard VDOT holidays.</td>
<td></td>
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## Attachment B - Work Breakdown Structure

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</tr>
</thead>
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<td>V2DV</td>
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<td>Ramp GHS SB HOT Lanes to SB Lanes</td>
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<td>Bridge: Ramp GHS over SB Lanes (B72A)</td>
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<td>Ramp JHS SB HOT Lanes to SB Lanes</td>
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<td>V2DV.1.4.b67a</td>
<td>Bridge: Ramp JHS over SB Lanes (B67a)</td>
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<td>Segment 2 - N. Of Quantico Creek to N. of Prince William Pkwy (St.449 to St.824)</td>
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### Attachment B - Work Breakdown Structure

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<th>WBS Code</th>
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<th>Total Activities</th>
<th>Total Cost</th>
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<td>Bridge (existing) HOT Lanes over Neabsco Crk (B63)</td>
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<td>HOT Lanes Neabsco Crk to St. 824+00</td>
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<tr>
<td>V2 DV.2.2.osh</td>
<td>Ramp OSH SB to HOT Lanes</td>
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<td>Ramp PWHN HOT to NB Lanes</td>
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<td>V2 DV.3S</td>
<td>Segment 3S - N. Of Prince William Parkway to Accotink Crk (St.824 to St.1171)</td>
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<td>Design Segment 3 South</td>
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<td>V2 DV.3S.1</td>
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<td>HOT Lanes N. of Prince William Pkwy to Occoquan Rd</td>
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<td>V2 DV.3S.2.b57a</td>
<td>Bridge (existing) HOT Flyover to Route 123 (B57a)</td>
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<td>V2 DV.3S.3</td>
<td>Occoquan River to Furnace Rd</td>
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<td>V2 DV.3S.3.b57</td>
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<td>Furnace Rd to Bridge 54</td>
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<td>Bridge (existing) Lanes over Furnace Rd - widening (B56)</td>
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<td>Bridge 54 to Lorton Rd</td>
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<td>V2 DV.3S.6</td>
<td>Lorton Rd to Pohick Crk</td>
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### Attachment B - Work Breakdown Structure

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<th>WBS Code</th>
<th>WBS Name</th>
<th>Total Activities</th>
<th>Total Cost</th>
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<td>Ramp FXEH/S Fairfax Co Pkwy to/from HOT/SB Lanes</td>
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# Attachment D - Constrained Activities

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<th>Secondary Constraint</th>
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<th>Early Finish</th>
<th>Late Finish</th>
<th>Reason for Constraint</th>
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<td>02-May-14</td>
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<td>13-Nov-13</td>
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<td>01-Mar-13</td>
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<td>3N.00.70840</td>
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<td>3S.00.70160</td>
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## Attachment D - Constrained Activities

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<th>Early Finish</th>
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## Attachment D - Constrained Activities

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### Attachment D - Constrained Activities

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## Attachment D - Constrained Activities

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<th>Early Finish</th>
<th>Late Finish</th>
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# Attachment D - Constrained Activities

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# Attachment D - Constrained Activities

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## Attachment D - Constrained Activities

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## Attachment D - Constrained Activities

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## Attachment D - Constrained Activities

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## Attachment D - Constrained Activities

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<td>Tolling Systems Management &amp; Indirects (Sep 2013)</td>
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<td>5 02-Sep-14 08-Sep-14 30-Sep-14</td>
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<td>5 02-Jul-12 09-Jul-12 31-Jul-12</td>
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<td>Start On or After Finish On or Before</td>
<td>5 01-Jun-12 07-Jun-12 29-Jun-12</td>
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<td>Tolling Systems Management for Early Works (May 2012)</td>
<td>Start On or After Finish On or Before</td>
<td>5 01-May-12 07-May-12 31-May-12</td>
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### Activity ID | Activity Name | Original Duration | Early Start | Early Finish | Total Float | 2012 | 2013 | 2014 | 2015
--- | --- | --- | --- | --- | --- | --- | --- | --- | ---
0.00.00010 | Notice to Proceed Early Works | 0 | 27-Mar-12 | 0 | | | | | |
0.00.10000 | Design Start | 0 | 27-Mar-12 | 0 | | | | | |
4.00.16800 | Roadway Design (C&G, Duct Banks & MOT Ph.1 - Seg 4) | 40 | 27-Mar-12 | 21-May-12 | 54 | | | | |
3N.00.15840 | Roadway Design (C&D, Duct Banks & MOT Ph.1 - Seg ... | 45 | 27-Mar-12 | 29-May-12 | 0 | | | | |
3N.00.15600 | Bridge Design: Stage 1 (B49A) | 50 | 27-Mar-12 | 05-Jun-12 | 7 | | | | |
0.00.09200 | Financial Close | 0 | 31-Jul-12 | 0 | | | | | |
0.00.09250 | Construction Notice to Proceed | 0 | 31-Jul-12 | 14 | | | | | |
4.01.65183 | Erosion Control Setup (RpTHN) | 3 | 31-Jul-12 | 02-Aug-12 | 168 | | | | |
3N.00.63180 | Reroute Traffic to East Side (3N.1.HOT) | 5 | 31-Jul-12 | 06-Aug-12 | 80 | | | | |
3N.00.15860 | Bridge Design: Substr. Beams & Wiffs (B49A) | 100 | 27-Mar-12 | 15-Aug-12 | 7 | | | | |
3N.01.65263 | Temporary Barrier: For HOT West Phase * (3N.1.HOT) | 10 | 07-Aug-12 | 21-Aug-12 | 80 | | | | |
3N.00.15820 | Roadway Design (Roadway, Drainage & MOT Ph.2 - Se... | 105 | 27-Mar-12 | 22-Aug-12 | 0 | | | | |
4.00.16810 | Roadway Design (Roadway, Drainage & MOT Ph.2 - Se... | 105 | 27-Mar-12 | 22-Aug-12 | 88 | | | | |
3N.00.65132 | Erosion Control Setup (RpFXEH/S) | 3 | 22-Aug-12 | 24-Aug-12 | 271 | | | | |
4.01.65330 | Clearing, Grubbing & Topsoil Stripping (RpTHN) | 20 | 31-Jul-12 | 28-Aug-12 | 106 | | | | |
3N.00.15930 | Constructability Review (Roadway, Drainage & MOT Ph... | 5 | 23-Aug-12 | 29-Aug-12 | 106 | | | | |
4.00.16170 | Constructability Review (Roadway, Drainage & MOT Ph... | 5 | 23-Aug-12 | 29-Aug-12 | 88 | | | | |
3N.00.15940 | Incorp. Constructability Comments (Roadway, Drainage... | 5 | 30-Aug-12 | 06-Sep-12 | 106 | | | | |
4.00.16180 | Incorp. Constructability Comments (Roadway, Drainage... | 5 | 30-Aug-12 | 06-Sep-12 | 88 | | | | |
3N.01.53320 | Clearing, Grubbing & Topsoil Stripping (RpFXEH/S) | 20 | 22-Aug-12 | 21-Sep-12 | 264 | | | | |
3N.00.15950 | VDOT Final Review (Roadway, Drainage & MOT Ph.2 ... | 21 | 07-Sep-12 | 27-Sep-12 | 160 | | | | |
4.00.16190 | VDOT Final Review (Roadway, Drainage & MOT Ph.2 ... | 21 | 07-Sep-12 | 27-Sep-12 | 132 | | | | |
3N.00.15860 | Comment Resolution (Roadway, Drainage & MOT Ph.2 ... | 7 | 28-Sep-12 | 04-Oct-12 | 160 | | | | |
4.00.16200 | Comment Resolution (Roadway, Drainage & MOT Ph.2 ... | 7 | 28-Sep-12 | 04-Oct-12 | 160 | | | | |
3N.00.15970 | VDOTComment Verification (Roadway, Drainage & MO... | 7 | 05-Oct-12 | 11-Oct-12 | 160 | | | | |
4.00.16210 | VDOTComment Verification (Roadway, Drainage & MO... | 7 | 05-Oct-12 | 11-Oct-12 | 132 | | | | |
3N.00.15240 | Roadway Design (Misc. Roadway - Seg 3N) | 144 | 27-Mar-12 | 28-Oct-12 | 0 | | | | |
3N.00.15980 | Final Comment Resolution (Roadway, Drainage & MOT... | 7 | 12-Oct-12 | 18-Oct-12 | 160 | | | | |
3N.00.15990 | APC Roadway Design (Roadway, Drainage & MOT Ph... | 0 | 0 | 18-Oct-12 | 106 | | | | |
4.00.16220 | Final Comment Resolution (Roadway, Drainage & MOT... | 7 | 12-Oct-12 | 18-Oct-12 | 132 | | | | |
4.00.16230 | AFC Roadway Design (Roadway, Drainage & MOT Ph... | 0 | 0 | 18-Oct-12 | 88 | | | | |
3N.00.65142 | Erosion Control Setup (RpFXEH/S): SWM Pond 3-2 (R... | 3 | 19-Oct-12 | 23-Oct-12 | 224 | | | | |
4.00.16573 | Erosion Control Setup: SWM Pond 4-1 (4.1.HOT) | 3 | 19-Oct-12 | 23-Oct-12 | 103 | | | | |
3N.00.15280 | Constructability Review (Misc. Roadway - Seg 3N) | 5 | 19-Oct-12 | 25-Oct-12 | 222 | | | | |
3N.00.64312 | Clearing, Grubbing & Topsoil Stripping: SWM Pond 3-2... | 5 | 19-Oct-12 | 25-Oct-12 | 222 | | | | |
4.00.16432 | Clearing, Grubbing & Topsoil Stripping: SWM Pond 4-1... | 5 | 19-Oct-12 | 25-Oct-12 | 101 | | | | |
3N.00.94712 | Procurement Piling: Bridge Rp FXEH over I-95 SB Lane... | 75 | 16-Aug-12 | 29-Oct-12 | 9 | | | | |
3N.00.15260 | Incorp. Constructability Comments (Misc. Roadway - Se... | 9 | 0 | 01-Nov-12 | 0 | | | | |
3N.01.52800 | Foundations: Piling - Abutment A (B49a) | 30 | 03-Oct-12 | 05-Nov-12 | 6 | | | | |
3N.01.52810 | Foundations: Piling - Abutment B (B49a) | 5 | 06-Nov-12 | 13-Nov-12 | 6 | | | | |
3N.00.15270 | VDOT Final Review (Misc. Roadway - Seg 3N) | 21 | 02-Nov-12 | 22-Nov-12 | 0 | | | | |
3N.00.15280 | Foundations: Drilled Shafts - Pier 1 (B49a) | 6 | 15-Nov-12 | 26-Nov-12 | 6 | | | | |
3N.00.15280 | Comment Resolution (Misc. Roadway - Seg 3N) | 7 | 23-Nov-12 | 29-Nov-12 | 0 | | | | |
3N.00.15290 | VDOTComment Verification (Misc. Roadway - Seg 3N) | 7 | 30-Nov-12 | 06-Dec-12 | 0 | | | | |
3N.00.15290 | Foundations: Drilled Shafts - Pier 2 (B49a) | 10 | 27-Nov-12 | 11-Dec-12 | 6 | | | | |
4.00.65162 | Procurement Piling: Bridge Rp THN over I-395 NB Lane... | 75 | 29-Sep-12 | 12-Dec-12 | 8 | | | | |
3N.00.15295 | Final Comment Resolution (Misc. Roadway - Seg 3N) | 7 | 07-Dec-12 | 13-Dec-2 | 0 | | | | |
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<th>Early Finish</th>
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<td>3S.01.65753</td>
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<td>Substructures: F&amp;P Pier 4 - Cap (B29a)</td>
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<td>21-Aug-13</td>
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## Activity ID | Activity Name | Original Duration | Early Start | Early Finish | Total Float |
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<td>3N.01.64852</td>
<td>Retaining Wall: Excavation MSE (RW1355-1)</td>
<td>19 30-Nov-13</td>
<td>20-Nov-13</td>
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<tr>
<td>3N.01.53200</td>
<td>Procure Panels: MSE* (RW1355-1)</td>
<td>36 17-Oct-13</td>
<td>10-Dec-13</td>
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<tr>
<td>3N.01.64492</td>
<td>Retaining Wall: Panels &amp; Backfill MSE (RW1345-1)</td>
<td>31 18-Oct-13</td>
<td>10-Dec-13</td>
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<td>3N.01.64852</td>
<td>Retaining Wall: Leveling Pad MSE (RW1355-1)</td>
<td>19 21-Nov-13</td>
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<td>4.01.64952</td>
<td>Retaining Wall Construction: MSE Summary (RW1355-1)</td>
<td>216 02-Jan-13</td>
<td>16-Dec-13</td>
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<td>4.01.64703</td>
<td>Retaining Wall: Moment Slab &amp; Barrier MSE (RW1355-1)</td>
<td>27 31-Oct-13</td>
<td>16-Dec-13</td>
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<tr>
<td>4.01.64773</td>
<td>Retaining Wall: Panels &amp; Backfill MSE (RW1355-2) - Roadway</td>
<td>21 14-Nov-13</td>
<td>19-Dec-13</td>
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<tr>
<td>3S.07.63418</td>
<td>Drill Shafts (Barrier): E. Ph. (3S.7.HOT)</td>
<td>28 15-Nov-13</td>
<td>02-Jan-13</td>
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<td>4.01.64942</td>
<td>Retaining Wall Construction: MSE Summary (RW1355-2)</td>
<td>221 24-Jan-13</td>
<td>14-Jan-14</td>
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<tr>
<td>4.01.64783</td>
<td>Retaining Wall: Moment Slab &amp; Barrier MSE (RW1355-2)</td>
<td>16 20-Dec-13</td>
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<td>3S.06.63388</td>
<td>Drill Shafts (Barrier): E. Ph. (3S.6.HOT)</td>
<td>22 03-Jan-14</td>
<td>07-Feb-14</td>
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<td>10-Feb-14</td>
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<td>3N.01.64958</td>
<td>Install Cross Bases/Connect Duct Sys To &amp; Complete Shaft Trenching</td>
<td>15 18-Oct-13</td>
<td>19-Mar-14</td>
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<td>7 17-Mar-14</td>
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<td>Pull &amp; Term Wire &amp; Cable (3S.6.HOT)</td>
<td>20 06-Mar-14</td>
<td>04-Apr-14</td>
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<td>Tolling Locations - Start Handover to Transurban</td>
<td>0 11-Apr-13</td>
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<td>22 21-Mar-13</td>
<td>23-Apr-13</td>
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<td>4.01.53670</td>
<td>Paving (RpTHN)</td>
<td>15 15-Apr-14</td>
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<td>4.00.40000</td>
<td>Erosion Control Maintenance: Segment 4</td>
<td>390 03-Aug-12</td>
<td>29-Apr-14</td>
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<td>4.01.53580</td>
<td>Permanent Barrier: (RpTHN)</td>
<td>3 01-May-14</td>
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<td>4.01.75723</td>
<td>Temporary Barrier: Final Removal (3.1.HOT)</td>
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<td>12-May-14</td>
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<td>4.01.38775</td>
<td>Roadway Ready for Mill &amp; Overlay (4.1.HOT)</td>
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<td>3N.01.75662</td>
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<td>0 12-May-14</td>
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<tr>
<td>3N.01.63682</td>
<td>Roadway Ready for Mill &amp; Overlay (3N.1.HOT)</td>
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<td>4.01.75793</td>
<td>Install Access Gates (4.1.HOT)</td>
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<td>16-May-14</td>
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<tr>
<td>2N.01.75792</td>
<td>Install Access Gates (3N.1.HOT)</td>
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<td>26-Jun-14</td>
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<tr>
<td>0.00.90030</td>
<td>Tolling Locations - Handover to Transurban</td>
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<td>30-Jun-14</td>
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<td>Activity ID</td>
<td>Activity Name</td>
<td>Duration</td>
<td>Early Start</td>
<td>Early Finish</td>
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<td>-------------</td>
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<td>0.00.90070</td>
<td>Tolling Locations - Complete Handover to Transurban</td>
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<td>0.00.90100</td>
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<td>01-Jul-14</td>
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# Attachment I - Price Summary

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<td>Project Indirects</td>
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<tr>
<td>Design</td>
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<td>Utilities</td>
<td>$3,535,000.00</td>
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<tr>
<td>Maintenance of Traffic</td>
<td>$23,797,000.00</td>
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<tr>
<td>Erosion Control</td>
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<td>Earthwork</td>
<td>$30,196,000.00</td>
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<td>Drainage</td>
<td>$30,023,000.00</td>
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<tr>
<td>Retaining Walls</td>
<td>$32,886,000.00</td>
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<td>Bridges</td>
<td>$50,419,000.00</td>
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<tr>
<td>Roadway</td>
<td>$94,792,000.00</td>
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<tr>
<td>Soundwalls</td>
<td>$44,911,000.00</td>
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<tr>
<td>Tolling &amp; Traffic Management (Construction)</td>
<td>$79,400,000.00</td>
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<td>TTMS Design &amp; Startup</td>
<td>$70,605,202.00</td>
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<td><strong>Total Price</strong></td>
<td>$691,147,569.00</td>
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*FLUOR-LANE 95*
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<tr>
<th>P6 Resource</th>
<th>Work Type</th>
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<tr>
<td>210500.Civil Design &amp; 211500.Structural Design</td>
<td>Design</td>
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<td>5104205.Drainage Temp &amp; Perm.</td>
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<td>5104400.Backfill and Compaction-MAT</td>
<td>Earthwork</td>
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<td>5104500.Environmental Work</td>
<td>SoundWalls: Posts</td>
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<tr>
<td>5105100.Landscaping</td>
<td>Topsoil Placement &amp; Landscaping</td>
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<td>5105200.Site Improvements</td>
<td>Ground Improvements</td>
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<td>5106300.Piling</td>
<td>Bridge Foundations</td>
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<td>5106400.Heavy Civil Works</td>
<td>Bridge Finishes: Barriers</td>
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<td>5110100.Underground Electrical - Duct Bank</td>
<td>Duct Bank</td>
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<td>5111500.Concrete</td>
<td>Box Culverts</td>
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<td>5111505.CIP (Cast-In-Place)</td>
<td>TTMS/Sign/Gantry Foundations</td>
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<tr>
<td>5111510.Reinforcing</td>
<td>Bridge SuperStructures: Rebar</td>
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<td>51115200.Core Drilling &amp; Concrete Cutting</td>
<td>Bridge Finishes: Deck Joints &amp; Grooving</td>
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<tr>
<td>51116600.Slab on Grade</td>
<td>Bridge Finishes: Approach Slabs/Slope Paving/Drainage &amp; Lighting</td>
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<td>51116800.Precast Concrete</td>
<td>SoundWalls: Procurement</td>
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<tr>
<td>5117105.Fabricated Steel - Light</td>
<td>Guardrail</td>
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<td>5117115.Fabricated Steel - Heavy</td>
<td>Bridge Foundations: Material</td>
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<td>5117120.Fabricated Steel - Extra Heavy</td>
<td>Bridge Girders: Material</td>
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<tr>
<td>5117125.Fabricated Steel - Double Extra Heavy</td>
<td>Bridge Girders</td>
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<td>5120100.Building-MAT</td>
<td>Project Office</td>
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<td>5129200.Panels and Receptacles</td>
<td>Service Panels</td>
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<td>5142605.Lighting Fixtures and Panels</td>
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<td>5146125.UPS System</td>
<td>Generators</td>
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<td>5146130.Other Tagged Electrical Equipm.</td>
<td>Tech Shelters</td>
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<td>5147200.Wire and Cable</td>
<td>Cabinets, Conduit &amp; JB, Fiber &amp; Wire</td>
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<td>5150200.Tagged Specialty Items</td>
<td>Access Gates</td>
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<td>5164100.Commissioning</td>
<td>TTMS Design &amp; Startup</td>
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<td>5168500.Site Management-MAT</td>
<td>Distrib. Indirects (Project)</td>
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<td>5180000.Transportation</td>
<td>Mobilization</td>
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<td>5180010.Roadway Topsoil Stripping</td>
<td>Clearing &amp; Grubbing</td>
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<td>5180130.Bridge Demolition</td>
<td>Bridge Demo (Tel Rd)</td>
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<td>5180160.Roadway Aggregate Base</td>
<td>Subbase</td>
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<td>5180170.Asphalt Paving/Shoulders</td>
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<td>5180200.Roadway Guardrail/Median Barrier</td>
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<td>5180210.Roadway Permanent Striping</td>
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<td>5180220.Roadway Signage</td>
<td>DMS / LUMS, Signs, Gantries &amp; ITS Equipment</td>
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<td>5180230.Roadway Noise Walls</td>
<td>SoundWalls: Panels</td>
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<td>5180240.Roadway Retaining Walls</td>
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<td>5180250.Temporary Bridges</td>
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<td>5180270.Temporary Signage, Signals and Striping</td>
<td>MOT Set Up</td>
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<td>5180280.Temporary Concrete Barrier</td>
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<td>5180310.Bridge Substructure Concrete</td>
<td>Bridge SubStructures</td>
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<td>5180340.Bridge Superstructure Concrete</td>
<td>Bridge SuperStructures: Pour</td>
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<td>5180350.Bridge Superstructure Forming Material</td>
<td>Bridge SuperStructures: Form</td>
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<td>5306100.Construction Services-Site</td>
<td>Distrib. Indirects (Construction)</td>
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<td>5306300.Job Cleanup-MAT</td>
<td>Project Close Out: Punchlisting</td>
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<td>5306700.Miscellaneous Prof. Services</td>
<td>Bonds</td>
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<td>5306800.Environmental Control</td>
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<td>5307000.Temporary Utilities</td>
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### Attachment J - Resource/Cost Code Map: Cost Codes

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<th>P6 Cost Account</th>
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<td>General Site Requirements</td>
<td>Project Indirects</td>
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<td>Site Indirects</td>
<td>Construction Indirects</td>
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<tr>
<td>Engineering and Design</td>
<td>Design</td>
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<td>Temporary Utilities</td>
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<tr>
<td>Maintenance of Traffic</td>
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<tr>
<td>Site Preparation</td>
<td>Erosion Control</td>
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<tr>
<td>Earthmoving</td>
<td>Earthwork</td>
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<tr>
<td>Oily - Storm Water - Effluent Runoff</td>
<td>Drainage</td>
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<tr>
<td>Roadway Retaining Walls</td>
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<tr>
<td>Bridges</td>
<td>Bridges</td>
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<tr>
<td>Roads General</td>
<td>Roadway</td>
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<td>Roadway Noise Walls</td>
<td>Soundwalls</td>
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<tr>
<td>Control Systems</td>
<td>Tolling &amp; Traffic Management</td>
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<tr>
<td>Start-up</td>
<td>TTMS Design &amp; Startup</td>
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![Fluor-Lane95 Logo](attachment_logo.png)
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<td>13,279,425</td>
<td>15,736,454</td>
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<td>May-12</td>
<td>11,201,615</td>
<td>26,938,069</td>
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<td>8,945,920</td>
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<td>Jul-12</td>
<td>9,909,469</td>
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<td>Aug-12</td>
<td>36,792,171</td>
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<td>Sep-12</td>
<td>30,250,353</td>
<td>112,835,982</td>
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<td>22,917,574</td>
<td>135,753,556</td>
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</tr>
<tr>
<td>Nov-12</td>
<td>30,821,222</td>
<td>166,574,778</td>
<td>4.5%</td>
</tr>
<tr>
<td>Dec-12</td>
<td>18,522,694</td>
<td>185,097,472</td>
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</tr>
<tr>
<td>Jan-13</td>
<td>17,919,520</td>
<td>203,016,992</td>
<td>2.6%</td>
</tr>
<tr>
<td>Feb-13</td>
<td>16,165,360</td>
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</tr>
<tr>
<td>Mar-13</td>
<td>29,922,508</td>
<td>249,104,860</td>
<td>4.3%</td>
</tr>
<tr>
<td>Apr-13</td>
<td>36,858,351</td>
<td>285,963,211</td>
<td>5.3%</td>
</tr>
<tr>
<td>May-13</td>
<td>42,418,561</td>
<td>328,381,772</td>
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</tr>
<tr>
<td>Jun-13</td>
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<td>355,765,521</td>
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<tr>
<td>Jul-13</td>
<td>28,736,432</td>
<td>384,501,953</td>
<td>4.2%</td>
</tr>
<tr>
<td>Aug-13</td>
<td>27,055,570</td>
<td>411,557,523</td>
<td>3.9%</td>
</tr>
<tr>
<td>Sep-13</td>
<td>28,152,936</td>
<td>439,710,459</td>
<td>4.1%</td>
</tr>
<tr>
<td>Oct-13</td>
<td>28,856,374</td>
<td>468,566,833</td>
<td>4.2%</td>
</tr>
<tr>
<td>Nov-13</td>
<td>23,927,956</td>
<td>492,494,789</td>
<td>3.5%</td>
</tr>
<tr>
<td>Dec-13</td>
<td>16,961,264</td>
<td>509,456,053</td>
<td>2.5%</td>
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<tr>
<td>Jan-14</td>
<td>18,979,760</td>
<td>528,435,813</td>
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</tr>
<tr>
<td>Feb-14</td>
<td>13,351,941</td>
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<tr>
<td>Mar-14</td>
<td>21,410,301</td>
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<tr>
<td>Apr-14</td>
<td>30,573,762</td>
<td>593,771,817</td>
<td>4.4%</td>
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<tr>
<td>May-14</td>
<td>26,270,771</td>
<td>620,042,588</td>
<td>3.8%</td>
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<tr>
<td>Jun-14</td>
<td>15,266,051</td>
<td>635,308,639</td>
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<tr>
<td>Jul-14</td>
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<td>646,637,480</td>
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<tr>
<td>Aug-14</td>
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<td>658,140,539</td>
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<tr>
<td>Sep-14</td>
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<td>Oct-14</td>
<td>9,040,090</td>
<td>676,726,795</td>
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<td>Nov-14</td>
<td>7,047,512</td>
<td>683,774,307</td>
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<td>Dec-14</td>
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<tr>
<td>Feb-15</td>
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<td>690,557,101</td>
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<tr>
<td>Mar-15</td>
<td>590,468</td>
<td>691,147,569</td>
<td>0.1%</td>
</tr>
</tbody>
</table>
This ESCROW AGREEMENT ("Escrow Agreement") is made and entered into as of July 31, 2012 by and among the VIRGINIA DEPARTMENT OF TRANSPORTATION (the “Department”), an agency of the Commonwealth of Virginia, 95 EXPRESS LANES LLC (the “Concessionaire”), a Delaware limited liability company, and SUNTRUST BANK a Georgia banking corporation, as escrow agent hereunder (the “Escrow Agent”) (the Department, the Concessionaire and the Escrow Agent are herein referred to collectively as the “Parties”).

RECITALS

WHEREAS, the Department and the Concessionaire have entered into a Comprehensive Agreement Relating to the I-95 HOV/HOT Lanes Project (the “Project”), dated as of July 31, 2012 (the “Comprehensive Agreement”), pursuant to which the Department has granted a permit to the Concessionaire, which includes (i) the right and obligation to develop, design, finance, construct, operate and maintain the Project and (ii) the right to establish, impose, charge, collect, use and enforce payment of tolls and related charges;

WHEREAS, pursuant to Section 18.05 of the Comprehensive Agreement, the Concessionaire is required to submit to the Department the Escrow Documents;

WHEREAS, the Concessionaire and the Department desire to appoint the Escrow Agent to act as escrow agent hereunder in the manner hereinafter set forth, and the Escrow Agent is willing to act in such capacity; and

WHEREAS, it is a condition to the execution and delivery by the Department of the Comprehensive Agreement that this Escrow Agreement be entered into among the Parties.

AGREEMENT

NOW, THEREFORE, in consideration of these premises and in consideration of the mutual covenants herein contained, and for such other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties hereto, the Parties, intending to be legally bound, do hereby agree as follows.

ARTICLE 1.

DEFINITIONS AND ORDER OF PRECEDENCE

Section 1.01 Definitions

Capitalized terms used but not otherwise defined in this Escrow Agreement have the respective meanings set forth in Exhibit A to the Comprehensive Agreement.
Section 1.02 Order of Precedence

In the event of any conflict, ambiguity or inconsistency between the provisions of the Comprehensive Agreement and the provisions of this Escrow Agreement, the provisions of this Escrow Agreement shall prevail.

Section 1.03 No Effect on Comprehensive Agreement

Nothing in this Escrow Agreement amends or modifies any of the Concessionaire’s or the Department’s obligations and rights under the Comprehensive Agreement.

ARTICLE 2.

ESCROW ARRANGEMENTS

Section 2.01 Appointment of Escrow Agent

The Concessionaire and the Department hereby appoint the Escrow Agent to serve as escrow agent hereunder, and the Escrow Agent hereby accepts such appointment, subject to the terms and conditions set forth in this Escrow Agreement. The Escrow Agent shall hold, manage, provide access to and dispose of the Escrow Documents in accordance with the terms hereof.

Section 2.02 Deposit of Escrow Documents

In accordance with Section 18.05 of the Comprehensive Agreement, the Department (or, at the request of the Department, the Concessionaire) shall deliver and deposit with the Escrow Agent the Escrow Documents in the same sealed containers in which the Concessionaire delivered the Escrow Documents to the Department, which containers shall not have been opened or the contents thereof altered or modified in any way by the Department or any other person. The Escrow Agent shall provide to each Party written acknowledgment of the receipt of the Escrow Documents, and any subsequent additions or modifications to the Escrow Documents, promptly upon receipt thereof. The Escrow Agent is not required to take notice of the Escrow Documents or the contents thereof, which the Escrow Agent shall hold only for custodial purposes.

Section 2.03 Ownership; Use and Review of Escrow Documents

The Parties hereby acknowledge and agree that the Escrow Documents are, and shall always be, the property of the Concessionaire. The Escrow Agent shall provide prompt access to the Escrow Documents upon receipt by it of a written notice requesting such access signed by the Department or the Concessionaire; provided, that the Department, prior to making such request, has given a minimum of 24 hours written notice to the Concessionaire, and the Concessionaire, prior to making such request, has given a minimum of 24 hours written notice to the Department. The Escrow Agent shall not permit access to the Escrow Documents to any person other than the Concessionaire, authorized representatives of the Concessionaire, the Department, members of the Department’s staff pursuant to Section 18.05 of the Comprehensive Agreement and to the Department’s Consultants; provided that any such Consultant enters into a confidentiality agreement of the type contemplated in Section 18.05 of the Comprehensive Agreement. For
purposes of certainty, authorized representatives of the Concessionaire shall include designated representatives of the Design-Build Contractor. Such authorized representatives of the Concessionaire and the Department staff and Consultants shall be entitled to conduct examinations and reviews of the Escrow Documents for the purposes and in accordance with the provisions set forth in Section 18.05(f) of the Comprehensive Agreement.

Section 2.04 Release and Return of Escrow Documents

(a) The Escrow Agent shall hold the Escrow Documents in its possession at its offices in Richmond, Virginia until directed to deliver such Escrow Documents upon receipt of a written certification delivered pursuant to Section 2.04(b) or (c) below or a final adjudication, as applicable, whereupon the Escrow Agent shall deliver the appropriate Escrow Documents to the Concessionaire.

(b) The Escrow Agent shall release the Construction Escrow Documents to the Concessionaire upon receipt by the Escrow Agent of a certification from the Concessionaire and the Department stating that the Project has achieved Final Acceptance, final payment has been made to the Design-Build Contractor and the TTMS Contractor, and all claims or disputes arising under or related to the Design-Build Contract and the TTMS Agreement have been fully and finally resolved and/or adjudicated.

(c) The Escrow Agent shall release the Construction Escrow Documents (if applicable) and the Financing Escrow Documents to the Concessionaire upon receipt by the Escrow Agent of a certification from the Concessionaire and the Department stating that the Comprehensive Agreement has been terminated in accordance with the provisions thereof and all claims or disputes arising under or related to the Comprehensive Agreement have been fully and finally resolved and/or adjudicated.

Section 2.05 Termination

This Escrow Agreement shall continue in effect and shall automatically terminate at such time as all Escrow Documents are released to the Concessionaire as provided in Section 2.04(c) hereof. It is agreed and understood that in the event of disagreement between the Parties hereto, the Escrow Agent will, and does, reserve the right to hold the Escrow Documents in its possession, and all papers in connection with or concerning this escrow, until mutual agreement has been reached between the Parties or until delivery thereof is ordered pursuant to a final disposition reached pursuant to the dispute resolution provisions of Article 21 of the Comprehensive Agreement.

ARTICLE 3.

ESCROW AGENT

Section 3.01 Liability of Escrow Agent

The Escrow Agent shall have no responsibility to any person in connection with this Escrow Agreement, except as specifically provided, and shall not be responsible for anything done or omitted to be done by it except for its own gross negligence or willful default in the
performance of any obligation imposed on it hereunder. Unless specifically provided herein, the Escrow Agent has no duty to determine or inquire into the happening or occurrence of any event or contingency or the performance or failure of performance of the other Parties with respect to arrangements or contracts with others, the Escrow Agent’s sole duty hereunder being to safeguard the Escrow Documents and to dispose of and deliver the same in accordance with this Escrow Agreement. If the Escrow Agent is called upon by the terms of this Escrow Agreement to determine the occurrence of any event or contingency, the Escrow Agent may request from the other Parties or any other person such reasonable additional evidence as the Escrow Agent in its discretion may deem necessary to determine any fact relating to the occurrence of such event or contingency, and in this connection may inquire and consult with the other Parties, among others, at any time. The Escrow Agent may request an opinion of counsel for a determination of any legal issue which might arise in the performance of its duties hereunder and such opinion of counsel shall be full and complete authorization for any action taken, suffered or omitted by the Escrow Agent in reliance thereon. This Escrow Agreement sets forth exclusively the duties of the Escrow Agent with respect to any and all matters pertinent hereto and no implied duties or obligations shall be read into this Escrow Agreement against the Escrow Agent.

Section 3.02 Payment of Escrow Agent

The Escrow Agent acknowledges receipt of good and valuable consideration for the services rendered or to be rendered by it pursuant to this Escrow Agreement. The Concessionaire shall pay the Escrow Agent’s reasonable fees and expenses in connection with the performance of its duties under this Escrow Agreement. The annual administrative fee is $2,500 and shall be payable at signing by the Concessionaire or within 30 days of receipt of an invoice from the Escrow Agent. The Escrow Agent and the Concessionaire acknowledge and agree that the Department shall have no liability in respect of any fees or expenses of the Escrow Agent.

Section 3.03 Resignation and Replacement of Escrow Agent

The Escrow Agent may resign, and thereby become discharged from the trusts, duties and obligations hereby created, by written notice given to the Department and the Concessionaire, not less than 15 days before such resignation shall take effect. Such resignation shall take effect immediately, however, upon the earlier appointment of a new Escrow Agent hereunder and acceptance of the trusts hereby created. The Escrow Agent shall continue to serve as Escrow Agent until a successor is appointed and the Escrow Documents have been properly transferred to the successor Escrow Agent. In the event of the resignation of the Escrow Agent prior to the expiration of this Escrow Agreement, the Escrow Agent shall rebate to the Concessionaire a ratable portion of any prepaid fee theretofore paid by the Concessionaire to the Escrow Agent for its services hereunder. After any notice of resignation of the Escrow Agent, the Concessionaire shall undertake to appoint a replacement Escrow Agent on terms reasonably acceptable to the Concessionaire and the Department.
ARTICLE 4.

GENERAL PROVISIONS

Section 4.01 Address for Notices

(a) Whenever under the provisions of this Escrow Agreement it will be necessary or desirable for one Party to serve any approval, notice, request, demand, report or other communication on another Party, the same will be in writing and will not be effective for any purpose unless and until actually received by the addressee or unless served (i) personally, (ii) by independent, reputable, overnight commercial courier, (iii) by facsimile transmission, where the transmitting Party includes a cover sheet identifying the name, location and identity of the transmitting Party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein or (iv) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

If to the Department:
Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219
Attention: Chief Engineer
Facsimile: (804) 786-2940

With copies to:

Office of the Attorney General
900 E. Main Street
Richmond, VA 23219
Attention: Chief Transportation Section
Facsimile: (804) 786-9136

If to the Concessionaire:
95 Express Lanes LLC
6440 General Green Way
Alexandria, Virginia 22312
Attention: President
Facsimile: (571) 419-6101
If to the Escrow Agent:
SunTrust Bank
919 East Main Street, Floor 7
Richmond, Virginia 23219
Attention: Charles Henderson
Telephone: (804) 782-7087
Facsimile: (804) 782-7855

(b) Any Party may, from time to time, by notice in writing served upon the other Parties as aforesaid, designate an additional and/or a different mailing address or an additional and/or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally will be deemed delivered upon receipt, if served by mail or independent courier will be deemed delivered on the date of receipt as shown by the addressee’s registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier, and if served by facsimile transmission will be deemed delivered on the date of receipt as shown on the received facsimile (provided, that the original is thereafter delivered as aforesaid).

Section 4.02 Successors and Assigns

This Escrow Agreement shall be binding upon, inure to the benefit of and be enforceable by the Parties hereto and their respective successors and assigns. The Department and the Escrow Agent hereby consent to the collateral assignment (the “Assignment”) of this Escrow Agreement in whole by the Concessionaire to the Collateral Agent as security for the performance of the Concessionaire’s obligations under the Project Financing Agreements. Pursuant to the Assignment, the Collateral Agent and its designee or assignee shall have the right to assume the benefits and obligations of the Concessionaire under this Escrow Agreement. In the event that the Collateral Agent or such designee or assignee exercise such right by notice to the Escrow Agent, as of the date of such assumption of benefits and obligations of the Concessionaire hereunder, the Collateral Agent may, in connection with any default under any Project Financing Agreement, assign any rights assigned to it hereunder to any other entity. However, the Escrow Agent shall have no obligation in performing this Escrow Agreement to recognize any successor or assign of the Concessionaire unless the Escrow Agent receives clear, authoritative and conclusive written evidence of the change of Party.

Section 4.03 Counterparts

This Escrow Agreement may be executed in several counterparts each of which shall be an original and all of which together shall constitute one and the same instrument.

Section 4.04 Waiver

Any term of this Escrow Agreement may be waived by the Party entitled to the benefits thereof, provided that any such waiver must be in writing and signed by the Party against whom the enforcement of the waiver is sought. No waiver of any condition, or breach of any provision of this Escrow Agreement, in any one or more instances, shall be deemed to be a further or
continuing waiver of such condition or breach. Delay or failure to exercise any right or remedy shall not be deemed the waiver of that right or remedy.

Section 4.05 Benefit of Agreement; Amendments

(a) This Escrow Agreement is made for the benefit of the Concessionaire and the Department, except as otherwise expressly provided herein.

(b) This Escrow Agreement shall not be amended without the prior written consent of the Concessionaire, the Department and the Escrow Agent.

Section 4.06 Severability

In the event any one or more of the provisions contained in this Escrow Agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof and this Escrow Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

Section 4.07 Prior Contracts Superseded

This Escrow Agreement constitutes the sole agreement of the Parties hereto with respect to the subject matter set forth herein and supersedes any prior understandings or written or oral contracts between the Parties respecting such subject matter.

Section 4.08 Effect of Breach

Without prejudice to any rights a Party may otherwise have, a breach of this Escrow Agreement shall not of itself give rise to a right to terminate the Comprehensive Agreement.

Section 4.09 No Third-Party Beneficiaries

Nothing contained in this Escrow Agreement is intended or will be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the Parties hereto toward, any person or entity that is not a Party.

Section 4.10 No Partnership

Nothing contained in this Escrow Agreement shall be deemed to constitute a partnership between the Parties hereto. None of the Parties shall hold itself out contrary to the terms of this Section 4.10.

Section 4.11 Governing Law

This Escrow Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia applicable to contracts executed and to be performed within the State. Venue for any legal action arising out of this Escrow Agreement shall lie in the Circuit Court in the City of Richmond, Virginia, Division I.
IN WITNESS WHEREOF, the Parties have caused this Escrow Agreement to be executed by their duly authorized representatives as of the date first written above.

VIRGINIA DEPARTMENT OF TRANSPORTATION
an agency of the Commonwealth of Virginia

By: ____________________________
Name: Jeffrey A. Roby
Title: Alternative Project Delivery Engineer

95 EXPRESS LANES LLC
a Delaware limited liability company

By: ____________________________
Name:
Title:

SUNTRUST BANK, 
a Georgia banking corporation

By: ____________________________
Name:
Title:
EXHIBIT BB
FINANCIAL CLOSE ADJUSTMENT PROTOCOL

INITIAL BASE CASE FINANCIAL MODEL refers to the agreed financial model reflecting the economic position of the agreement on Major Business Terms dated November 29, 2011 ("Term Sheet"), as evidenced by Scenario 3 of the financial model with filename “I95N v13 2011_11_30 (DISTBD VDOT)”, adjusted as follows:

- Change design build price to $620,542,300 to reflect the portion of wetland mitigation cost moved under the Design Build Contract;
- Change standalone wetland mitigation cost to zero;
- Change design build S-curve to the profile labeled “Updated Wetland & TTMS (May Close)”; and
- Change Public Funds Amount to $94,000,000.

CREATION OF THE ADJUSTED FINANCIAL MODEL
Starting from the Initial Base Case Financial Model, the following protocol outlines the steps to be used to implement the risk sharing mechanism to determine the Initial Public Funds Amount and Initial Equity Commitment Amount at Financial Close. These steps are explained in greater detail in Table BB-1 below.

The risk sharing mechanism will be implemented as follows:

- Table BB-1 (Item 1): All changes discovered through the model audit or tax review process, to the extent they result in a material benefit (>5bps) to the Initial Equity IRR, will be implemented;
- Table BB-1 (Item 2): The model will be updated to reflect an expected $300,000,000 of TIFIA Credit Assistance, which is also known as the Benchmark TIFIA Credit Assistance Amount;
- Table BB-1 (Item 3): Mutually agreed changes to the design build price, TTMS price, and SPV costs during construction will be reflected;
- Table BB-1 (Item 4): The agreement on electronic toll collection (“ETC”) account fees will be reflected;
- Table BB-1 (Item 5): The Model PABs Yield will replace the Benchmark PABs Interest Rate;
- Table BB-1 (Item 6): The actual Leverage Ratio achieved during financing, to the extent it is higher than 65% will be reflected; and
- Table BB-1 (Item 7): Without further adjusting the Public Funds Amount, the model will be updated for all other necessary model changes, for which the Department has no exposure, to reflect the final commercial agreements.

Once these adjustments (Items 1 through 7 of Table BB-1) are completed, the model will become the ADJUSTED FINANCIAL MODEL, assuming the Benchmark TIFIA Credit Assistance Amount is obtained, and the resulting Equity IRR will become the Adjusted Equity IRR. The resulting Equity
Contribution Amount, less the Contingent Capital Contribution Amount, will become the Initial Equity Commitment Amount. The resulting Public Funds Amount will become the Initial Public Funds Amount.

**CREATION OF THE BASE CASE FINANCIAL MODEL**

The Adjusted Financial Model will be adjusted to reflect Table BB-1 (Item 8) to determine the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount. The resulting model, reflecting the following adjustments, will become the BASE CASE FINANCIAL MODEL:

- Remove the Benchmark TIFIA Credit Assistance Amount from the capital structure in the Adjusted Financial Model (while keeping the PABs amount constant) and adjust the Public Funds Amount so that the Equity IRR equals the Adjusted Equity IRR
  - The Department TIFIA Protection Amount will be equal to the resulting net increase in the Public Funds Amount over the Initial Public Funds Amount
  - The Concessionaire TIFIA Protection Amount will be equal to the resulting net increase in the Equity Contribution Amount, less the Contingent Capital Contribution Amount, over the Initial Equity Commitment Amount, plus $30,000,000
<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
<th>Sharing on the Financial close Date</th>
<th>Term sheet Reference</th>
<th>CA Reference</th>
<th>Commentary / Model Adjustment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Net benefit from errors identified in tax review or model audit</td>
<td>100% VDOT benefit (5bp materiality threshold)</td>
<td>5A</td>
<td>7.03(b) (i)</td>
<td>1. From the Initial Base Case Financial Model, implement any changes discovered through the model audit or tax review process. Run the model optimization macro. If the resulting Equity IRR is at least 5bps greater than the Initial Equity IRR, retain the changes in the model 2. Adjust the Public Funds Amount so that the Equity IRR is equal to the Initial Equity IRR</td>
</tr>
<tr>
<td>2</td>
<td>TIFIA Credit Assistance Amount</td>
<td>100% VDOT exposure</td>
<td></td>
<td></td>
<td>1. The Department will have the risk and benefit of the receipt of TIFIA Credit Assistance. From the Initial Base Case Financial Model, as adjusted for the preceding steps in this table, update the model to reflect the agreed upon expected quantum of TIFIA Credit Assistance  a. Set the “TIFIA - % of Total Funding” to 0%, the “% of Project Contingency considered TIFIA Eligible Cost” to 0%, the “% of Project Contingency funded by Equity” to 100% and the “Existing Capital Costs” to $0  b. Activate the “Fix TIFIA Amount” flag and set the “Fixed TIFIA Amount” to $300,000,000 2. Adjust the Public Funds Amount derived from the preceding step in this table so that the Equity IRR is equal to the Initial Equity IRR</td>
</tr>
<tr>
<td>3</td>
<td>DB Price, TTMS, and SPV Costs During Construction</td>
<td>100% VDOT Exposure</td>
<td>19, 20</td>
<td></td>
<td>1. The Department will have the risk and benefit of mutually agreed changes in the design build contract price, TTMS price, and SPV fixed costs during construction. From the Initial Base Case Financial Model, as adjusted for the preceding steps in this table, update the model to reflect the agreed upon design build price, TTMS price and SPV costs during construction  a. Remove TTMS cost of $62,100,000  b. Change design build price to $691,147,527  c. Reduce SPV fixed costs during construction to $33,867,000 (to reflect TTMS SPV costs moved under DB contract)  d. Reflect any other mutually agreed changes in the design build contract price, TTMS price and SPV costs during construction 2. Adjust the Public Funds Amount derived from the preceding step in this table so that the Equity IRR is equal to the Initial Equity IRR</td>
</tr>
<tr>
<td>Item</td>
<td>Description</td>
<td>Sharing on the Financial close Date</td>
<td>Term sheet Reference</td>
<td>CA Reference</td>
<td>Commentary / Model Adjustment</td>
</tr>
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<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| 4    | Operating Costs (ETC Fees)          | 100% VDOT exposure                   | 10                   | 7.03(b) (ii) | 1. The Initial Base Case Financial Model, as adjusted for the preceding steps in this table, will be updated to reflect the agreement on ETC account fees, for which the Department has exposure  
   a. Increase operating costs in the model by changing the “ETC Fee Cost / Transaction” to $0.0544 ($2010), which is the agreed rate equivalent to the impact on the Public Funds Amount of $1,000,000 ($2010) in increased annual operating costs  
   2. Adjust the Public Funds Amount derived from the preceding step in this table so that the Equity IRR is equal to the Initial Equity IRR |
| 5    | Change in PABs Rate                 | 100% VDOT exposure up to 25bp,      | 4                    | 7.03(b) (iii)| 1. Size the equivalent PABs rate  
   a. As there may be multiple PAB tranches with varying pricing structures, this model adjustment will need to derive one equivalent PABs interest rate (“Model PABs Interest Rate”) to use as the basis for adjusting the model under the risk sharing mechanism  
   b. The Model PABs Interest Rate will be derived by determining a single rate (“Model PABs Yield”) that sets the present value of the PABs debt service equal to the proceeds of the PABs issuance on a 30/360 day basis  
   i. The PABs underwriters will provide a schedule of total debt service (principal and interest, collectively the “PABs Scheduled Debt Service”) in semi-annual periods over the life of the issuance, the corresponding dates in which each payment of debt service is due, and the total bond proceeds from the PABs issuance (“PABs Bond Proceeds”)  
   ii. The Model PABs Yield will be calculated as the discount rate required to set the present value of the PABs Scheduled Debt Service equal to the PABs Bond Proceeds  
   iii. The resulting Model PABs Yield will correspond to and be measured against the Benchmark PABs Interest Rate used in the Initial Base Case Financial Model  
   2. Implement the sharing mechanism – From the Initial Base Case Financial Model, as adjusted for the preceding steps in this table, change the Benchmark PABs Interest Rate (for the avoidance of doubt, the input labeled “Upfront PABs – Base Rate (Initial)”) in the model as follows: |
### TABLE BB-1  Adjustments to the Financial Model

<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
<th>Sharing on the Financial close Date</th>
<th>Term sheet Reference</th>
<th>CA Reference</th>
<th>Commentary / Model Adjustment</th>
</tr>
</thead>
</table>
| 6    | Increase in Leverage Ratio | 50/50 share | 7.03(b)(iv) |  | **1. If the Leverage Ratio is greater than 65%, the benefit will be shared equally between the Department and the Concessionaire**  
   a. From the Initial Base Case Financial Model, as adjusted for the preceding steps in this table, update the model to reflect the actual Leverage Ratio  
   b. Calculate the Public Funds Amount that would result in an Equity IRR equal to the Initial Equity IRR  
   c. Calculate 50% of the difference in i) the Public Funds Amount calculated in 1(b); and ii) the Public Funds Amount calculated in the preceding step in this table  
   2. Subtract the amount calculated in 1(c) above from the Public Funds Amount derived from the preceding step in this table so that the Equity IRR is equal to the Initial Equity IRR |
## TABLE BB-1 Adjustments to the Financial Model

<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
<th>Sharing on the Financial close Date</th>
<th>Term sheet Reference</th>
<th>CA Reference</th>
<th>Commentary / Model Adjustment</th>
</tr>
</thead>
</table>
| 7    | All other model changes  | 100% Equity Exposure                |                      | 7.03(b) (v)  | 1. From the Initial Base Case Financial Model, as adjusted for the preceding steps in this table, make all other necessary model changes, for which the Department has no risk or exposure, to reflect the final commercial agreements  

2. The resulting financial model will be defined as the Adjusted Financial Model and the resulting Equity IRR will be defined as the Adjusted Equity IRR, with no further change to the Initial Public Funds Amount. The resulting Equity Contribution Amount, less the Contingent Capital Contribution Amount, will be defined as the Initial Equity Commitment Amount. |
| 8    | TIFIA Protection Amounts | n/a                                 |                      | 7.03(b)(vi)  | 1. Starting from the Adjusted Financial Model, as derived from the preceding steps in this table, the Department TIFIA Protection Amount and the Concessionaire TIFIA Protection Amount will be determined as follows:  

   a. Remove the Benchmark TIFIA Credit Assistance Amount from the capital structure by setting the input labeled “Fixed TIFIA Amount” to 0  

   b. Set the input labeled “TIFIA Loan Service Fee” to 0  

   c. Change the “Funding Drawdown Profile” to the profile labeled “Option 8 – No TIFIA Case”  

   d. Change the “VDOT Funding Profile” to the profile labeled “Mixed”  

   e. Hold the “PABs Size (net of original issue discount)” constant by inserting the actual PABs principal amount from the Adjusted Financial Model and activate the flag to “Hold PABs Size Constant”  

   f. Adjust the Public Funds Amount so that the Equity IRR is equal to the Adjusted Equity IRR  

   i. The Department TIFIA Protection Amount will be equal to the resulting net increase in the Public Funds Amount over the Initial Public Funds Amount  

   ii. The Concessionaire TIFIA Protection Amount will be equal to the resulting net increase in the Equity Contribution Amount, less the Contingent Capital Contribution Amount, over the Initial Equity Commitment Amount, plus $30,000,000 |
EXHIBIT CC

PROJECT RIGHT OF WAY ACQUISITION

[see attached]
## 95 Express Lanes - Potential ROW/Easement Impacts

<table>
<thead>
<tr>
<th>ID</th>
<th>Affected Parcel(s)</th>
<th>Purpose of ROW/Easement</th>
<th>Estimated Impact Area</th>
<th>Sheet No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>#01</td>
<td>TM 099-1-((17))-4</td>
<td>SIGN</td>
<td>10' x 20'</td>
<td>6</td>
</tr>
<tr>
<td>#02</td>
<td>TM 099-1-((3))-2</td>
<td>SIGN</td>
<td>10' x 10'</td>
<td>6</td>
</tr>
<tr>
<td>#03</td>
<td>TM 099-1-((1))-13</td>
<td>SIGN - Utility relocation required for sign location</td>
<td>50' x 400'</td>
<td>6</td>
</tr>
<tr>
<td>#05</td>
<td>TM 099-1-((1))-19</td>
<td>SIGN</td>
<td>20' x 20'</td>
<td>6</td>
</tr>
<tr>
<td>#06</td>
<td>TM 099-1-((1))-13</td>
<td>SIGN - Utility relocation required for sign location</td>
<td>50' x 400'</td>
<td>6</td>
</tr>
<tr>
<td>#07</td>
<td>TM 099-1-((5))-1A</td>
<td>SIGN</td>
<td>20' x 20'</td>
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<tr>
<td>#08</td>
<td>TM 090-2-((1))-62A</td>
<td>SIGN</td>
<td>10' x 10'</td>
<td>7</td>
</tr>
<tr>
<td>#09</td>
<td>TM 090-2-((1))-61B</td>
<td>SIGN</td>
<td>10' x 10'</td>
<td>7</td>
</tr>
<tr>
<td>#10</td>
<td>TM 080-4-((1))-17</td>
<td>SIGN</td>
<td>10' x 10'</td>
<td>8</td>
</tr>
<tr>
<td>#11</td>
<td>TM 099-3-((1))-14H</td>
<td>SIGN</td>
<td>20' x 50'</td>
<td>5</td>
</tr>
<tr>
<td>#12</td>
<td>TM 099-1-((1))-5B</td>
<td>SIGN</td>
<td>20' x 50'</td>
<td>6</td>
</tr>
<tr>
<td>#13</td>
<td>TM 080-4-((1))-18, TM 080-4-((1))-18</td>
<td>SIGN</td>
<td>20' x 50'</td>
<td>8</td>
</tr>
<tr>
<td>#14</td>
<td>TM 080-4-((1))-11A1</td>
<td>SIGN</td>
<td>20' x 50'</td>
<td>8</td>
</tr>
<tr>
<td>#15</td>
<td>TM 090-2-((1))-62A</td>
<td>SERVICE PANEL</td>
<td>10' x 20'</td>
<td>7</td>
</tr>
<tr>
<td>#16</td>
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</tr>
<tr>
<td>#17</td>
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<td>SIGN</td>
<td>10' x 10'</td>
<td>6</td>
</tr>
<tr>
<td>#18</td>
<td>TM 099-1-((3))-7</td>
<td>SIGN</td>
<td>10' x 10'</td>
<td>6</td>
</tr>
<tr>
<td>#19</td>
<td>TM 099-1-((3))-5</td>
<td>SIGN</td>
<td>10' x 10'</td>
<td>6</td>
</tr>
<tr>
<td>#20</td>
<td>TM 099-1-((3))-5</td>
<td>SIGN</td>
<td>10' x 10'</td>
<td>6</td>
</tr>
<tr>
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<td>SIGN</td>
<td>10' x 10'</td>
<td>6</td>
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<tr>
<td>#25</td>
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<td>SIGN</td>
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<tr>
<td>#26</td>
<td>8492-07-2460</td>
<td>SIGN</td>
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<tr>
<td>#27</td>
<td>8392-77-6880</td>
<td>SIGN</td>
<td>10' x 10'</td>
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<tr>
<td>#36</td>
<td>8292-93-8784</td>
<td>SIGN</td>
<td>10' x 10'</td>
<td>1</td>
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<tr>
<td>#39</td>
<td>8292-93-3915</td>
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</tr>
<tr>
<td>#40</td>
<td>8392-44-0403</td>
<td>SIGN</td>
<td>10' x 10'</td>
<td>2</td>
</tr>
<tr>
<td>#41</td>
<td>8392-34-4306</td>
<td>SIGN</td>
<td>10' x 10'</td>
<td>2</td>
</tr>
<tr>
<td>#42</td>
<td>8392-34-4306</td>
<td>SIGN</td>
<td>10' x 10'</td>
<td>2</td>
</tr>
</tbody>
</table>
EXECUTION VERSION – JULY 31, 2012

EXHIBIT F

FORM OF DESIGN-BUILD WORK GUARANTEE

[see attached]
This GUARANTY (this “Guaranty”) is made as of July 31, 2012, by FLUOR CORPORATION, a Delaware corporation (the “Guarantor”), to 95 EXPRESS LANES LLC, a Delaware limited liability company (the “Concessionaire”), with respect to the obligations of Fluor-Lane 95, LLC, a Delaware limited liability company (the “DB Contractor”), pursuant to that certain Turnkey Lump-Sum Design-Build Contract Relating to the I-95 HOV/HOT Lanes Project, dated as of July 31, 2012, by and between the Concessionaire and the DB Contractor (together, as amended, altered, varied or supplemented, the “Design-Build Contract”). The Design-Build Contract is hereby incorporated by reference herein, and capitalized terms used herein and not otherwise defined herein shall have the meanings set forth in the Design-Build Contract. The Guarantor is an Affiliate of the DB Contractor. The Guarantor acknowledges that financial and direct benefits will accrue to the Guarantor by virtue of entering into this Guaranty and that such benefits constitute adequate consideration therefor.

This Guaranty is provided pursuant to Section 4.8 of the Design-Build Contract.

ARTICLE I

GUARANTY

Section 1.01 Guaranty. The Guarantor guarantees to the Concessionaire, absolutely, unconditionally and irrevocably, that each and every payment and performance obligation and other liability of the DB Contractor now or hereafter arising under the Design-Build Contract, including but not limited to all obligations and liabilities of the DB Contractor under any and all representations and warranties made or given by the DB Contractor under the Design-Build Contract, under any and all liquidated or stipulated damage provisions of the Design-Build Contract and under any and all indemnities given by the DB Contractor under the Design-Build Contract (collectively the “Guaranteed Obligations”) will be promptly paid and satisfied in full when due and without offset, and performed and completed when required. This is a continuing guaranty of payment and performance of the Guaranteed Obligations.

Section 1.02 Obligations. Except as otherwise provided in Section 4.06, the obligations of the Guarantor hereunder are absolute and unconditional and independent of the Guaranteed Obligations and shall remain in full force and effect until all the Guaranteed Obligations have been paid, performed and completed in full, irrespective of any assignment, amendment, modification or termination of the Design-Build Contract.
Section 1.03 No Exoneration. Except as otherwise provided in Section 4.06 below, the obligations of the Guarantor hereunder shall not be released, discharged, exonerated or impaired in any way by reason of:

(a) any failure of the Concessionaire to retain or preserve any rights against any person, except to the extent the Concessionaire is required to do so under the terms of the Design-Build Contract and such failure prejudices Guarantor;

(b) the lack of prior enforcement by the Concessionaire of any rights against any person and the lack of exhaustion of any bond, letter of credit or other security held by the Concessionaire, except to the extent the Concessionaire is required to do so under the terms of the Design-Build Contract and such failure prejudices Guarantor;

(c) the lack of authority or standing of the DB Contractor or the dissolution of the Guarantor, the DB Contractor or the Concessionaire;

(d) with or without notice to the Guarantor, the amendment, alteration, acceleration, extension, waiver, retirement, suspension, surrender, compromise, settlement, release, revocation or termination of, or failure to assert, any portion of the Guaranteed Obligations, the Design-Build Contract, any rights or remedies of the Concessionaire (including rights of offset) against the DB Contractor, or any bond, letter of credit, other guaranty, instrument, document, collateral security or other property given or available to the Concessionaire to secure all or any part of the Guaranteed Obligations; provided that, notwithstanding the foregoing, the Guarantor shall have available to it any and all defenses relating to the Guaranteed Obligations that may be available to the DB Contractor based on any such amendment, alteration, acceleration, extension, waiver, retirement, suspension, surrender, compromise, settlement, release, revocation or termination or failure to assert voluntarily made by the Concessionaire, except defenses available to the DB Contractor under any federal or state law respecting bankruptcy, arrangement, reorganization or similar relief of debtors and those expressly waived under this Guaranty;

(e) the extension of the time for payment of any amount owing or payable under the Design-Build Contract or of the time for performance or completion of any Guaranteed Obligation; provided, however, that to the extent the Concessionaire grants the DB Contractor an extension of time under the Design-Build Contract for performance of any of the obligations of the DB Contractor thereunder, such extension of time shall likewise extend the time for performance by the Guarantor;

(f) the existence now or hereafter of any other guaranty or endorsement by the Guarantor or anyone else of all or any portion of the Guaranteed Obligations;

(g) the acceptance, release, exchange or subordination of additional or substituted security for all or any portion of the Guaranteed Obligations;

(h) the taking of any action or the failure to take any action simply because it would constitute a legal or equitable defense, release or discharge of a surety;
(i) any bankruptcy, arrangement, reorganization or similar proceeding for relief of debtors under federal or state law hereafter initiated by or against the DB Contractor or any of its members or the Concessionaire;

(j) any full or partial payment or performance of any Guaranteed Obligation which is required to be returned as a result of or in connection with the insolvency, reorganization or bankruptcy of the DB Contractor or any of its members or otherwise;

(k) the rejection of the Design-Build Contract in connection with the insolvency, reorganization or bankruptcy of the DB Contractor or any of its members;

(l) an impairment or limitation on damages otherwise due from the DB Contractor by operation of law as a result of any insolvency, reorganization or bankruptcy proceeding by or against the DB Contractor or any of its members;

(m) failure by the Concessionaire to file or enforce a claim against the estate (either in administration, bankruptcy or other proceedings) of the DB Contractor, any of its members, the Guarantor or any other guarantor;

(n) any merger, consolidation or other reorganization to which the DB Contractor, the Concessionaire (except to the extent prohibited by the Design-Build Contract), or the Guarantor is a party;

(o) any sale or disposition of all or any portion of the Guarantor’s direct or indirect ownership in the DB Contractor, or action by the Guarantor or its Affiliates) which results in discontinuation or interruption in the business relations of the DB Contractor with the Guarantor; or

(p) the failure of the Concessionaire to assert any claim or demand, bring any action or exhaust its remedies against the DB Contractor or any security before proceeding against the Guarantor hereunder after the expiration of applicable notice and cure periods.

Section 1.04 Enforcement of the Design-Build Contract and Guaranteed Obligations.

(a) Nothing contained herein shall prevent or limit the Concessionaire from pursuing any of its rights and remedies under the Design-Build Contract. The Concessionaire may apply any available moneys, property or security in such manner and amounts and at such times to the payment or reduction or performance of any Guaranteed Obligation as it may elect, and may generally deal with the DB Contractor, the Guaranteed Obligations, such security and property as the Concessionaire may see fit. Notwithstanding the foregoing, the Guarantor shall remain bound by this Guaranty.

(b) The Guarantor shall be obligated to undertake all curative action which may be agreed upon between the Concessionaire, the Guarantor and the DB Contractor. If
following notice under Section 4.06 below (to the extent required thereunder) the Guarantor does not use commercially reasonable efforts to proceed promptly to effectuate such curative action within a reasonable time after the Concessionaire notifies the DB Contractor and the Guarantor of the need for curative action (or immediately, in the case of emergency conditions), the Concessionaire, without further notice to the Guarantor, shall have the right to perform or have performed by third parties the necessary curative action, and the costs thereof shall be borne by the Guarantor.

(c) The Concessionaire may bring and prosecute a separate action or actions against the Guarantor to enforce its liabilities hereunder, regardless of whether any action is brought against the DB Contractor and regardless of whether any other person is joined in any such action or actions. Nothing shall prohibit the Concessionaire from exercising its rights against the Guarantor, the DB Contractor, any other guarantor of the Guaranteed Obligations, a performance bond or other security, if any, which insures the payment of the Guaranteed Obligations, or any other person simultaneously, or any combination thereof jointly and/or severally. The Concessionaire may proceed against the Guarantor from time to time as it sees fit in its sole and absolute discretion.

ARTICLE II

REPRESENTATIONS AND WARRANTIES

Section 2.01 Representations and Warranties. The Guarantor hereby represents and warrants, which shall be continuing representations and warranties until the expiration of the Guarantor’s obligations under this Guaranty, that:

(a) Consents. The DB Contractor is a limited liability company duly organized, validly existing and in good standing under the laws of its state of formation. Consent of the DB Contractor to any modification or amendment of the Design-Build Contract to which it is a party constitutes knowledge thereof and consent thereto by the Guarantor;

(b) Organization and Existence. The Guarantor is a corporation duly organized, validly existing and in good standing under the laws of Delaware;

(c) Power and Authority. The Guarantor has the full power and authority to execute, deliver and perform this Guaranty, and to own and lease its properties and to carry on its business as now conducted and as contemplated hereby;

(d) Authorization and Enforceability. This Guaranty has been duly authorized, executed and delivered by the Guarantor and constitutes the legal, valid and binding obligation of the Guarantor, enforceable against it in accordance with the terms hereof, subject as to enforceability of remedies to limitations imposed by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating, to or affecting the enforcement of creditors’ rights generally, as applicable to the Guarantor, and to general principles of equity;

(e) No Governmental Consents. No authorization, consent or approval of,
notice to or filing with, any governmental authority, is required for the execution, delivery and performance by the Guarantor of this Guaranty;

(f) **No Conflict or Breach.** Neither the execution, delivery or performance by the Guarantor of this Guaranty, nor compliance with the terms and provisions hereof, conflicts or will conflict with or will result in a breach or violation of any material terms, conditions, or provisions of any Laws, regulations and ordinances applicable to the Guarantor or the charter documents, as amended, or bylaws or equivalent governing documents, as amended, of the Guarantor, or any order, writ, injunction or decree of any court or governmental authority against the Guarantor or by which it or any of its properties are bound, or any indenture, mortgage or contract or other agreement or instrument to which the Guarantor is a party or by which it or any of its properties are bound, or constitutes or will constitute a default thereunder or will result in the imposition of any lien upon any of its properties;

(g) **No Proceedings.** There are no suits or proceedings pending, or, to the knowledge of the Guarantor, threatened in any court or before any regulatory commission, board or other governmental administrative agency against the Guarantor which could reasonably be expected to have a material adverse affect on the business or operations of the Guarantor, financial or otherwise, or on its ability to fulfill its obligations hereunder;

(h) **Contract.** The Guarantor is fully aware of and consents to the terms and conditions of the Design-Build Contract;

(i) **Financial Statements.** All financial statements and data that have been given to the Concessionaire by the Guarantor with respect to the Guarantor: (A) are complete and correct in all material respects as of the date given; (B) accurately present in all material respects the financial condition of the Guarantor as of the date thereof; and (C) have been prepared in accordance with generally accepted accounting principles consistently applied throughout the periods covered thereby;

(j) **No Adverse Change.** There has been no material adverse change in the financial condition of the Guarantor since the date of the most recent financial statements given to the Concessionaire with respect to the Guarantor;

(k) **No Default.** The Guarantor is not in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions set forth in any agreement or instrument to which the Guarantor is a party, which default may materially and adversely affect the Guarantor's ability to fulfill its obligations hereunder;

(l) **Accuracy of Information.** All other reports, papers and written data and information given to the Concessionaire by the Guarantor with respect to the Guarantor are accurate and correct in all material respects and complete; and

(m) **Notice of Change.** The Guarantor shall advise the Concessionaire in writing of any material adverse change in the business or financial condition of the Guarantor
and promptly furnish to the Concessionaire such information about the financial condition of the Guarantor as the Concessionaire shall reasonably request.

ARTICLE III

WAIVERS, SUBROGATION AND SUBORDINATION

Section 3.01 Waivers.

(a) The Guarantor hereby unconditionally waives:

(i) notice of acceptance of this Guaranty or of the intention to act in reliance hereon and of reliance hereon;

(ii) notice of the incurring, contracting, amendment, alteration, acceleration, extension, waiver, retirement, suspension, surrender, compromise, settlement, release, revocation or termination of, or of the failure to assert, any Guaranteed Obligation or any contract;

(iii) demand on the Guarantor in the event of default (but not the giving of notice to the extent required in Section 4.06 below);

(iv) any invalidity of the Design-Build Contract due to lack of proper authorization of or a defect in execution thereof by the DB Contractor, its purported representatives or agents;

(v) demand for payment or performance, presentment, protest and notice of nonpayment or dishonor to the Guarantor respecting any Guaranteed Obligation;

(vi) any right of the Guarantor to receive notices to the DB Contractor to which the Guarantor might otherwise be entitled except notice to the extent required in Section 4.06 below;

(vii) any demand for payment hereunder (but not the giving of notice to the extent required in Section 4.06 below); and

(viii) any duty on the part of the Concessionaire to disclose to the Guarantor any facts the Concessionaire may now or hereafter know with regard to the DB Contractor.

(b) The Guarantor also hereby waives any right to require, and the benefit of all laws now or hereafter in effect giving the Guarantor the right to require, any prior enforcement as referred to in Section 1.03(b) above, and the Guarantor agrees that any delay in enforcing or failure to enforce any such rights or in making demand on the Guarantor for the performance of the obligations of the Guarantor under this Guaranty shall not in any way affect
the liability of the Guarantor hereunder.

(c) The Guarantor hereby waives, as against the Concessionaire or any person claiming under the Concessionaire, all rights and benefits which might accrue to the Guarantor by reason of any bankruptcy, arrangement, reorganization or similar proceedings by or against the DB Contractor and agrees that its obligations and liabilities hereunder shall not be affected by any modification, limitation or discharge of the obligations of the DB Contractor that may result from any such proceedings.

(d) Until the DB Contractor shall have fully and satisfactorily paid, performed, completed and discharged all the Guaranteed Obligations, the Guarantor hereby agrees not to file, or solicit the filing by others of, any involuntary petition in bankruptcy against the DB Contractor.

Section 3.02 Subrogation. Until the DB Contractor shall have fully and satisfactorily paid, performed, completed and discharged all the Guaranteed Obligations, the Guarantor shall not claim or enforce any right of subrogation, reimbursement or indemnity against the DB Contractor, or any other right or remedy which might otherwise arise on account of any payment made by the Guarantor or any act or thing done by the Guarantor on account of or in accordance with this Guaranty.

Section 3.03 Subordination.

(a) All existing or future indebtedness of the DB Contractor to the Guarantor is subordinated to all of the Guaranteed Obligations. Whenever and for so long as the DB Contractor shall be in default in the performance or payment of any Guaranteed Obligation, no payments with respect to any such indebtedness shall be made by the DB Contractor to the Guarantor without prior written notice to the Concessionaire.

(b) The Guarantor shall file all claims against the DB Contractor in any bankruptcy or other proceedings in which the filing of claims is required or permitted by law upon any obligation or indebtedness of the DB Contractor to the Guarantor, and shall have assigned to the Concessionaire all of the Guarantor’s rights thereunder to the extent of outstanding and unsatisfied Guaranteed Obligations. If the Guarantor does not file any such claim, the Concessionaire is authorized as the Guarantor’s attorney-in-fact to do so in the Guarantor’s name, or in the discretion of the Concessionaire, the Concessionaire is authorized to assign the claim to, and cause proof of claim to be filed in the name of the Concessionaire or its nominee. In all such cases, whether in administration, bankruptcy, or otherwise, the person or persons authorized to pay such claim shall pay to the Concessionaire or its nominee the full amount payable on the claim in the proceeding before making any payment to the Guarantor, and to the full extent necessary for that purpose, the Guarantor assigns to the Concessionaire all of its rights to any payments or distributions to which it otherwise would be entitled. If the amount so paid is in excess of the Guaranteed Obligations covered hereby, the Concessionaire shall pay the amount of the excess to the party determined by it to be entitled thereto.

ARTICLE IV
Section 4.01 Enforcement of Guaranty.

(a) The terms and provisions of this Guaranty shall be governed by and interpreted in accordance with the laws of the State of New York.

(b) No supplement, amendment, modification, waiver or termination of this Guaranty shall be binding unless executed in writing and duly signed by the Guarantor and the Concessionaire. No waiver of any of the provisions of this Guaranty shall be deemed or shall constitute a waiver of any other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided. No failure on the part of the Concessionaire to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right hereunder preclude any other or further exercise of any other right.

(c) All disputes between the Concessionaire and the Guarantor arising under or relating to this Guaranty or its breach shall be filed, heard and decided in the Supreme Court of the State of New York sitting in New York County and of the United States District Court of the Southern District of New York, and any appellate court from any thereof, which shall have exclusive jurisdiction and venue. The Guarantor hereby irrevocably waives, to the fullest extent it may effectively do so, the defense of an inconvenient forum to the maintenance of any action or proceedings in such court arising out of or relating to this Guaranty. The Guarantor agrees that a final non-appealable judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. The Guarantor agrees and consents to service of process by delivery in the manner and to the address set forth in Section 4.02 below. Nothing in this section shall affect the right of the Concessionaire or to serve legal process in any other manner permitted by law.

(d) The rights of the Concessionaire hereunder are cumulative and shall not be exhausted by any one or more exercises of said rights against the Guarantor or other guarantors or by any number of successive actions until and unless all Guaranteed Obligations have been fully paid or performed.

(e) The Guarantor shall pay to the Concessionaire all reasonable out-of-pocket legal fees and other reasonable out-of-pocket costs and expenses (including fees and costs on appeal) it incurs by reason of any permitted enforcement of its rights hereunder, provided that it is the prevailing party with respect to a substantial portion of its claim.

(f) THE PARTIES HEREBY KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVE ANY RIGHTS THEY MAY HAVE TO A TRIAL BY JURY IN ANY LITIGATION OR CLAIM WHICH IS BASED ON, OR ARISES OUT OF, UNDER OR IN CONNECTION WITH, THIS GUARANTY OR THE TRANSACTIONS CONTEMPLATED BY THIS GUARANTY.

(g) Notwithstanding anything to the contrary, if at any time payment of any of
the Guaranteed Obligations is rescinded or must otherwise be returned upon bankruptcy, reorganization or similar proceeding for relief of debtors under federal or state law, Guarantor shall continue to remain liable therefor.

Section 4.02 Notices. All notices, demands or other communications under this Guaranty shall be in writing and shall be sent to each other party, at its address specified below (or such other address as a party may from time to time specify to the other parties by notice given in accordance with this Guaranty), and shall be deemed to have been duly given when actually received by the addressee or when served:

(a) personally;

(b) by independent, reputable, overnight commercial courier; or

(c) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

If to the Concessionaire:

95 Express Lanes LLC
6440 General Green Way
Room 95
Alexandria, VA 22312
Attention: President
Telephone: (571) 419-6100
Facsimile: (571) 419-6101

With a copy to:

Transurban (USA) Inc.
6440 General Green Way
Alexandria, VA 22312
Attention: Vice President-Development
Telephone: (646) 278-0870
Facsimile: (646) 278-0839

If to the Guarantor:

Fluor Corporation
100 Fluor Daniel Drive
Greenville, SC 29607
Attention: Tim Howard, Controller

With a copy to:

Fluor Corporation
Section 4.03 Severability. If any provision of this Guaranty shall for any reason be held invalid or unenforceable, to the fullest extent permitted by law, such invalidity or unenforceability shall not affect any other provisions hereof, but this Guaranty shall be construed as if such invalid or unenforceable provision had never been contained herein.

Section 4.04 Assignment. Neither this Guaranty nor any of the rights, interest or obligations hereunder shall be assigned or delegated by the Guarantor without the prior written consent of the Concessionaire. The Concessionaire may assign this Guaranty, with prior notice but without need for the consent of Guarantor, but only together with an assignment of the Design-Build Contract and only (a) to the Financing Parties as collateral security for its obligations, (b) absolutely to the Department, and (c) absolutely to any person to whom the Design-Build Contract has been assigned with the consent of the DB Contractor. This Guaranty and all of the provisions hereof shall be binding upon the Guarantor and its successors and permitted assigns and shall inure to the benefit of the Concessionaire and its successors and assigns.

Section 4.05 No Third Party Beneficiaries. Nothing in this Guaranty shall entitle any person other than the Concessionaire and its successors and assigns to any claim, cause or action, remedy or right of any kind.

Section 4.06 Certain Rights, Duties, Obligations and Defenses. Notwithstanding Sections 1.01, 1.02, 1.03, 3.01 and 4.08 hereof, the Guarantor shall have all rights, duties, obligations and defenses available to the DB Contractor under the Design-Build Contract relating to waiver, surrender, compromise, settlement, release or termination voluntarily made by the Concessionaire, failure to give notice of default to the DB Contractor to the extent required by the Design-Build Contract (except to the extent the giving of notice is precluded by bankruptcy or other applicable law), interpretation or performance of terms and conditions of the Design-Build Contract, or other defenses available to the DB Contractor under the Design-Build Contract except those expressly waived (otherwise than in Section 1.02) in this Guaranty and defenses available to the DB Contractor as a result of any federal or state law respecting bankruptcy, arrangement, reorganization or similar relief of debtors. Action against the Guarantor shall be subject to no prior notice or demand except for 14 days’ prior written notice to the Guarantor (except to the extent the giving of notice to the Guarantor is precluded by bankruptcy or other applicable law affecting the Guarantor) in the case of any demand relative to any Guaranteed Obligation not paid or performed when due under the Design-Build Contract setting forth the default of the DB Contractor.

Section 4.07 Mergers, etc. The Guarantor shall not, in a single transaction or through a series of related transactions, consolidate with or merge with or into any other person or sell, assign, convey, transfer, lease or otherwise dispose of any material portion of its properties and assets to any person(s) or group of affiliated persons, unless:
(a) in case of a merger, the Guarantor shall be the continuing corporation; or

(b) the person (if other than the Guarantor) formed by such consolidation or into which the Guarantor merges or the person(s) (or group of affiliated persons) that acquires by sale, assignment, conveyance, transfer, lease or other disposition a material portion of the properties and assets of the Guarantor shall expressly agree to perform all of the obligations of the Guarantor hereunder, as a joint and several obligor with the Guarantor if the Guarantor continues to exist after such transaction, by a writing in form and substance reasonably satisfactory to the Concessionaire.

Notwithstanding the agreement by any such person to perform the obligation of the Guarantor hereunder, the Guarantor shall not be released from its obligations hereunder unless released by operation of law or by consent.

Section 4.08 Survival. The obligations and liabilities of the Guarantor hereunder shall survive termination of any or all of the Design-Build Contract or the DB Contractor’s rights thereunder due to default by the DB Contractor thereunder; provided, however, that for the avoidance of doubt, such obligations and liabilities are only in respect of the Guaranteed Obligations.

Section 4.09 Headings. The Article and Section headings in this Guaranty are for convenience of reference only and shall not be deemed to alter or affect the meaning or interpretation of any provisions hereof.

Section 4.10 Counterparts. This Guaranty may be executed in one or more counterparts, all of which shall constitute one and the same instrument.

Section 4.11 Entire Agreement. This Guaranty constitutes the entire agreement of the parties hereto with respect to the subject matter hereof. The Guarantor agrees to execute, have acknowledged and delivered to the Concessionaire such other and further instruments as may be reasonably required by the Concessionaire to effectuate the intent and purpose hereof.

[Intentionally left blank. Signatures follow.]
IN WITNESS WHEREOF, the Guarantor has caused this Guaranty to be executed as of the day and year first above written by its duly authorized officer.

FLUOR CORPORATION,
a Delaware corporation

By:
Name:

Title: ________________________________

Receipt of this Guaranty is hereby acknowledged and accepted effective as of the day of July, 2012.

95 EXPRESS LANES LLC,
a Delaware limited liability company

By:
Name:

Title:
EXHIBIT DD

TOLL SECTIONS

[see attached]
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- Franconia
- Franconia-Springfield
- Fairfax County Parkway (Rt. 7100)
- Alban Road Access
- Lorton Road
- US Route 1
- Gordon Road (Rt. 123)
- Prince William Parkway
- Opitz Road
- Dale Boulevard
- Dumfries Road
- Joplin Road
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Turkeycock Run

Springfield Interchange

Franconia

Franconia-Springfield

Fairfax County Parkway (Rt. 7100)

Alban Road Access

Lorton Road

US Route 1

Gordon Road (Rt. 123)

Prince William Parkway

Opitz Road

Dale Boulevard

Dumfries Road

Joplin Road

Garrisonville Road (Rt. 610)
TURNKEY LUMP-SUM
DESIGN-BUILD CONTRACT
RELATING TO THE I-95 HOV/HOT LANES PROJECT

BETWEEN

95 EXPRESS LANES LLC,
AS CONCESSIONAIRE

AND

FLUOR-LANE 95, LLC,
AS CONTRACTOR

DATED AS OF JULY 31, 2012
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Exhibit DD  —  Contractor Overhead & Profit
Exhibit EE  —  Public Funds Amount Allocation
THIS TURNKEY LUMP-SUM DESIGN-BUILD CONTRACT RELATING TO THE I-95 HOV/HOT LANES PROJECT, dated as of July 31, 2012, is made by and between 95 Express Lanes LLC, a Delaware limited liability company, as Concessionaire, and Fluor-Lane 95, LLC, a Delaware limited liability company, as Contractor.

W I T N E S S E T H:

WHEREAS, Concessionaire and the Department entered into the Comprehensive Agreement (as defined below) which sets out general requirements for the Project (as defined below) and this Agreement; and

WHEREAS, in order to fulfill certain of Concessionaire’s obligations under the Comprehensive Agreement, Contractor desires to provide and Concessionaire desires to obtain the design, turnkey engineering, procurement, construction, demonstration, testing and related services for the DB Project (as defined below), all of which shall be provided on a lump sum, fixed price basis and in accordance with the terms and conditions herein specified.

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties hereto, intending to be legally bound, hereby agree as follows:

ARTICLE 1

DEFINITIONS

1.1 Definitions. As used in this Agreement, the following terms shall have the meanings indicated (such meanings as necessary to be equally applicable to both the singular and plural forms of the terms defined):

“AASHTO” means American Association of State Highway and Transportation Officials.

“Affiliate” when used to indicate a relationship with a specified Person, means a Person that, directly or indirectly, through one or more intermediaries has a ten percent (10%) or more voting or economic interest in such specified Person or controls, is controlled by or is under common control with such specified Person, and a Person is deemed to be controlled by another Person, if controlled in any manner whatsoever that results in control in fact by that other Person (or that other Person and any Person or Persons with whom that other Person is acting jointly or in concert), whether directly or indirectly and whether through share ownership, a trust, a contract or otherwise. For the avoidance of doubt, Concessionaire and Contractor are not Affiliates of each other.

“Agreement” means this Turnkey Lump-Sum Design-Build Contract Relating to the I-95 HOV/HOT Lanes Project, all written amendments, modifications and supplements hereto, and all Exhibits attached hereto, all of which by this reference are incorporated herein.
“Agreement Date” means the date on which this Agreement is executed and delivered by the Parties, which date is intended to be the same date as the “Agreement Date” under the Comprehensive Agreement.

“Allowance Items” has the meaning set forth in Section 4.1.2.1 hereof.

“Applicable Standards” means those standards, special provisions and reference guides (including all supplements, errata, revisions and interims) applicable to the DB Work listed in Attachment 1.5a to the Technical Requirements in such versions in effect as of August 15, 2011 or as otherwise noted in Attachment 1.5a to the Technical Requirements; provided, however, that if any portion of such standards, special provisions and reference guides conflicts with or is less stringent than Laws or other requirements in the Contract Documents, such conflicting or less stringent portions of such standards, special provisions and reference guides shall not be deemed “applicable,” unless expressly provided by this Agreement.

“Approved for Construction (AFC) Documents” means all drawings, specifications, revisions thereto, and any other items necessary to construct the DB Work, sealed by a professional engineer licensed by the State.

“Bank Rate” means the prime rate of interest announced publicly by The Wall Street Journal (or its successors) as the so-called “prime rate.”

“Baseline Quantities” has the meaning set forth in Section 4.1.2.1 hereof.

“Business Day” means any day on which the Department is officially open for business.

“CA Compensation Event” means any of the following specified events that constitutes a “Compensation Event” under the Comprehensive Agreement and that entitles Contractor to claim a Scope Change pursuant to Section 12.6 hereof (which Scope Change may include an adjustment to the Contract Sum and other appropriate changes to the Contract Documents), but only if and to the extent (i) Contractor has used Commercially Reasonable Efforts in order to prevent or avoid such event and mitigate the effect of such event on its ability to perform its obligations under this Agreement and which by the exercise of reasonable due diligence Contractor could not reasonably have been expected to avoid and which by the exercise of reasonable due diligence it has been unable to overcome and (ii) such event is not the result of the negligence or misconduct of a Contractor Party or any act or omission of a Contractor Party in breach of the provisions of this Agreement:

(a) Department-Caused Delays;

(b) the development or implementation of any Department Change or Department Project Enhancement (as defined in the Comprehensive Agreement);

(c) any Discriminatory Change in Law (as defined in the Comprehensive Agreement);

(d) a Toll Exemption Event (as defined in the Comprehensive Agreement);
(e) an Alternative Facility (as defined in the Comprehensive Agreement), to the extent provided for in Section 12.05 of the Comprehensive Agreement;

(f) any Significant Force Majeure Event to the extent the Department or Concessionaire elects to continue the Comprehensive Agreement under Section 20.03 thereof;

(g) a Tax Imposition (as defined in the Comprehensive Agreement);

(h) an order by the Department under the Comprehensive Agreement suspending tolls on, or diverting traffic onto, the HOT Lanes, other than as provided in the Comprehensive Agreement;

(i) an exercise by the Department under the Comprehensive Agreement of its Reserved Rights within or immediately adjacent to the HOT Lanes or the Design-Build Right of Way;

(j) issuance by a Governmental Authority having jurisdiction over the Project of an injunction or other order enjoining or estopping either the Department or Concessionaire from the performance of its respective rights or obligations under the Comprehensive Agreement or Contractor from the performance of its rights or obligations under this Agreement, in any case for more than 45 days in the aggregate;

(k) the discovery of any subsurface, man-made structure within the Project Right of Way, excluding any such structure known to Contractor prior to the Agreement Date and to the extent provided under Section 12.6.4.1 hereof;

(l) any Change in Law taking effect prior to the Guaranteed Substantial Completion Date that specifically affects the physical construction of the Project Assets in such a way as to increase the costs of the DB Work, to the extent provided under Section 12.6.4.2;

(m) a Northern HOT Lanes Development Concessionaire Impact (as defined in the Comprehensive Agreement); or

(n) any other event that the Comprehensive Agreement expressly deems or treats as a CA Compensation Event.

“CA Compensation Event Notice” has the meaning set forth in Section 12.6.1.1 hereof.

“CA Delay Event” means any of the following specified events that constitutes a “Delay Event” under the Comprehensive Agreement and that entitles Contractor to claim a Scope Change pursuant to Section 12.5 hereof (which Scope Change may include an adjustment to the Guaranteed Substantial Completion Date, the Project Schedule and other appropriate changes to the Contract Documents, but not to the Contract Sum) if the same wholly or partly prevents, restricts or delays the performance of any material obligation of Contractor arising under this Agreement, but only if and to the extent (i) Contractor has used Commercially Reasonable Efforts in order to prevent or avoid such event and mitigate the effect of such event on its ability
to perform its obligations under this Agreement and which by the exercise of reasonable due diligence Contractor could not reasonably have been expected to avoid and which by the exercise of reasonable due diligence it has been unable to overcome, (ii) such event is not the result of the negligence or misconduct of any Contractor Party or any act or omission of a Contractor Party in breach of the provisions of this Agreement, (iii) except to the extent the same constitutes a Force Majeure Event, such event does not include any delay that arises by reason of any weather condition (including any flooding) whether or not such weather conditions or the severity of such weather conditions are not or have not ordinarily or customarily been encountered or experienced and (iv) except to the extent the same constitutes a Force Majeure Event, such event does not include any delay that arises by reason of any strike, labor dispute or other labor protest involving any Person retained, employed or hired by a Contractor Party or its Representatives to supply materials or services for or in connection with the DB Work or any strike, labor dispute or labor protest caused by or attributable to any act (including any pricing or other price or method of operation) or omission of a Contractor Party or its Representatives:

(a) a Force Majeure Event;

(b) discovery of a Differing Site Condition or an Unknown Geotechnical Condition;

(c) an unreasonable and unjustifiable failure by a Governmental Authority to issue, or an unreasonable and unjustified delay by a Governmental Authority in issuing, any Governmental Approval or other authorization required for the DB Work;

(d) issuance by a Governmental Authority of competent jurisdiction of an injunction or other order enjoining or estopping either the Department or Concessionaire from the performance of its respective rights or obligations under the Comprehensive Agreement or Contractor from the performance of its rights or obligations under this Agreement;

(e) a Change in Law that imposes one or more changed or additional requirements that directly and materially adversely impact performance of the DB Work by Contractor and that could not have reasonably been anticipated by a reasonable contractor;

(f) the development and implementation of any Department Change or Department Project Enhancement (as defined in the Comprehensive Agreement);

(g) any Department-Caused Delay;

(h) [Reserved]

(i) an exercise by the Department under the Comprehensive Agreement of any of its Reserved Rights within or immediately adjacent to the HOT Lanes or the Design-Build Right of Way; or

(j) any other event that the Comprehensive Agreement expressly deems or treats as a CA Delay Event.
“CA Delay Event Notice” has the meaning set forth in Section 12.5.1.1 hereof.

“Change in Law” means (a) the enactment of any Law after the Agreement Date or (b) any change, amendment to, repeal or revocation of any Law or in the interpretation or application thereof by any Governmental Authority after the Agreement Date; excluding, however, any change in or new Law enacted but not yet effective as of the Agreement Date.

“Change Order Proposal” has the meaning set forth in Section 12.2 hereof.

“Chief Engineer” means the Department’s Chief Engineer.

“Chief of Administration” means the Department’s Chief of Administration.

“Claim” means any and all claims, disputes, disagreements, causes of action, demands, suits, proceedings, damages, injuries, liabilities, obligations, losses, costs and expenses.

“Claim Threshold” has the meaning set forth in Section 12.6.4.1(i) hereof.

“Commencement Date” has the meaning set forth in Section 2.3.1 hereof.

“Commercially Reasonable Efforts” means efforts which are reasonably within the contemplation of the Parties at the time of executing this Agreement and which do not require the performing Party to expend any funds other than expenditures which are customary and reasonable in transactions of the kind and nature contemplated by this Agreement in order for the performing Party to satisfy its obligations hereunder.

“Commissioning” means the systematic verification, as required in the Commissioning program established pursuant to Section 6.1 hereof, that each component or system of the DB Project in question is physically complete, checked, calibrated and safe for initial operation. To “commission the DB Work” or “commission the DB Project” means to provide Commissioning thereof.

“Comprehensive Agreement” means the Comprehensive Agreement Relating to the I-95 HOV/HOT Lanes Project, dated as of July 31, 2012, entered into by and between Concessionaire and the Department, and all exhibits and schedules thereto, as supplemented or amended from time to time.

“Concessionaire” means 95 Express Lanes LLC, a Delaware limited liability company, and its successors and permitted assigns as concessionaire hereunder.

“Concessionaire-Caused Delay” means a delay or failure by Concessionaire in the performance of its obligations under this Agreement, or any interference with the DB Work by a Concessionaire Contractor, or any agent or representative of any thereof (or anyone other than Contractor or any Subcontractor acting at the direction thereof), in each case that is not permitted under or excused by this Agreement or the other Contract Documents, and in each case only if the performance of the DB Work by Contractor is actually delayed as a result of such delay, failure or interference or if the cost to Contractor to perform the DB Work is increased as a result of such delay, failure or interference. Delays or failures by Concessionaire that are attributable
to the failure of Contractor (or any Subcontractor) to perform its obligations in accordance with this Agreement shall not constitute Concessionaire-Caused Delays. For the avoidance of doubt, no CA Compensation Event, CA Delay Event, or Department-Caused Delay shall be deemed to constitute a Concessionaire-Caused Delay.

“Concessionaire Contractors” means contractors of whatever tier engaged by Concessionaire or its designees at the Project Right of Way, including the OS&S Contractor.

“Concessionaire Default” means any of the events set forth in Section 15.3.1 hereof.

“Concessionaire Delay Damages Rate” means, (i) if Contractor notifies Concessionaire more than six (6) months prior to the Guaranteed Substantial Completion Date that it does not believe Substantial Completion will occur on or before the Guaranteed Substantial Completion Date, $98,644, (ii) if Contractor notifies Concessionaire more than three (3) months but fewer than six (6) months prior to the Guaranteed Substantial Completion Date that it does not believe Substantial Completion will occur on or before the Guaranteed Substantial Completion Date, $109,395, and (iii) if Contractor notifies Concessionaire fewer than three (3) months prior to the Guaranteed Substantial Completion Date that it does not believe Substantial Completion will occur on or before the Guaranteed Substantial Completion Date, $131,158.

“Concessionaire Indemnitee” means Contractor, its subsidiaries and Affiliates, and the directors, officers, agents, employees, successors or assigns of each of them.

“Concessionaire’s Approval” means the right of Concessionaire to review and approve the items set forth on Exhibit Q or another matter as expressly provided in this Agreement or the Technical Requirements (which approval by Concessionaire may be contingent upon its receipt of the Department’s approval to the extent required under the Comprehensive Agreement or as otherwise designated on Exhibit Q). Subject to Section 2.11, Contractor shall submit items of DB Work subject to Concessionaire’s Approval by the date specified in this Agreement, the Technical Requirements or in Exhibit Q (or if a date is not specified, when Contractor desires), and Concessionaire shall provide its written approval or disapproval thereof or otherwise respond within twenty-five (25) days of such submission, unless another time period is specified in Exhibit Q, the Technical Requirements or in this Agreement, but in no event shall Concessionaire’s Approval or denial be provided to Contractor after the earlier of (i) four (4) days after the Department issues a corresponding approval or denial to Concessionaire under the Comprehensive Agreement or (ii) twenty-one (21) days after the Department’s receipt of the submission by Concessionaire under the Comprehensive Agreement. If Concessionaire determines to deny its approval, it shall provide a summary in reasonable detail of the reasons for its determination. If Concessionaire does not respond within the time allotted, Concessionaire’s Approval shall be deemed to have been given unless otherwise provided in Exhibit Q, the Technical Requirements or in this Agreement with respect to the approval of such item. In the event of deemed disapproval, Concessionaire will provide, within fourteen (14) days after a request by Contractor therefor, its rationale for such deemed disapproval in reasonable detail. Except as otherwise specified in this Agreement, Exhibit Q or the Technical Requirements and subject to Section 2.11, if Concessionaire denies its approval, Contractor shall as promptly as reasonably possible resubmit items subject to Concessionaire’s Approval, and Concessionaire shall provide its written approval or denial thereof within fourteen (14) days of such re-
submission, unless another time period is specified in Exhibit Q, the Technical Requirements or in this Agreement, but in no event shall Concessionaire’s Approval or denial be provided to Contractor after the earlier of (i) four (4) days after the Department issues a corresponding approval or denial to Concessionaire under the Comprehensive Agreement or (ii) ten (10) days after the re-submittal by Concessionaire under the Comprehensive Agreement. Unless the Parties expressly agree otherwise in writing, Concessionaire’s Approval of any aspect of the DB Work (whether deemed or actual) shall not affect Contractor’s obligation to provide the complete DB Project in accordance with the requirements of this Agreement or any of Contractor’s other obligations hereunder, or change the scope of DB Work set forth in the Scope Document, or reduce, increase or waive Contractor’s obligations under this Agreement and its independent responsibility for performance of the DB Work hereunder or for any acts or omissions of the Contractor’s design professionals or other Subcontractors engaged by Contractor to perform the DB Work, or constitute a waiver of Concessionaire’s rights with respect thereto. Each Concessionaire’s Approval is given by Concessionaire in reliance upon, and subject to, full and satisfactory performance by Contractor of its obligations hereunder.

“Concessionaire’s Field Representative” has the meaning set forth in Section 5.1 hereof.

“Concessionaire’s Project Manager” has the meaning set forth in Section 5.1 hereof.

“Concessionaire’s Punch List” means an itemized list of DB Work prepared (and periodically revised) by Concessionaire, and submitted to Contractor, setting forth the items of DB Work which remain to be completed after Substantial Completion has been achieved and before Final Acceptance, the existence, correction and completion of which will have no material or adverse effect on the normal, uninterrupted and safe use and operation of the DB Project.

“Concessionaire’s Review” means the right of Concessionaire to review the items set forth on Exhibit Q or inspect an aspect of the DB Work or another matter specified in this Agreement (which review may include review or inspection by the Department to the extent required under the Comprehensive Agreement or otherwise designated on Exhibit Q). Contractor shall submit items of DB Work subject to Concessionaire’s Review to Concessionaire by the applicable date specified in this Agreement or in Exhibit Q (or if a date is not specified, when Contractor desires), and Concessionaire shall provide its comments thereon, if any, within twenty-five (25) days of such submission, unless another time period is specified in Exhibit Q or in this Agreement, but in no event shall Concessionaire’s response be provided to Contractor after the earlier of (i) four (4) days after the Department issues a corresponding response to Concessionaire under the Comprehensive Agreement or (ii) twenty-one (21) days after the Department’s receipt of the submission by Concessionaire under the Comprehensive Agreement. If Concessionaire fails to respond within the time allotted, Concessionaire’s Review shall be deemed to have been made, unless otherwise provided in Exhibit Q or this Agreement with respect to such item. Except as otherwise specified in this Agreement, Exhibit Q or the Technical Requirements and subject to Section 2.11, if Concessionaire’s response requires re-submittal, Contractor shall as promptly as reasonably possible resubmit items subject to Concessionaire’s Review, and Concessionaire shall provide its written response thereto within fourteen (14) days of such re-submission, unless another time period is specified in Exhibit Q, the Technical Requirements or in this Agreement, but in no event shall Concessionaire’s response be provided to Contractor after the earlier of (i) four (4) days after the Department
issues a corresponding response to Concessionaire under the Comprehensive Agreement or (ii) ten (10) days after the re-submittal by Concessionaire under the Comprehensive Agreement. Unless the Parties expressly agree otherwise in writing, Concessionaire’s Review of any aspect of the DB Work (whether deemed or actual) shall not affect Contractor’s obligation to provide the complete DB Project in accordance with the requirements of this Agreement or any of Contractor’s other obligations hereunder, or change the scope of DB Work set forth in the Scope Document, or reduce, increase or waive Contractor’s obligations under this Agreement and its independent responsibility for performance of the DB Work hereunder or for any acts or omissions of the Contractor’s design professionals or other Subcontractors engaged by Contractor to perform the DB Work, or constitute a waiver of Concessionaire’s rights with respect thereto.

“Construction Documentation” means all Design Documentation, AFC Documents, and all shop drawings, working drawings, fabrication plans, material and hardware descriptions, specifications, construction quality control reports, construction quality assurance reports and samples necessary for construction of the DB Project and/or the Utility Relocations included in the DB Work in accordance with the Agreement (including the Technical Requirements).

“Construction Manager” means a person employed by Contractor to supervise and coordinate the prosecution of the DB Work at the Project Right of Way on behalf of Contractor. The Construction Manager may or may not be the same individual as the Project Director.

“Construction Quality Management Plan” means the plan developed by Contractor that provides the organization, relationship and procedures that define clear lines of responsibility and well defined approach for meeting requirements for the DB Work and innovation in construction approach, as described in more detail in the Technical Requirements.

“Contract Documents” means, collectively, this Agreement, the Comprehensive Agreement, the Construction Documentation, all Scope Change Orders, the Operating Manual, the Quality Management System Plan, the Transportation Management Plan, the Performance Testing and Commissioning Plan and Program, the Health, Safety and Security Plan, the Public Information and Communications Plan, the ROW Acquisition and Relocation Plan, DBE/SWaM Plan, Design Quality Management Plan, Document Management Plan, Environmental Management Plan, Maintenance of Traffic Plan and any other plans required to be developed and/or complied with by Contractor hereunder.

“Contract Sum” has the meaning set forth in Section 4.1.1 hereof.

“Contract Sum Adjustment” has the meaning set forth in Section 12.6.2.1 hereof.

“Contractor” means Fluor-Lane 95, LLC, a Delaware limited liability company, and its permitted successors and assigns as contractor hereunder.

“Contractor Default” means any of the events set forth in Section 15.2.1 hereof.

“Contractor Overhead & Profit” means the fixed profit and fixed overhead due Contractor, all as set forth on Exhibit DD.
“Contractor Party” means Contractor and any Affiliate and any agents, Representatives, officers, directors, employees, Subcontractors, suppliers and materialmen of the Contractor or any Affiliate.

“Contractor’s Punch List” means an itemized list of DB Work prepared (and periodically revised) by Contractor, and submitted to Concessionaire, setting forth the items of DB Work which remain to be completed with respect to the DB Project after Substantial Completion has been achieved and before Final Acceptance, the existence, correction and completion of which will have no material or adverse effect on the normal, uninterrupted and safe use and operation of the DB Project.

“CPI” means the “Consumer Price Index – U.S. City Averages for all Urban Consumers, All Items” (not seasonally adjusted), or its successor, as published by the U.S. Department of Labor, Bureau of Labor Statistics, or its successor; provided, that if the CPI is changed so that the base year of the CPI changes, the CPI will be converted in accordance with the conversion factor published by the U.S. Department of Labor, Bureau of Labor Statistics, or its successor. If the CPI is discontinued or substantially altered, the applicable substitute index will be that chosen by the Secretary of the Treasury for the Department of Treasury’s Inflation-Linked Treasuries as described at 62 Fed. Reg. 846-847 (Jan. 6, 1997), or if no such securities are outstanding, will be determined by the Parties in accordance with general market practice at that time.

“Critical Path” means the longest chain(s), in terms of time, of logically connected activities on a Project Schedule ending with Final Acceptance.

“DBE Performance Improvement Plan” means the plan submitted by Contractor, as reviewed by Concessionaire pursuant to Section 24.16.1(iv)(b) hereof and approved by the Department pursuant to Section 24.03(a)(v)(B) of the Comprehensive Agreement, with respect to improving Contractor’s DBE program performance.

“DBE/SWaM” means Disadvantaged Business Enterprise/Small, Women- and Minority-owned Business Enterprise.

“DBE/SWaM Plan” means the plan developed by Contractor that defines Contractor’s approach to meet the DBE/SWaM participation goal, as described in more detail in the Technical Requirements.

“DB Indemnitee” means Concessionaire, the State Indemnitees, the Financing Parties, the Independent Engineer, each of their subsidiaries and Affiliates, and the directors, officers, agents, employees and successors of each of them.

“DB Project” means that part of the Project included in the DB Work but excludes such portion of the Project that is expressly excluded from the DB Work by the terms of this Agreement.

“DB Project Documentation” means Construction Documentation and Design Public Hearing Documentation.
“DB Work” has the meaning set forth in Section 2.1 hereof.

“DB Work Period” means the date commencing on the Commencement Date (or if an LNTP is issued, the date on which Contractor is to commence performance hereunder pursuant to an LNTP) and ending on the date Final Acceptance occurs under this Agreement.

“Demobilization Costs” means the amount necessary to reimburse the reasonable out-of-pocket costs and expenses incurred by Contractor as result of the occurrence of a Significant Force Majeure Event, including its reasonable costs to demobilize and terminate Subcontracts between Contractor and third parties or Affiliates for performance of DB Work, excluding Contractor’s non-contractual liabilities and indemnity liabilities (contractual or non-contractual) to third parties or Affiliates.

“Department” means the Virginia Department of Transportation, an agency of the State, and any other state agency succeeding to the powers, authorities and responsibilities of the Department invoked by or pursuant to the Comprehensive Agreement.

“Department-Caused Delay” means:

(a) a delay or failure by the Department in performing any of its material obligations pursuant to the Comprehensive Agreement; or

(b) performance of work by the Department or its contractors (other than Concessionaire, Concessionaire Contractors and Contractor) within or immediately adjacent to the HOT Lanes or the Design-Build Right of Way that causes physical damage to the HOT Lanes or the DB Work or limits access to the Design-Build Right of Way and such physical damage or limited access delays the DB Work;

provided, however, that a Department-Caused Delay specifically excludes a delay attributable to:

(1) the submission of incomplete documentation by Contractor (directly or through Concessionaire) for the Department’s review under the Comprehensive Agreement;

(2) required review of Governmental Approvals from other Governmental Authorities necessary or appropriate to the Department’s review;

(3) failure by the Department to obtain appropriation and allocation of public funds;

(4) consumption of available Float;

(5) submittals or requests that are “deemed approved” under the Comprehensive Agreement if no response is provided within the applicable timeframe; or

(6) Force Majeure Events.

“Department Change” means (a) a change to the DB Work pursuant to a “Change Order” (as defined in the Comprehensive Agreement) or a Directive Letter issued pursuant to Section
14.02(d)(i) of the Comprehensive Agreement and (b) any other event that the Comprehensive Agreement expressly states will be treated as a Department Change.

“Department Change Proposal” has the meaning set forth in Section 12.3.1.2 hereof.

“Department Existing ROW” means that portion of the Project Right of Way owned by the Department on the Agreement Date.

“Department Request for Change Proposal” has the meaning set forth in Section 12.3.1.1 hereof.

“Department TIFIA Protection Amount” means a supplemental Public Funds Amount for the Project equal to $224,250,000 to be made, or caused to be made, by the Department pursuant to the Comprehensive Agreement, subject to adjustment or cancellation pursuant to Section 7.07 of the Comprehensive Agreement.

“Design-Build Right of Way” means active construction areas on the Project Right of Way during the DB Work Period.

“Design Documentation” means such plans, drawings, specifications and other design documentation (including design standards, design or durability reports, models, samples and calculations) in computer readable and written formats prepared by or on behalf of Contractor for the purposes of the performance of the DB Work or any component thereof in accordance with this Agreement (including the Technical Requirements).

“Design Public Hearing Documentation” means documents prepared by Contractor pursuant to Section 2.1.2.2 for a required public hearing relative to the design of the DB Project and approved by the Department’s Chief Engineer following such hearing.

“Design Quality Management Plan” means the plan developed by Contractor that provides the organization, relationship and procedures that define clear lines of responsibility and well defined approach for meeting DB Project requirements and innovation in design approach, as described in more detail in the Technical Requirements.

“Differing Site Conditions” means any:

(a) threatened or endangered species whose habitat is protected by Law on the Project Right of Way;

(b) archaeological, paleontological or cultural resources on the Project Right of Way;

(c) Unknown Pre-Existing Hazardous Substances;

(d) Hazardous Substances spilled or otherwise placed on the Project Right of Way subsequent to the Agreement Date other than by a Contractor Party in the course of performing the DB Work; or
Utilities in the Project Right of Way, excluding any such Utilities known to Contractor on the Agreement Date;

provided, however, that to qualify as a Differing Site Condition, such condition:

(1) was not known or discovered by Contractor prior to the Agreement Date, and could not reasonably be expected to have been known or discovered by Contractor prior to the Agreement Date; and

(2) has a material impact on Contractor’s performance of the DB Work pursuant to the terms of the Agreement.

“Direct Agreement” has the meaning set forth in Section 16.1 hereof.

“Directive Letter” means an order issued by the Department in accordance with Section 14.02 of the Comprehensive Agreement directing Concessionaire to perform Work.

“Document Management Plan” means the plan developed by Contractor to define the document management approach for all Work Product, as described in more detail in the Technical Requirements.

“Early Work” means the work identified in Exhibit U.

“Environmental Assessment” means the Revised Environmental Assessment submitted by the Department to FHWA on November 7, 2011, and consisting of (i) the Environmental Assessment prepared by the Department and dated September 8, 2011, (ii) the summary of comments that the Department received to the September 8, 2011, Environmental Assessment along with the Department’s responses to those comments, (iii) the summary of changes to the Project and mitigation measures that were based on the comments, and (iv) a summary of findings, agreements, and determinations that the Department made for the Project.

“Environmental Management Plan” means the plan developed by Contractor that sets forth the Contractor’s approach to environmental management, as described in more detail in the Technical Requirements.

“Escrow Agent” means SunTrust Bank, and its successors and assigns, or such other entity serving as escrow agent pursuant to the Escrow Agreement.

“Escrow Agreement” means the Escrow Agreement, dated as of July 31, 2012, among Concessionaire, the Department and the Escrow Agent which will be in substantially the form attached as Exhibit D to the Comprehensive Agreement, as it may be amended or supplemented from time to time.

“ETTM” means electronic toll and traffic management.

“ETTM Equipment” means the automatic vehicle identification equipment, video monitoring equipment, vehicle occupancy detection equipment, toll violator systems, and electronic toll collection equipment, including its components, systems and subsystems; the
transportation management system equipment; communications equipment, and all associated hardware and physical infrastructure and other computer hardware and software necessary to meet the performance specifications for ETTM.

“ETTM Facilities” means the administration/operations building, toll gantries and technical cabinets, utility connections, lighting facilities and other facilities associated with electronic toll and traffic management.

“ETTM System” means the ETTM Facilities, the ETTM Equipment and the Software which monitors, controls or executes operation of the ETTM Equipment, all of which will meet the minimum performance criteria established by the Technical Requirements.

“eVA Business to Government Vendor System” has the meaning as such term is used in the Comprehensive Agreement.

“E-ZPass” means an electronic toll collection system used in the Commonwealth of Virginia and as part of the “E-ZPass Interagency Group.”

“Federal Requirements” means the provisions required to be part of federal-aid contracts relating to highway projects and applicable to the Project, including the provisions set forth in Exhibit V.

“FHWA” means the Federal Highway Administration or any successor agency.

“Final Acceptance” means the satisfaction by Contractor of the requirements set forth in Section 6.7.1 hereof.

“Final Acceptance Certificate” means, a certificate of Contractor in the form of Exhibit X, delivered to Concessionaire certifying that Final Acceptance of the entire DB Project has occurred.

“Final As-Built Drawings and Documentation” means all drawings, specifications and other documentation, as further described in Section 17.2 hereof, prepared in accordance with the standard of performance described in Section 2.4 hereof, which accurately and completely represent in detail the physical placement of all DB Project components and systems as installed and/or constructed and as they exist at the time of Final Acceptance.

“Final Payment” has the meaning set forth in Section 4.3 hereof.

“Financial Close” has the meaning set forth in the Comprehensive Agreement.

“Financial Close Date” means the date on which Financial Close occurs under the Comprehensive Agreement.

“Financial Close Deadline” means the date by which Financial Close must occur, which is the first to occur of (a) 270 days following the date on which Concessionaire has submitted an application to USDOT to obtain financing under any credit assistance program under TIFIA for the Project, or (b) 270 days following the date on which USDOT provides written notice to
Concessionaire that the Project will not receive financing under any credit assistance program under TIFIA for the Project.

“Financing Parties” means (i) any and all lenders providing the construction, interim or long-term financing (including a leveraged lease or any other refinancing thereof) for the Project, and any trustee or agent acting on their behalf, and (ii) any and all equity investors providing leveraged lease financing or refinancing for the Project, and any trustee or agent acting on their behalf.

“Float” means the amount of time that any given activity or logically connected sequence of activities shown on a Project Schedule may be delayed before it will affect Contractor’s ability to achieve Substantial Completion by the Guaranteed Substantial Completion Date. Such Float is generally identified as the difference between the early completion date and late completion date for all activities as shown on a Project Schedule.

“FM Termination Payment” has the meaning set forth in Section 15.4 hereof.

“FONSI” means the Finding of No Significant Impact related to the Project issued by the FHWA on December 5, 2011.

“Force Majeure Event” means the occurrence of an event, act, omission, condition, or circumstance beyond either Parties’ reasonable control and due to no fault of either Party, or those for whom either Party is responsible, that materially prevents or delays Contractor from performing any of its obligations pursuant to this Agreement. An event is not a Force Majeure Event if such event is otherwise specifically dealt with in the Agreement or arises by reason of:

(a) the negligence or misconduct of a Contractor Party;

(b) any act or omission by a Contractor Party in breach of the provisions of this Agreement;

(c) CA Delay Events, other than Force Majeure Events;

(d) lack or insufficiency of funds or failure to make payment of monies or provide required security on the part of a Contractor Party;

(e) any strike, labor dispute or labor protest directed solely at a Contractor Party or caused by or attributable to any act (including any pricing or other practice or method of operation) or omission of a Contractor Party;

(f) an earthquake after Substantial Completion that causes ground accelerations below the AASHTO bridge design standards for the site of the DB Project;

(g) floods after Substantial Completion below the base flood levels specified in the Technical Requirements;

(h) market conditions and economic conditions affecting the availability, supply, or cost of labor, equipment and materials, construction equipment and supplies, or commodities;
(i) market conditions and economic conditions affecting Contractor’s ability to meet its financial obligations for the DB Project; or

(j) weather conditions, other than hurricane force winds, tornadoes and floods to the extent not excluded by the above.

“General Warranty” has the meaning set forth in Section 10.1.1 hereof.

“Geotechnical Conditions” means any geotechnical, subsurface or latent physical conditions within the Project Right of Way (including natural foundations, infrastructures or manmade obstructions within the Project Right of Way).

“Good Faith Efforts” means the adequate demonstrated effort required by Contractor to achieve the DBE and SWaM goals or other requirements in Section 24.16, as set forth in Exhibit I.

“Good Industry Practice” means the industry practices and standards that would be exercised by a prudent and experienced designer, engineer or contractor, engaged in the same kinds of undertakings and under similar circumstances as those applying to the DB Work.

“Governmental Approvals” means all local, regional, state and federal agreements, studies, findings, permits, approvals, authorizations, certifications, consents, decisions, exemptions, filings, leases, licenses, registrations, rulings and other governmental authorizations required to be obtained or completed under Law prior to undertaking any particular DB Work activity contemplated by this Agreement or a Scope Change Order. The term “Governmental Approvals” includes the NEPA Documents.

“Governmental Authority” means any court, federal, state or local government, department, commission, board, bureau, agency or other regulatory or governmental authority, but it does not include the Department.

“GP Lanes” means the general purpose traffic lanes (in either or both directions) along the I-95 Corridor.

“Gross Negligence” means any act or omission of a Person where (i) such Person knows, or has reason to know, that its conduct may create an unreasonable risk of harm to another Person, and (ii) its conduct evidences a reckless disregard of the probable consequences of its actions or omissions, but which falls short of being so reckless as to be equivalent to a willful and intentional wrongdoing.

“Guaranteed Final Acceptance Date” has the meaning set forth in Section 6.7.3 hereof.

“Guaranteed Substantial Completion Date” means the date on which Substantial Completion shall occur, which date shall be no later than twenty-nine (29) calendar months after the Commencement Date, as the same may be adjusted from time to time pursuant to the terms of this Agreement.
“Guarantor” means Fluor Corporation, a Delaware corporation.

“Guaranty” has the meaning set forth in Section 4.8 hereof.

“Hazardous Environmental Condition” means the presence of any Hazardous Substances on, in, under or emanating from the Project Right of Way that is present at concentrations or in quantities that: (a) may present an imminent or substantial safety or health hazard for Contractor, Concessionaire, the Department or their respective employees, agents, representatives or independent contractors, the general public or the surrounding environment or (b) are required to be removed or remediated as a matter of Law or in accordance with the requirements of any Governmental Authority.

“Hazardous Substances” means, but is not limited to, any solid, liquid, gas, odor, heat, sound, vibration, radiation or other substance or emission which is or could be considered a contaminant, pollutant, dangerous substance, toxic substance, Hazardous Waste, solid waste, hazardous material or hazardous substance which is or becomes regulated by Laws or which is classified as hazardous or toxic under Laws.

“Hazardous Waste” means a waste that is (a) listed as a hazardous waste in 40 CFR Section 261.31 to 261.33, and (b) exhibits one of the following characteristics: ignitability, corrosivity, reactivity or toxicity, or is otherwise defined as a hazardous waste by Law.

“Health, Safety and Security Plan” means the plan developed by Contractor that defines the health, safety and security activities required during the design and construction of the DB Project, as described in more detail in the Technical Requirements.

“HOT Lanes” means the high occupancy toll lanes and the associated entry and exit ramps within the Project Right of Way that are separated from the adjacent GP Lanes, and the use of which is restricted pursuant to Section 5.01 of the Comprehensive Agreement.

“HOV Assets” has the meaning set forth in Section 6.9.2 hereof.

“HOV Lanes” means the two reversible high occupancy vehicle lanes and the associated entry and exit ramps within the Project Right of Way that are separated from the adjacent GP Lanes, and in operations as of the Agreement Date.

“Indemnifying Party” has the meaning set forth in Section 13.3.1 hereof.

“Indemnitee” means any of the DB Indemnitees or the Concessionaire Indemnitees.

“Independent Engineer” means the engineering company or companies (retained by Concessionaire) appointed from time to time by the Financing Parties to act on their behalf in connection with the review of the Project, including the DB Work.

“Initial Public Funds Amount” means $94 million, which will be adjusted at Financial Close pursuant to Section 7.03(b) of the Comprehensive Agreement.
'"Intellectual Property" means the ETTM books and records, escrow documents, copyrights (including moral rights), trade marks (registered and unregistered), designs (registered, including applications, and unregistered), patents (including applications), circuit layouts, Source Code and Source Code Documentation, plant varieties, business and domain names, inventions, trade secrets, proposals, copyrightable works, customer and supplier lists and information, and other results of intellectual activity, copies and tangible embodiments of all of the foregoing (in whatever form or medium) and licenses granting any rights with respect to any of the foregoing (to the extent assignable), in each case, relating to the DB Project.

"Interim Agreement" means the Interim Agreement to Develop and/or Operate the I-95/395 HOT Lanes Project in Virginia, dated as of October 24, 2006, by and among the Department, Fluor Enterprises, Inc. (the successor-in-interest to Fluor Virginia, Inc.) and Transurban (USA) Inc., as amended.

"ITS" means intelligent transportation system.

"I-95 Corridor" means the portion of Interstate 95 located within the State with a northern terminus approximately one mile north of Route 648 (Edsall Road) and a southern terminus at the ramp for the Route 610 interchange (Garrisonville Road) on Interstate 95 in Stafford County.

"JAMS" means JAMS, The Resolution Experts, a private alternative dispute resolution provider.

"Known Geotechnical Conditions" means Geotechnical Conditions:

(a) identified in Exhibit T;

(b) which Contractor should have known were present within the Project Right of Way based on the Geotechnical Conditions identified in Exhibit T; and

(c) which were actually known by Contractor to be present within the Project Right of Way as of the Agreement Date.

"Known Pre-Existing Hazardous Substances" means Hazardous Substances:

(a) identified in Exhibit K;

(b) which Contractor should have known were present within the Project Right of Way based on the contents of Exhibit K, as of the Agreement Date; and

(c) which were actually known by Contractor to be present within the Project Right of Way as of the Agreement Date;

provided, however, that, notwithstanding anything to the contrary herein (including Exhibit K), any Hazardous Substances resulting from the gasoline spill on February 26, 1995 at the northbound on-ramp to I-95 at Backlick Road in Newington, Exit 166 and any Hazardous Substances consisting of asbestos on the existing bridges within the I-95 Corridor (other than
asbestos contained in insulation in steel pipes on such existing bridges) shall not be considered to be Known Pre-Existing Hazardous Substances for the purposes of this Agreement.

“Lane Closure Payment” has the meaning set forth in Section 7.5 hereof.

“Late Completion Payments” has the meaning set forth in Section 7.2 hereof.

“Late Final Acceptance Payment” has the meaning set forth in Section 7.2 hereof.

“Late Substantial Completion Payment” has the meaning set forth in Section 7.2 hereof.

“Law” means all laws, treaties, ordinances, judgments, Federal Requirements, decrees, injunctions, writs and orders of any Governmental Authority, and all rules, regulations, orders, formal interpretations and permits of any Governmental Authority having jurisdiction over construction of the DB Project on the Project Right of Way, performance of the DB Work, or operation of the DB Project, or the health, safety or environmental condition of the DB Project or the Project Right of Way, as the same may be in effect from time to time. Laws include VA. Code and the Uniform Act.

“Law Enforcement Allowance” has the meaning set forth in Section 4.1.4 hereof.

“Letter of Credit” means an irrevocable, unconditional letter of credit in favor of Concessionaire (with the Department as permitted transferee), in form and content reasonably acceptable to Concessionaire, the Department and the Financing Parties that:

(a) is payable within one (1) Business Day in U.S. dollars upon presentation of a sight draft and a certificate confirming that Concessionaire has the right to draw under such letter of credit from time to time in the amount of such sight draft and confirming such other matters that may be required under the Letter of Credit, without presentation of any other document, statement or authorization;

(b) is issued by a commercial bank or trust company that (i) has a combined capital and surplus of at least $1,000,000,000 U.S. Dollars, (ii) is a national banking association, a state bank chartered in one of the states of the United States, or the U.S. branch of a foreign bank, and (iii) is not an Affiliate of Contractor or Concessionaire;

(c) is issued by a commercial bank or trust company that has a current credit rating of at least A- or its equivalent from at least two nationally recognized Rating Agencies (or such other credit rating as is acceptable to Concessionaire and the Department in their respective discretions and approved by each of them prior to the submission of the letter of credit);

(d) has an initial term as specified in this Agreement;

(e) provides for the continuance or extension of its term for a period of at least one year, or if earlier, until the end of the term for which the Letter of Credit is required or as otherwise provided for in this Agreement; and
(f) provides that the office for presentment of sight drafts specified in the Letter of Credit will be located at a specified street address in the City of New York, New York.

“LNTP” has the meaning set forth in Section 2.3.2 hereof.

“Long Stop Date” means the date that is 365 days after the Guaranteed Substantial Completion Date, as such date may be extended hereunder; provided that a new Long Stop Date may be established pursuant to the Substantial Completion Recovery Plan proposed by Contractor and approved by (i) Concessionaire pursuant to Section 6.6.5 hereof and (ii) the Department pursuant to Section 8.15 of the Comprehensive Agreement.

“Losses” means, with respect to any Person, any losses, liabilities, judgments, damages, fees, penalties, fines, sanctions, charges or out-of-pocket and documented costs or expenses actually suffered or incurred by such Person, including as a result of any injury to or death of persons or damage to or loss of property.

“Maintenance of Traffic Plan” means the plan developed by Contractor that sets forth Contractor’s approach to maintenance of traffic as it relates to the DB Project, as described in more detail in the Technical Requirements.

“Maximum Cumulative Contract Sum Payment” means a cap, designated on the Maximum Cumulative Drawdown Schedule, on the aggregate amount of payments of the Contract Sum that can be made to Contractor hereunder as of any month during the DB Work Period, as it may be modified from time to time pursuant to terms hereof.

“Maximum Cumulative Drawdown Schedule” means the schedule attached hereto as Exhibit J setting forth the Maximum Cumulative Contract Sum Payment stated as of any month during the DB Work Period.

“Monthly Progress Report” means a progress report containing the following information: (a) a narrative description of Contractor’s and all Subcontractors’ activities and design, engineering, procurement and construction progress as compared with the Project Schedule (including an updated Project Schedule), (b) the information required in Section 2.1.1.2 hereof, (c) a detailed description of the DB Work which has been completed, including digital photographs showing the progress of the DB Work and a comparison of actual and planned progress, (d) the current status of the DB Project and any deviations from scheduled performance, (e) quality management reporting, (f) safety activities and environmental compliance activities, (g) all other information required by Section 1.4.3(B) and (C) of the Technical Requirements and (h) all other information reasonably requested by Concessionaire or the Department relating to the DB Work.

“NEPA Documents” means the Environmental Assessment and the FONSI.

“Non-Permitted Closure” has the meaning set forth in Section 7.5 hereof.

“Notice of Final Acceptance” has the meaning set forth in Section 6.7.2 hereof.

“Notice of Substantial Completion” has the meaning set forth in Section 6.6.2 hereof.
“Notice to Proceed” has the meaning set forth in Section 2.3.1 hereof.

“Open Book Basis” means allowing the Department and/or Concessionaire to review all underlying assumptions and data associated with each net revenue impact, net cost saving, pricing or compensation or adjustments thereto relating to the DB Work, including assumptions as to costs of the DB Work, schedule, composition of equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, inflation and deflation rates, and other items reasonably required by the Department or Concessionaire to satisfy itself as to the reasonableness and accuracy of the amount.

“Operating Manual” has the meaning set forth in Section 2.1.28 hereof.

“OS&S Contractor” means Concessionaire or its designee(s) who will operate the Project.

“Party” or “Parties” means, respectively, a party or both parties to this Agreement.

“Payment and Values Schedule” means the schedule of values of various items of DB Work based upon which Scheduled Payments of the Contract Sum will be made by Concessionaire as set forth in Exhibit L hereto, as the same may be adjusted pursuant to this Agreement.

“Performance Guarantees” has the meaning set forth in Section 8.1 hereof.

“Performance Test” means the operation of the equipment and applicable systems included in the DB Work necessary for operation of the HOT Lanes by Contractor in accordance with the Performance Testing and Commissioning Plan and Program and the provisions of Sections 6.4 and 6.5 hereof for the purposes of determining the DB Project’s level of achievement of the Performance Guarantees and other conditions to Substantial Completion set forth in Section 6.6, and Final Acceptance set forth in Section 6.7 hereof.

“Performance Testing and Commissioning Plan and Program” means plan and program, developed by Contractor and approved by Concessionaire and the Independent Engineer, for the conduct of Performance Tests; such plan shall also specify when start-up personnel needs to be dispatched for Commissioning and inspection of the DB Work.

“Person” means any individual, corporation, partnership, association, joint stock company, trust, unincorporated organization, joint venture, government or political subdivision or agency thereof.

“Pre-Existing Hazardous Substances” means Known Pre-Existing Hazardous Substances and Unknown Pre-Existing Hazardous Substances.

“Project” means the development, design, financing, construction, operation, maintenance and tolling of the Project Assets, all as more particularly described in the Technical Requirements and in Exhibit N, and includes the DB Project.
“Project Assets” means the HOT Lanes and other assets constructed, maintained or held by Concessionaire pursuant to the Comprehensive Agreement (or any applicable portion of such assets).

“Project Director” means a person employed by Contractor to administer and act under this Agreement on behalf of Contractor.

“Project Enhancement Account” means a concession payment account created by the Department in accordance with VA. Code, Section 33.1-23.03:9(A), into which certain funds shall be deposited as required by the Comprehensive Agreement.

“Project Right of Way” means any real property within the I-95 Corridor (which term is inclusive of all estates and interests in real property, including easements), which is:

(a) necessary for performance of the Work, including temporary and permanent easements, and ownership and operation of the Project;

(b) shown on the approved ROW Acquisition and Relocation Plan; and

(c) within the lines established by the NEPA Documents, as such limits may be adjusted pursuant to the Comprehensive Agreement.

“Project ROW Acquisition Work” means the DB Work associated with acquisition of the Project Right of Way as set forth in the ROW Acquisition and Relocation Plan.

“Project Schedule” means the construction and design schedule prepared by Contractor under the provisions of Section 2.1.1 hereof, which is to be consistent with the initial Project Schedule set forth as Exhibit M hereto, as adjusted pursuant to this Agreement. The Project Schedule is intended to be identical to the “Baseline Schedule” under the Comprehensive Agreement, as the same is modified from time to time pursuant to the Comprehensive Agreement.

“Proposal Request” has the meaning set forth in Section 12.2 hereof.

“Proprietary Intellectual Property” means any Intellectual Property that is patented or copyrighted by Concessionaire, Contractor or any of its Subcontractors, or, if not patented or copyrighted, is created, held and managed as a trade secret or confidential, proprietary information by Concessionaire, Contractor or any of its Subcontractors, but excludes any item of Intellectual Property that is produced for multiple purposes and is not unique to the technology that is being applied to or for the DB Project.

“Public Funds Amount” means the Initial Public Funds Amount and the Department TIFIA Protection Amount.

“Public Information and Communications Plan” means the plan developed by Contractor setting forth Contractor’s approach to communicating with road users and other stakeholders affected by the development and construction of the DB Project, as described in more detail in the Technical Requirements.
“Quality Management System Plan” means the plan developed by Contractor that defines the quality management systems during the design and construction phases of the DB Project, as described in more detail in the Technical Requirements.

“Quality Manager” means a person employed by Contractor who is responsible for overseeing quality assurance and quality control of the DB Work and for ensuring that the DB Work conformance with the requirements of this Agreement and the other Contract Documents.

“Railroad Easement” has the meaning set forth in Section 2.1.6.6 hereof.

“Rating Agencies” means any nationally recognized statistical rating organization, such as Moody’s Investor Service, Inc., Fitch Ratings, or Standard & Poor’s Rating Service, a division of The McGraw-Hill Companies, Inc., or any similar entity, or any of their respective successors.

“Real Estate Rights” means all rights, title and interests in or to real estate, leases, contracts, permits, easements, licenses, private rights of way, and Utility and railroad crossing rights that are needed for performance of the DB Work other than the Project Right of Way itself, including ingress and egress, storage and laydown areas, drainage and construction staging areas.

“Remedial Action Plan” means the plan developed by Contractor with respect to Hazardous Substances encountered by Contractor within the Project Right of Way, as described in more detail in the Technical Requirements.

“Remedial Actions” has the meaning set forth in Section 2.1.17.3 hereof.

“Representative” means, with respect to any Person, any director, officer, employee, official, lender (or any agent or trustee acting on its behalf), partner, member, owner, agent, lawyer, accountant, auditor, professional advisor, consultant, engineer, contractor, other Person for whom such Person is, under Law, responsible or other representative of such Person and any professional advisor, consultant or engineer designated by such Person as its “Representative.”

“Reserved Rights” means the Department’s right and opportunity under the Comprehensive Agreement 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 the Comprehensive Agreement and the collection, use and enjoyment of Toll Revenues as provided in the Comprehensive Agreement. The Reserved Rights reserved to the Department under the Comprehensive Agreement include but are not limited to all the following:

(a) all rights to finance, design, construct, use, possess, operate and maintain any passenger or freight rail facility, roads and highways (State and local) or other mode of transportation in the airspace, including tunnels, flyovers, frontage roads, crossings, interchanges and fixed guide-ways, and to grant to others such rights;

(b) all rights to install, use, lease, grant indefeasible rights of use, sell and derive revenues from electrical and fiber optic conduit, cable, capacity, towers, antennas and associated equipment or other telecommunications equipment, hardware and capacity, existing over, on,
under or adjacent to any portion of the Project Right of Way installed by anyone, whether before or after the Agreement Date, and all software which executes such equipment and hardware and related documentation, except for the capacity of any such improvement installed by the Concessionaire that is necessary for and devoted exclusively to the operation of the Project;

(c) all rights to use, sell and derive revenues from ETTM data and other data generated from operation of the Project or any ETTM System, except use of such data as required solely for operation of the Project and enforcement and collection of tolls and incidental charges;

(d) all ownership, possession and control of, and all rights to develop, use, operate, lease, sell and derive revenues from, the airspace, including development and operation of service areas, rest areas and any other office, retail, commercial, industrial, residential, retail or mixed use real estate project within the airspace;

(e) all rights to install, use and derive information, services, capabilities and revenues from ITS, except installation and use of any such systems and applications by Concessionaire under the Comprehensive Agreement required solely for operation of the Project. For avoidance of doubt, if Concessionaire installs any such systems or applications, all use and capacity thereof not necessary for operation of the Project is reserved to, and will be the sole property of, the Department;

(f) all rights to use, install, maintain, repair, or authorize the use, installation, maintenance or repair, of Utilities;

(g) 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, or that may be confused with those of the Department or the Project;

(h) all rights and opportunities to grant to others sponsorship and advertising rights with respect to the Project or any portion thereof, except for a non-exclusive license for Concessionaire to use the name in connection with Project operations;

(i) all rights to revenues and profits derived from the right or ability of electronic toll account customers to use their accounts or transponders to purchase services or goods other than payment of tolls;

(j) any other commercial or noncommercial development or use of the airspace or electronic toll collection technology for other than operation of the Project; and

(k) 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 resulting from the development, use, operation or maintenance of the Project.

“Response” has the meaning set forth in Section 2.11.1 hereof.
“ROW Acquisition and Relocation Plan” means the plan developed by Contractor that defines the approach to acquisition of the Project Right of Way, and to the extent permitted by Section 2.1.6, any Real Estate Rights as set forth in Section 2.1.6, as described in more detail in the Technical Requirements.

“ROW Allowance” means the monetary allowance established in the amount of $275,000 to pay ROW Costs.

“ROW Costs” means the actual amount paid or payable to a property owner for the acquisition of Project Right of Way and the Real Estate Rights as set forth in Section 2.1.6, which includes any relocation, settlement, or damage costs. For the avoidance of doubt, ROW Costs do not include any acquisition activities and/or property management services required for the acquisition of Project Right of Way and the Real Estate Rights as set forth in Section 2.1.6.

“Rules Governing Prequalification Privileges” has the meaning as such term is used in the Comprehensive Agreement.

“Scheduled Payments” has the meaning set forth in Section 4.2 hereof.

“Scope Change” has the meaning set forth in Section 12.1 hereof.

“Scope Change Order” means a written order to Contractor, in the form of Exhibit G hereto, issued and signed by Concessionaire in accordance with the provisions of Article 12 hereof after the execution and delivery of this Agreement, authorizing a Scope Change and, if appropriate pursuant to the terms hereof, an adjustment in one or more of the Scope Document, the Contract Sum, the Project Schedule, the Guaranteed Substantial Completion Date, the Guaranteed Final Acceptance Date, the Long Stop Date, the Payment and Values Schedule, the Maximum Cumulative Drawdown Schedule, or any other amendment of the terms and conditions of the Contract Documents.

“Scope Document” means the general description of the DB Work to be performed by Contractor as set forth in Exhibit P hereto.

“Segment” has the meaning as such term is used in the Comprehensive Agreement.

“Service Commencement” means the opening of the Project for normal and continuous operations and use by the travelling public, after occurrence of all the events and satisfaction of all the conditions therefor set forth in Section 9.01(a) of the Comprehensive Agreement.

“Service Commencement Date” means the date on which Service Commencement is achieved under the Comprehensive Agreement.

“Significant Force Majeure Event” has the meaning set forth in the Comprehensive Agreement.

“Software” means (a) computer instructions, including programs, routines and databases and applications supplied, procured or developed by Concessionaire, its contractors, or the Department, as applicable, in connection with the operation of the Project or in connection with
Reserved Rights, including but not limited to that which monitors, controls or executes on ETTM Equipment or ITS equipment or hardware, and (b) all modifications, updates and revisions made to the matter described in clause (a) above, including those made to correct errors or to support new models of computer equipment and/or new releases of operating systems.

“Source Code and Source Code Documentation” mean Software written in programming languages, such as C and Fortran, including all comments and procedural code, such as job control language statements, in a form intelligible to trained programmers and capable of being translated into object or machine readable code for operation on computer equipment through assembly or compiling, and accompanied by documentation, including flow charts, schematics, statements of principles of operations, architectural standards, and commentary, explanations and instructions for compiling, describing the data flows, data structures, and control logic of the software in sufficient detail to enable a trained programmer through study of such documentation to maintain and/or modify the Software without undue experimentation. Source Code and Source Code Documentation also include all modifications, additions, substitutions, updates, upgrades and corrections made to the foregoing items prior to Final Acceptance.

“Source Code Escrows” has the meaning set forth in Section 24.12.2.

“Standard of Care” means the performance of the DB Work in accordance with prudent industry practices, methods, techniques and standards, and using the degree of care, skill and diligence, that would be expected to be exercised by a prudent, skilled and experienced contractor engaged in the same types of undertakings as the DB Project under the same or similar circumstances and conditions as those applying to the design, development and construction of the DB Project, all Laws (including, without limitation, the State’s right to work Laws, and to the extent applicable, with all Federal Requirements and Laws applicable to a transportation project that has received or receives federal-aid funds), all Governmental Approvals, all Applicable Standards, Good Industry Practice, the requirements of the Comprehensive Agreement (including the Technical Requirements) with which Concessionaire must comply in the performance of the DB Work under the Comprehensive Agreement, the requirements of insurance policies required to be maintained in accordance with this Agreement so as not to knowingly void or omit to take any action that would void any such policy or limit the coverage of any such policy in a way that materially and adversely affects Concessionaire or the Department, and the other requirements specified or referred to herein or in other Contract Documents.

“State” means the Commonwealth of Virginia.

“State Highway” means any highway designated a State Highway pursuant to Title 33.1, Chapter 1, Sections 25, 48 and 67, Code of Virginia.

“State Indemnitees” means the State, the Commonwealth Transportation Board, the Department or any other agency, instrumentality or political subdivision of the State and their respective Representatives.

“Subcontract” means a contract between Contractor and a Subcontractor for the performance or supply of a portion of the DB Work by such Subcontractor.
“Subcontractor” means a vendor, supplier, materialman, consultant or subcontractor of any tier providing equipment, materials or services directly or indirectly to Contractor in connection with the DB Work.

“Substantial Completion” means the satisfaction by Contractor of the requirements set forth in Section 6.6 so that only minor deficiencies which do not affect safety or Toll Revenue earnings remain such that Concessionaire can operate and collect tolls with respect to the HOT Lanes, all as evidenced by Concessionaire’s delivery to Contractor of the fully countersigned Substantial Completion Certificate pursuant to Section 6.6.3 hereof.

“Substantial Completion Certificate” means a certificate of Contractor in the form of Exhibit W delivered to Concessionaire certifying that Substantial Completion of the entire DB Project has occurred.

“Substantial Completion Recovery Plan” has the meaning set forth in Section 6.6.5 hereof.

“SWaM Performance Improvement Plan” means the plan submitted by Contractor to Concessionaire pursuant to Section 24.16.2(iv)(b) hereof and approved by the Department pursuant to Section 24.03(b)(v)(B) of the Comprehensive Agreement, with respect to improving Contractor’s SWaM program performance.

“Taxes” has the meaning set forth in Section 2.1.19 hereof.

“Technical Requirements” means the Technical Requirements attached as Exhibit Z hereto, as the same may be revised by any Technical Requirements Revisions pursuant to 14.02(f) of the Comprehensive Agreement and Section 12.3.2 hereof.

“Technical Requirements Deviations” has the meaning set forth in Section 12.4 hereof.

“Technical Requirements Revisions” has the meaning set forth in Section 12.3.2 hereof.

“Termination For Cause” has the meaning set forth in Section 15.2.2 hereof.

“Termination Payment” has the meaning set forth in Section 4.4 hereof.

“Third Party Claims” means any Claim asserted against an Indemnitee by any Person who is not a party to this Agreement or an Affiliate of such party.

“Third Party Hazardous Substances” means any Hazardous Substances introduced or brought onto the Project Right of Way prior to Substantial Completion by a Person other than a Contractor Party.

“TIA” or “Time Impact Analysis” means a time impact analysis, (a) establishing the influence of an event on the Project Schedule, and will include a fragmentary network, and for events that have not yet occurred (such as proposed changes), the fragmentary network will demonstrate how Contractor proposes to incorporate such event in the Project Schedule, and (b) demonstrating: (i) the time impact based on the date the event occurred or notice of a proposed
change is given to Contractor, (ii) the status of the DB Work at such point of time; and (iii) the
time computation of all affected activities.


“TMS” means the traffic management system.

“Toll Revenues” means:

(a) all amounts received by or on behalf of Concessionaire applicable to
vehicles for the privilege of traveling on the Project imposed pursuant to the Comprehensive
Agreement and from any other permitted use or operation of the Project, including without
limitation fees, tolls, rates, incidental charges and other charges (including administrative
charges such as late fees, insufficient funds fees, etc.);

(b) amounts received pursuant to any collection or enforcement action, judgment or
settlement with respect to any of the foregoing revenues; and

(c) amounts Concessionaire receives as contractual liquidated or other contract
damages with respect to any of the foregoing revenues.

“Transportation Management Plan” has the meaning set forth in Section 2.1.25 hereof.

“Turnover Plan” means the plan developed by Concessionaire pursuant to the Technical
Requirements that describes the process by which Concessionaire will take over operations and
maintenance responsibilities from the Department for the Project, attached as Exhibit AA.

“Uniform Act” means the Uniform Relocation Assistance and Real Property Acquisition

“Unknown Geotechnical Conditions” means any Geotechnical Conditions which are not
Known Geotechnical Conditions.

“Unknown Pre-Existing Hazardous Substances” means any Hazardous Substances
present on the Project Right of Way or portion thereof as of the date that Contractor assumes
responsibility for such Project Right of Way or portion thereof pursuant to Section 2.1.17.2
and which are not Known Pre-Existing Hazardous Substances.

“USDOT” means the United States Department of Transportation.

“Utilities Plan” means the plan developed by Contractor that defines the Utility
coordination activities during the design and construction of the DB Project, as described in
more detail in the Technical Requirements.

“Utility” means any public, private, cooperative, municipal and/or government line,
facility or system used for the carriage, transmission and/or distribution of cable television,
electric power, data or other telecommunications, telephone, telegraph, water, gas, oil, petroleum
products, steam, chemicals, sewage, storm water not connected with the highway drainage and
similar substances that directly or indirectly serve the public. The term “Utility” specifically excludes (a) storm water lines connected with the highway drainage, and (b) traffic signals, street lights, and electrical systems for roadways.

“Utility Owner” means the owner or franchisee of any Utility (including both privately held and publicly held entities, cooperative utilities, and municipalities and other governmental agencies).

“Utility Relocation” means the removal, relocation and/or protection in place (including provision of temporary services as necessary) of any and all Utility facilities that have to be removed, relocated and/or protected in place in order to permit construction of the DB Project.


“Warranty Period” has the meaning set forth in Section 10.1.3 hereof.

“Work” means collectively, the finance, development, planning, design, acquisition, installation, construction, completion, management, equipment, operation, repair and maintenance and any other services identified in the Comprehensive Agreement to be performed by Concessionaire under the Comprehensive Agreement.

“Work Order” has the meaning set forth in Section 12.9 hereof.

“Work Product” means all the data, information, documentation and other work product produced, prepared, obtained or deliverable by or on behalf of Contractor for the DB Project, including but not limited to designs, drawings, plans and specifications, record and as-built plans and specifications, engineering documents, geotechnical soils and soil boring data, analyses, reports and records, property acquisition files, agreements and documents (including records of payment and related correspondence, title policies, parcel diaries and all construction documents relating to the DB Work), engineers’ and inspectors’ diaries and reports, Utility Relocation plans and agreements, right of way record maps and surveys, traffic and revenue studies, and other feasibility data, analyses, studies and reports, correspondence and memoranda relevant to design or construction decisions, contracting plans, air quality monitoring data, environmental reviews, studies and reports, mitigation studies and reports, data, assessments, studies and reports regarding Hazardous Substance investigations, testings, borings, monitoring and analyses, manifests regarding handling, storage or transportation of Hazardous Substances, correspondence and agreements relating to Governmental Approvals, change orders, final quantities, pile driving records, records of accidents and traffic management, field test records and reports, concrete pour records, surfacing depth check records, grade and alignment books, cross-section notes, drainage notes, photographs, false work and form plans, records of construction materials, ETTM Equipment and ETTM Facilities records and reports to the extent relating to the DB Work, and any other documents which can be reasonably described as technical or engineering documents. Work Product expressly excludes, however, documents and information which Concessionaire and Contractor mutually agree in writing, or which a court determines, to be exempted or protected from public disclosure and which is not conceived or first reduced to practice for the Project purposes, such as proprietary financial and pricing information of Contractor.
ARTICLE 2
CONTRACTOR’S DB WORK AND OTHER OBLIGATIONS OF CONTRACTOR

2.1 DB Work to be Performed. Except as otherwise expressly set forth in this Agreement, and subject to the specific provisions of and exclusions set forth in the Scope Document, Contractor shall perform or cause to be performed any and all work and services required or appropriate in connection with the design, engineering, procurement, procurement of Real Estate Rights, Project Right of Way acquisition in the name of the Department, Project Right of Way clearance, construction, Commissioning, start-up, demonstration, testing and completion of the DB Project, and shall provide all materials, equipment, machinery, tools, labor, supervision, transportation, administration, training and other services and items required to complete and deliver to Concessionaire the fully integrated and operational DB Project, all on a lump-sum, fixed-price, turnkey basis, and otherwise in accordance with the Standard of Care, Laws, Applicable Standards, the Technical Requirements, this Agreement and the other Contract Documents (collectively, the “DB Work”). Notwithstanding the foregoing, the fact that Contractor exercised the Standard of Care shall not excuse Contractor from a breach of any express obligation hereunder or the General Warranty. The DB Work does not include the items expressly excluded from the DB Work by the terms of this Agreement. To the extent any elements of the Early Work have not been completed or, if completed, have not been invoiced by Contractor, prior to the Agreement Date, Contractor is authorized to complete or invoice, as applicable, such Early Work in accordance with this Agreement and payment therefor will be made by Concessionaire under this Agreement (including for any such Early Work performed by Contractor but not invoiced by Concessionaire prior to the Agreement Date, it being understood that Early Work that has been performed and invoiced but not paid prior to the Agreement Date shall be payable at Financial Close). Any Early Work performed and/or approved prior to the Agreement Date shall, upon execution of this Agreement, be deemed to have been performed by Contractor and/or approved pursuant to, and subject to the terms and conditions of, this Agreement. Certain details of the DB Work are described in the Contract Documents, but Contractor shall perform or cause to be performed all DB Work necessary to complete the DB Project generally described in or reasonably inferable from the Contract Documents. Except as otherwise expressly provided in this Agreement (including those items expressly excluded by Exhibit P), all obligations of Concessionaire under the Comprehensive Agreement with respect to the design, construction and completion of the DB Project shall be deemed to be included as part of Contractor’s obligations hereunder and shall be fulfilled by Contractor on behalf of Concessionaire as part of the DB Work. Without limiting the foregoing, Contractor shall perform the following as part of the DB Work:

2.1.1 Scheduling and Milestones.

2.1.1.1 Project Schedule. If not already approved by Concessionaire and the Department, Contractor shall, within fifty (50) days after the Financial Close Date, submit for Concessionaire’s Approval a proposed updated detailed DB Project engineering, procurement and construction schedule, which shall include, among other things: (i) the order in which Contractor proposes to carry out the DB Work, including each stage of design, Project Right of Way acquisition, obtaining of Governmental Approvals, procurement, manufacture, delivery to the Project Right of Way, construction, inspection and testing, (ii) information
required by Section 1.4.2(B)-(F) of the Technical Requirements and (iii) the times when submissions and Concessionaire’s Approvals are requested. Such proposed Project Schedule shall be submitted by Contractor to Concessionaire as follows: (i) one (1) copy in searchable PDF electronic format, (ii) one (1) electronic version in the Primavera proprietary exchange format (XER) and (iii) three (3) hard color copies (printed on 11” by 17” paper). Once approved by Concessionaire, Contractor shall submit to Concessionaire the agreed Project Schedule in the same number of copies and format as required for the initial submission, in addition to the following for the submission by Concessionaire to the Department: (i) one (1) electronic version in the Primavera proprietary exchange format (XER) and (ii) six (6) hard color copies (printed on 11” by 17” paper). Contractor shall also provide one (1) license to Concessionaire and two (2) licenses to the Department, with maintenance agreements covering the entire duration of the DB Work, for Primavera software to enable them to access and analyze all such schedules.

Under the Comprehensive Agreement, the Department is to provide its approval or disapproval of the submitted Project Schedule to Concessionaire within twenty-one (21) days of its receipt of same and Concessionaire will promptly notify Contractor after receipt of the Department’s response. Contractor shall give due consideration to the Department’s comments as forwarded by Concessionaire and revise the Project Schedule accordingly and re-submit same to Concessionaire for Concessionaire’s Approval and once approved, Concessionaire will re-submit such revised Project Schedule to the Department. Under the Comprehensive Agreement, the Department is required to notify Concessionaire of its approval or disapproval of the revised Project Schedule within fourteen (14) days of the receipt of same and Concessionaire will promptly notify Contractor of the Department’s response. If during the process outlined in this Section 2.1.1.1 Concessionaire and Contractor cannot agree on the revisions to the Project Schedule either through written correspondence or subsequent meetings, Concessionaire and Contractor shall agree to attempt to resolve the issues through the dispute resolution process set forth in Article 19 hereof. If Concessionaire and Contractor cannot agree on any revision to the Project Schedule, Contractor shall proceed under the previously approved schedule. Once the proposed Project Schedule is approved by Concessionaire and the Department, it shall replace the initial “Project Schedule” attached as Exhibit M. Contractor shall perform the DB Work in accordance with the Project Schedule and shall coordinate and incorporate the schedules of all Subcontractors into the Project Schedule as they become available.

2.1.1.2 Schedule Updates. Following the conclusion of the process outlined in Section 2.1.1.1, as part of each Monthly Progress Report and in conjunction with the monthly progress meetings required in accordance with Section 2.1.10 hereof, Contractor shall provide Concessionaire with updates to the Project Schedule meeting the requirements of Section 1.4.3(F) of the Technical Requirements. Contractor acknowledges that certain alterations to the Project Schedule and Critical Path require the Department’s prior approval pursuant to Sections 8.07(d) and (e) of the Comprehensive Agreement. If Concessionaire or the Department believes that the Project Schedule needs a specific revision, either in logic, activity duration, DB Work breakdown structure, manpower or cost, Concessionaire will request Contractor in writing to make such revisions. Contractor shall respond in writing within seven (7) days or such other timeframe as mutually agreed by the Parties, and in the case of the revisions proposed by the Department, subject to the Department’s approval, either agreeing with Concessionaire’s proposed revision, and henceforth including it in the next Project Schedule update, or providing justification why it should not be accomplished. If revisions cannot be agreed upon either
through written correspondence or subsequent meetings, Concessionaire and Contractor shall agree to attempt to resolve the issues through the dispute resolution process set forth in Article 19 hereof. If Concessionaire and Contractor cannot agree on any revision to the Project Schedule, Contractor shall proceed under the previously approved schedule, subject to the dispute resolution process set forth in Article 19.

2.1.1.3 Schedule Update Format. Contractor shall submit to Concessionaire the Project Schedule update and narrative as follows: (i) one (1) copy in searchable PDF electronic format, (ii) one (1) electronic version (plus two (2) such electronic versions for the Department in accordance with Section 1.4.3(B)(4)(i) of the Technical Requirements) in the Primavera proprietary exchange format (XER), with each submission having a unique file name to indicate the type and order of submission and each compact disk labeled to indicate the type of submission, file name, and schedule data date and (iii) three (3) hard color copies of the current Time Scaled Logic Diagram, which shall be neatly organized and plotted time scaled from left to right on 11”x17” sheets with suitable notation relating the interface points among sheets and Time Scaled Logic Diagrams shall clearly depict the Critical Path, as well as activity identifications, activity descriptions, original durations, early start, early finish, late start, late finish, and actual dates as applicable. This process shall continue until Final Acceptance. The first day of the month (“data date”) of each Project Schedule update shall coincide with Contractor’s monthly request for payment made pursuant to Section 4.2.1 hereof. Contractor shall use the same software for all updates as required by Section 2.1.1.1 for the Project Schedule.

2.1.1.4 Recovery Plans. If the Monthly Progress Report shows that the Substantial Completion is projected to occur ninety (90) days later than the then-current Guaranteed Substantial Completion Date, Contractor will submit a written schedule recovery plan for Concessionaire’s Review concurrent with the next monthly Project Schedule update. Such recovery schedule shall (i) include a list of all activities changed, added or deleted along with all logic changes and an accompanying narrative explaining the nature of the changes as required by Section 1.4.6(A) of the Technical Requirements and (ii) set forth a revised Project Schedule that shall be subject to Concessionaire’s Approval for which projected Substantial Completion shall not, subject to Section 6.6.5, be later than 365 days after the Guaranteed Substantial Completion Date. Contractor shall respond to Concessionaire’s comments in accordance with the process outlined in Section 2.1.1.2 until Concessionaire and the Department have approved the revised Project Schedule. Concessionaire’s Review of a recovery plan and Concessionaire’s Approval of a revised Project Schedule shall not affect any of Concessionaire’s rights or Contractor’s obligations under this Agreement, including Contractor’s obligations to pay Late Completion Payments. Once a revised Project Schedule is reviewed and approved by Concessionaire hereunder and the Department under the Comprehensive Agreement, it shall become the Project Schedule and be used as the basis for subsequent Monthly Progress Reports.

2.1.1.5 Comprehensive Agreement Provisions. Contractor’s obligations under this Article 2.1.1 shall include fulfilling Concessionaire’s obligations to the Department under Sections 8.04(a) and (b) and 8.07 of the Comprehensive Agreement with respect to the DB Project, and Contractor shall coordinate with Concessionaire as appropriate such that Concessionaire may timely and fully perform such obligations.
2.1.2 Engineering and Design. Contractor shall perform all engineering and design services for completion of the DB Work in conformity with the requirements of this Agreement. All engineering work of Contractor requiring certification shall be certified, and all Design Documentation requiring sealing shall be sealed, by professional engineers licensed and properly qualified to perform such engineering services in all appropriate jurisdictions, which engineers and their qualifications shall be subject to the review and approval procedures set forth in Section 2.1.5.

2.1.2.1 Design. Contractor shall cause to be conducted all surveys, geotechnical engineering services and other tests and inspections of the Project Right of Way, and shall obtain written reports of all such tests and inspections as may be necessary or appropriate to design, procure and construct the DB Project in accordance with the Standard of Care, Laws, Applicable Standards, the Technical Requirements, this Agreement and the other Contract Documents. Contractor shall satisfy itself with the accuracy and completeness of all such tests and inspections, and shall not be excused from any of its obligations under this Agreement for any condition affecting the DB Project, the Project Right of Way or the DB Work, except as otherwise expressly provided in this Agreement. Contractor is responsible for the design of the DB Work. Design work for the DB Project shall include design for all civil works, structures, roadways, mechanical systems, electrical systems, preparation of drawings and specifications in accordance with the Scope Document, and coordination of data systems with the Department and the OS&S Contractor. Contractor expressly acknowledges and agrees that while the Scope Document sets forth a general guide as to the requirements of the DB Project, Contractor shall have full responsibility for the adequacy, safety and stability of the design for the DB Work and of all Project Right of Way operations and methods of development, construction, maintenance, testing, Commissioning and completion of the DB Project in accordance with the Standard of Care, Laws, Applicable Standards, the Technical Requirements, this Agreement and the other Contract Documents, such that the whole of the DB Project is constructed, Commissioned and operational and fulfills Concessionaire’s obligations to provide the DB Project under the Comprehensive Agreement. Except as otherwise expressly provided in this Agreement, in the event Contractor’s design differs from the schematic upon which the NEPA Documents were based, as between Concessionaire and Contractor, Contractor will be fully responsible for all necessary actions unless such design change was caused by Concessionaire, and will bear all risk of delay and all risk of increased cost, resulting from or arising out of any associated change in the DB Project location and design, including (i) conducting all necessary environmental studies and preparing all necessary environmental documents in compliance with applicable environmental Laws, (ii) obtaining and complying with all necessary new Governmental Approvals (including any modifications, renewals and extensions of the NEPA Documents and other existing Governmental Approvals) or third party approvals or agreements, (iii) bearing all risk and cost of litigation and (iv) paying to the Department (through Concessionaire) for the “Allocable Costs” the Department incurs to conduct further or supplemental environmental studies and to fulfill any other responsibilities assigned to it pursuant to 23 CFR Part 771.

2.1.2.2 Design Documentation. Contractor shall prepare all Design Documentation in computer readable and written formats in full compliance with the Standard of Care, Laws, Applicable Standards, the Technical Requirements, this Agreement and the other Contract Documents and shall submit those set forth on Exhibit Q for Concessionaire’s Review
or Concessionaire’s Approval (which may include review and approval by the Department as provided in Exhibit Q). Contractor’s obligations with respect to Design Documentation include fulfilling the obligations of Concessionaire with respect to the DB Project under Sections 8.03(b)(i) and 8.04 of the Comprehensive Agreement (including obligations to pay the Department its “Allocable Costs” and other amounts payable to the Department to the extent due from Concessionaire as a result of Contractor’s acts or failures to act in accordance with the requirements of this Agreement), and Contractor shall coordinate with Concessionaire as appropriate such that Concessionaire may timely and fully perform such obligations.

Notwithstanding anything to the contrary in this Agreement, Concessionaire’s Review or Concessionaire’s Approval (as the case may be) of Design Documentation shall be only a determination whether such documents (and the portions of the DB Work represented thereby) on their face meet the standards for the DB Work set forth in this Agreement, and shall not be considered an evaluation or determination that such documents and the portions of the DB Work represented thereby in fact meet the standards for the DB Work or are otherwise satisfactory for their intended purpose. Based on the Scope Document and that Design Documentation that has received Concessionaire’s Approval, Contractor shall prepare comprehensive drawings and specifications setting forth in detail the requirements for the procurement and construction of the DB Project. As the drawings and specifications for the DB Project are issued and, if applicable, receive Concessionaire’s Approval, they shall be clearly identified as Design Documentation. Contractor may, with Concessionaire’s Approval, apply for approvals from the Department of interpretive engineering decisions concerning the meaning, scope, interpretation and application of the Technical Requirements. All applications for such approvals shall be in writing. Contractor acknowledges that the Department may issue a written approval of Contractor’s proposed interpretive engineering decision, if any (upon which Concessionaire and Contractor may rely), may issue its own interpretive engineering decision, or may disapprove any interpretive engineering decision Contractor proposes.

2.1.3 Procurement. Contractor shall procure and pay for, in Contractor’s name as an independent contractor and not as agent for Concessionaire, all materials, equipment, supplies, consumables, transportation, labor, supervision and other necessary services (whether on or off the Project Right of Way), which are not expressly specified to be furnished by Concessionaire in this Agreement, to complete the DB Work in accordance with the Contract Documents. Contractor shall be responsible for obtaining all customs clearances required in connection with the provision of equipment, materials and supplies necessary to complete the DB Work in accordance herewith, including any temporary clearances for construction and testing equipment and other items to be used in the DB Work.

2.1.4 Construction. If not already approved by Concessionaire and the Department, Contractor shall prepare the Construction Quality Management Plan for Concessionaire’s Approval within the time required by the Technical Requirements, and shall construct and install the DB Project expeditiously and in accordance with the approved Construction Quality Management Plan and the requirements of this Agreement. Contractor shall furnish to Concessionaire Monthly Progress Reports of progress of the DB Work, together with monthly DB Work plans of activities being performed at the Project Right of Way and an updated Project Schedule (if applicable), as specified in Exhibit Q and as required by the Technical Requirements.
2.1.5 Labor Matters.

2.1.5.1 Contractor’s Personnel. Contractor shall provide all labor and personnel required in connection with the DB Work, including: (a) professional engineers licensed to perform engineering services in each jurisdiction where the performance of the DB Work requires such licensing; (b) a DB Project engineer, lead structural, mechanical, electrical, instrumentation and control and civil engineers, cost and schedule engineers, and procurement, construction, start-up and training supervisors, all of whom have had extensive experience in projects of similar technology and magnitude; (c) the Project Director and the Construction Manager; and (d) the Quality Manager and other quality assurance personnel (who shall report directly to Contractor’s home office managers and not to the DB Project personnel located at the Project Right of Way). Contractor shall not remove or permit the release of any personnel described in clauses (a) through (d) without replacing them with other personnel of comparable or more extensive skill and experience. As of the Agreement Date, the Project Director is John Heffley, the Construction Manager is Wallace Alphin and the Quality Manager is Sandro Plutino. If any such persons are to be replaced, Contractor shall, upon Concessionaire’s request, provide for Concessionaire’s Approval the résumés of the Project Director, the Construction Manager and the Quality Manager, and shall arrange for interviews by Concessionaire of such persons if requested by Concessionaire.

2.1.5.2 Facilities and Other Personnel Requirements. Contractor shall provide sufficient and appropriate first-aid facilities, sanitary facilities and potable water for the benefit of all personnel employed or expected to be present at the Project Right of Way in connection with the DB Project including Concessionaire’s and the Department personnel (other than any Concessionaire Contractors’ personnel), and all such facilities shall be maintained in a clean and orderly condition. Contractor may conduct periodic searches of employees and other persons present at the Project Right of Way, including personal and professional possessions, automobiles, trucks, briefcases, lunchboxes and persons for the presence of firearms, alcohol and illegal drugs. Contractor shall immediately notify Concessionaire’s Project Manager if firearms, alcohol or illegal drugs are found. Concessionaire shall have the right to require the immediate removal and permanent expulsion from the Project Right of Way and from any work associated with the DB Work of any Person that at any time is found in possession of firearms, alcohol or illegal drugs. In addition, Contractor will comply, and to the extent required by the Comprehensive Agreement will cause its Subcontractors to comply, with the provisions set forth in Exhibit I to this Agreement related to labor, employment and DBE/SWaM-related matters.

2.1.5.3 Labor Relations. Contractor shall be responsible and liable for all labor relations matters of Contractor and Subcontractor personnel relating to the DB Work and shall at all times use Commercially Reasonable Efforts to maintain harmony among the unions (if any) and other personnel employed in connection with the DB Work and act in a reasonable, professional and courteous manner with Concessionaire Contractors. Contractor shall at all times use all Commercially Reasonable Efforts and judgment as an experienced contractor to adopt and implement policies and practices designed to avoid DB Work stoppages, slowdowns, disputes and strikes.
2.1.6 Project Right of Way and Real Estate Rights.

2.1.6.1 Project Right of Way. Contractor shall perform all Project ROW Acquisition Work necessary for the construction and operation of the Project that is set forth in the ROW Acquisition and Relocation Plan in accordance with the Standard of Care, Laws (including the Uniform Act and Titles 25.1 and 33.1 of the VA. Code), Applicable Standards, Exhibit CC (Project Right of Way Acquisition), the Technical Requirements, this Agreement and the other Contract Documents; provided, that Contractor may not make any offers to acquire the Project Right of Way or the Real Estate Rights until the Department has issued a “Notice to Commence Right of Way Acquisition” to Concessionaire under the Comprehensive Agreement. Except as otherwise provided below in this Section 2.1.6.1 and in Section 2.1.6.5, ROW Costs shall be paid by Contractor from the ROW Allowance; provided, that (i) if the aggregate ROW Costs exceed the ROW Allowance by more than $150,000 (which shall be borne by Contractor), subject to Section 2.13.3, upon receipt of the payment therefor from the Department, Concessionaire will reimburse Contractor for such excess ROW Costs above the ROW Allowance and (ii) if the aggregate ROW Costs are less than the ROW Allowance, such difference shall be rebated by Contractor to Concessionaire. Contractor’s Project ROW Acquisition Work shall include Utility Relocation services in accordance with the Technical Requirements, assessment of the land required for the DB Work, preparation of the ROW Acquisition and Relocation Plan, all appraisals, appraisal reviews, negotiations with landowners and Utility Owners, relocation assistance and advisory services, legal services, making bona fide efforts to purchase properties or property rights for amounts not to exceed just compensation therefor, settlement of claims using its “best efforts” (as such term is defined for this purpose in the Technical Requirements), engagement of relevant property consultants and all other services other than exercise of power of condemnation and related services that is the Department’s responsibility. Contractor shall prepare, obtain execution of, and record documents conveying title to such properties in the Project Right of Way and Real Estate Rights to the State and shall deliver all executed and recorded general warranty deeds to Concessionaire for delivery by Concessionaire to the Department pursuant to the Comprehensive Agreement. For all property purchased in conjunction with the Project, title will be acquired in fee simple except as may be specifically agreed to by the Department under the Comprehensive Agreement. Contractor shall exercise due diligence and use reasonable care in determining whether property to be acquired may contain waste or other materials or Hazardous Substances requiring remedial action or treatment to the extent Contractor has access to such property and will otherwise comply with the Technical Requirements, including the undertaking of studies, assessments and tests required by the Technical Requirements. As required by Section 1.6(C)(13) of the Technical Requirements, when there is reason to believe that such materials may be present, Contractor shall notify Concessionaire within two (2) days of such discovery and will not proceed with acquiring such property until it receives written notification from Concessionaire.

The Parties acknowledge that the Department has agreed under Sections 8.05(b), 8.05(d)(ii) and 8.05(e)(ii) of the Comprehensive Agreement to (i) handle any necessary condemnation proceedings for the Project Right of Way and any other Real Estate Rights in accordance with the Technical Requirements, if despite Contractor’s “best efforts” (as such term is defined for this purpose in the Technical Requirements), Contractor is unable to reach a settlement with the owners of such real estate or Real Estate Rights within thirty (30) days; provided, that prior to filing a condemnation proceeding, Contractor shall prepare or cause to be
prepared all necessary paperwork and supporting documentation required for the proceeding and deliver it to the Department (through Concessionaire), (ii) be responsible for all ROW Costs that in the aggregate exceed the sum of the ROW Allowance and $150,000 US Dollars, and shall be entitled to the savings if such costs are below the ROW Allowance (such savings to be deposited by Concessionaire in the Project Enhancement Account, as required by Section 8.05(d)(ii) of the Comprehensive Agreement), (iii) subject to Law, provide the benefit of any provisions in recorded utility or other easements affecting the Project which require easement holders to relocate at their expense and (iv) provide reasonable assistance in obtaining the benefit of all rights the Department has under any Utility easement, permit or other right relating to Utility Relocation, it being understood that such assistance shall not entail the initiation of or participation in legal actions or proceedings. Concessionaire shall use Commercially Reasonable Efforts to cause the Department to comply with such obligations.

2.1.6.2 **Payment Procedures for Project Right of Way Acquisition Costs.** Contractor shall submit with each request for payment made under Section 4.2.1 hereof evidence (including copies of each agreement and instrument pursuant to which acquisition of such portion of the Project Right of Way or Real Estate Rights was effected, and such other information as may be requested by Concessionaire or the Department relating to such acquisition) of the amounts paid to acquire any portion of the Project Right of Way and Real Estate Rights pursuant to Section 2.1.6.1. Contractor shall make direct payments of benefits to property owners for negotiated settlements, relocation benefits, and payments to be deposited with the court.

2.1.6.3 **ROW Acquisition and Relocation Plan.** If not already approved by Concessionaire and the Department in connection with the Early Work, Contractor shall, within the time required by the Technical Requirements, prepare and submit for Concessionaire’s Approval (which shall be subject to approval by the Department pursuant to Sections 8.03(b)(iv)(E) and 8.05(a)(iii) of the Comprehensive Agreement) the ROW Acquisition and Relocation Plan that identifies a schedule of right of way activities, including the specific parcels to be acquired, will allow for the orderly relocations of displaced persons based on time frames not less than those provided by the Uniform Act. In the event Concessionaire fails to respond within the time allotted in this Agreement, such failure will not be deemed approval of the ROW Acquisition and Relocation Plan. Unless otherwise permitted in the Technical Requirements, the ROW Acquisition and Relocation Plan will not include parcels considered to be solely for the convenience of Contractor, including those necessary to accommodate laydown, staging, temporary drainage and other construction methods in connection with the construction of the DB Project. If required by the Comprehensive Agreement, the ROW Acquisition and Relocation Plan shall be updated by Contractor quarterly during the DB Work Period with each subsequent update subject to Concessionaire’s Approval.

2.1.6.4 ** Sufficiency of Project Right of Way.** Contractor agrees that it has inspected and is fully familiar with the physical sufficiency of the Project Right of Way and Real Estate Rights as represented on the drawings included in Exhibit N, and that the Project Right of Way, together with the Real Estate Rights, is physically sufficient for Contractor to undertake and complete the DB Work in accordance with the requirements of this Agreement. If Contractor subsequently determines that the as-represented Project Right of Way, together with the Real Estate Rights, is not physically sufficient for it to undertake and complete the DB Work
for reasons other than those that would entitle Contractor to claim a Scope Change Order under this Agreement, Contractor shall promptly obtain, at Contractor’s expense, any additions to the area of the Project Right of Way required by Contractor.

2.1.6.5 **Real Estate Rights Outside of Project Right of Way.** Contractor will be responsible, at its own cost and expense, for the acquisition of the Real Estate Rights (including any property, temporary easements or other property rights) not included in the ROW Acquisition and Relocation Plan, including those necessary to accommodate laydown, staging, temporary drainage and other construction methods in connection with the construction of the DB Project. To the extent the Department provides Concessionaire (at no cost to Concessionaire) with Real Estate Rights from other agencies of the State, Concessionaire shall make the same available to Contractor for performance of the DB Work.

2.1.6.6 **Acquisition of Railroad Easements.** Under Section 8.05(f) of the Comprehensive Agreement, the Department has agreed to obtain, at its sole cost and expense, any easements and other property rights necessary for the Work located on property owned by Norfolk Southern Corporation, and facilitate the negotiation of a construction agreement between Contractor and Norfolk Southern Corporation (the “Railroad Easement”). Notwithstanding the foregoing, (i) Contractor will pay the Department on behalf of Concessionaire any amounts payable by Concessionaire under Section 8.05(f) of the Comprehensive Agreement resulting from any Contractor Party’s misconduct, negligence or other culpable act, error or omission and (ii) as part of the Contract Sum, Contractor shall pay all costs of any DB Work performed on the Railroad Easement and reimburse Norfolk Southern Corporation any of its costs in connection therewith, all as provided in the Technical Requirements.

2.1.6.7 **Contractor’s Obligation to Maintain.** Except to the extent the Department is responsible for same pursuant to the Comprehensive Agreement, Contractor shall maintain any part of the Project Right of Way and Real Estate Rights of which it takes possession until care, custody and control is transferred to Concessionaire in accordance with the terms of this Agreement.

2.1.7 **Governmental Approvals.** Contractor shall procure and maintain in full force and effect throughout the term hereof all Governmental Approvals necessary for the DB Work, excluding only those Governmental Approvals (a) if any, that are the responsibility of the Department under the Comprehensive Agreement, the benefit of which Concessionaire shall make available to Contractor and (b) expressly specified in this Agreement to be the responsibility of Concessionaire. Contractor’s obligations under this Section 2.1.7 shall include fulfilling the obligations of Concessionaire to the Department under Section 8.06(d) of the Comprehensive Agreement with respect to the DB Project, including the payment to the Department (through Concessionaire) for its “Allocable Costs” for the preparation of documentation if supplements to the NEPA Documents or additional NEPA Documents are necessitated by a change in the base design of the DB Project following the Agreement Date, unless such change is caused by Concessionaire. Without limitation of Contractor’s other rights under this Agreement, Contractor will be entitled to the payment for supplements to the existing NEPA Documents or additional NEPA Documents necessitated by a CA Compensation Event or Department Project (as defined in the Comprehensive Agreement) and its reasonable costs incurred by it in providing data and information relating to such supplements or additional NEPA
Documents, in each case, subject to Section 2.13.3, to the extent Concessionaire receives such payments from the Department under the Comprehensive Agreement. Contractor shall provide copies of all Governmental Approvals and modifications to such Governmental Approvals to Concessionaire upon receipt and shall comply with other requirements related to the permitting applicable to the DB Work set forth in the Technical Requirements.

2.1.8 Royalties and License Fees. Contractor shall pay all applicable and required initial royalties and license fees (it being understood that Contractor is not responsible for ongoing maintenance and support fees) and shall procure for the benefit of Concessionaire and/or the Department, as applicable, at Contractor’s sole expense (other than ongoing maintenance and support fees), the appropriate rights, licenses, agreements and permissions for materials, methods, processes and systems incorporated into the DB Project. In performing the DB Work hereunder, Contractor shall not incorporate into the DB Project any materials, methods, processes or systems which involve the use of any confidential information, intellectual property or proprietary rights which Concessionaire, the Department or Contractor does not have the right to use or which may result in Claims or suits against Concessionaire, the Department or Contractor arising out of Claims of infringement of any domestic or foreign patent rights, copyrights or other proprietary rights, or applications for any such rights, or use of confidential information. Any such rights held by Contractor with respect to items incorporated in the DB Work shall be assigned or licensed to the Department or Concessionaire, as applicable, at no additional cost to the Department or Concessionaire, in connection with the use or operation of the DB Project.

2.1.9 Inspection and Expediting. Contractor shall perform all inspection, expediting, quality surveillance and maintenance of traffic services that are required for performance of the DB Work on a timely basis. Contractor’s responsibilities under this Section 2.1.9 shall include, without limitation, inspecting all materials and equipment, both on and off the Project Right of Way that comprise or will comprise the DB Project or that are to be used in performance of the DB Work hereunder. Contractor shall perform a detailed inspection of all DB Work in progress at intervals appropriate to the stage of construction or fabrication off the Project Right of Way as is necessary to ensure that such DB Work is proceeding in accordance with the Contract Documents and to protect Concessionaire against defects and deficiencies in such DB Work. On the basis of such inspections, Contractor shall keep Concessionaire continuously informed of the progress and quality of all DB Work and shall provide Concessionaire with written reports of deficiencies revealed through such inspections and of measures proposed by Contractor to remedy such deficiencies. Contractor shall use all reasonable efforts to secure for Concessionaire, the Department and the Independent Engineer or their representatives the option of being present at all inspections off the Project Right of Way. In the event that the progress and quality of the DB Work is not proceeding in accordance with the Contract Documents, Concessionaire shall be entitled to make recommendations to Contractor for the purpose of remedying such deficiencies. Contractor shall provide Concessionaire with a detailed list of materials and equipment inspection points. Contractor shall provide Concessionaire and the Department with at least five (5) days’ prior written notice of all inspections and on a monthly basis, Contractor shall advise Concessionaire and the Department of inspections planned for the forthcoming month. Concessionaire, the Department and the Independent Engineer, and each of their designated representatives, shall have the right to be present at and participate in all inspections of the DB Work or the Project Right of Way.
undertaken by Contractor. No inspection performed or failed to be performed by Concessionaire, the Department or the Independent Engineer, or any recommendation from Concessionaire, the Department or the Independent Engineer in connection therewith, shall be a waiver of any of Contractor’s obligations hereunder or be construed as an approval or acceptance of any DB Work hereunder and shall not relieve Contractor of independent responsibility for performance of the DB Work hereunder or for any acts or omissions of the Contractor’s design professionals or other Subcontractors engaged by Contractor to perform the DB Work.

2.1.10 Project Right of Way Access; Field Office Accommodations; Project Right of Way Monthly Progress Meetings. Contractor shall provide Concessionaire, the Department, the Independent Engineer and their designees access to the Project Right of Way at all times and arrange for access by Concessionaire, the Department, the Independent Engineer and their designees to the engineering, manufacturing and fabricating premises of all Subcontractors sufficient to permit Concessionaire, the Department, the Independent Engineer and their designees to inspect DB Work being performed and monitor compliance by Contractor and the Subcontractors with the terms hereof. Contractor shall (as part of the Contract Sum) establish (i) a field office meeting the requirements set forth in the Technical Requirements for the exclusive use of Department’s engineers, the Independent Engineer and inspectors and (ii) four (4) furnished project office spaces for Concessionaire. Contractor has the choice to either provide modular trailers or rent office accommodations to satisfy the field and project office requirements. Contractor shall propose the location of such offices for Concessionaire’s Approval (including the Department’s approval under the Comprehensive Agreement). Such field office shall be available and operational from sixty (60) days after the later of (i) Financial Close Date or (ii) “Design Work Notice to Proceed” under the Comprehensive Agreement, to one hundred and twenty (120) days after “Final Acceptance” under the Comprehensive Agreement. Contractor shall conduct regularly scheduled, monthly progress meetings at the Project Right of Way throughout construction of the DB Project beginning the month after the Financial Close Date to thoroughly discuss the progress and status of construction with Concessionaire’s Field Representative and any other representatives of Concessionaire and the Department that Concessionaire desires or the Department may request. Such meetings shall be attended by Contractor’s Construction Manager and Project Director, Concessionaire’s representatives and representatives of Contractor’s design staff, and during such meetings, progress during the prior month, as presented in the Monthly Progress Report, shall be reviewed and Contractor shall report information from any key Subcontractors responsible for the DB Work completed during the specified duration and the DB Work scheduled during the upcoming reporting duration. Contractor shall be responsible for preparing, maintaining and distributing minutes of the monthly progress meetings to all attendees for review and shall provide such minutes incorporating the attendees’ comments, if any, to Concessionaire within twenty-four (24) hours after the meeting (or such other timeframe as mutually agreed by the Parties) to enable Concessionaire to provide same to the Department in accordance with the requirements of Section 8.07(b) of the Comprehensive Agreement and Section 1.2.9 of the Technical Requirements. In addition, under the Comprehensive Agreement, Concessionaire and the Department are to conduct monthly progress meetings in accordance with the Technical Requirements and Contractor shall attend all such meetings unless otherwise directed by Concessionaire. The Parties acknowledge that all direction to Contractor will be provided by Concessionaire; provided, that the Department has the authority pursuant to Section 24.02(f)(viii) of the Comprehensive Agreement to give such direction which in the opinion of the
Department is necessary to remove an immediate and present threat to the safety of life or property. The Parties further agree to abide by the terms and procedures set forth in the Technical Requirements pertaining to project management and coordination matters.

2.1.11 Witness Points. The Quality Management System Plan shall set forth a list of agreed witness points for Concessionaire and the Department to witness certain portions of the DB Work. At least fourteen (14) days in advance of any witness point, Contractor shall provide Concessionaire and the Department with a preliminary notice thereof, and Contractor shall provide a final notice no later than five (5) days in advance of any witness point. Contractor shall not proceed past an established witness point prior to the date specified therefor in the advance notice unless Concessionaire has witnessed the activity and Contractor is in compliance with its obligations under Section 2.1.9 or Concessionaire has failed to witness or inspect the DB Work on the date scheduled, in which case Concessionaire will be deemed to have waived its right to witness such activity and Contractor shall be entitled to proceed with the DB Work. Concessionaire’s failure to view a witness point shall not be cause for a Concessionaire-Caused Delay.

2.1.12 Uncovering of DB Work. If any portion of the DB Work should be covered contrary to the written request of Concessionaire or to requirements specifically expressed in the Contract Documents, such portion of the DB Work shall, if requested in writing by Concessionaire, be uncovered for observation and shall be replaced at Contractor’s expense. If any other portion of the DB Work has been covered which Concessionaire has not specifically requested to observe prior to being covered, the Department or Concessionaire may request to see such DB Work and it shall be uncovered by Contractor. If such DB Work shall be found in accordance with the Contract Documents, the cost of uncovering and replacement shall, by appropriate Scope Change Order, be charged to Concessionaire. If such DB Work shall be found not to be in accordance with the Contract Documents, Contractor shall pay such costs.

2.1.13 Storage and Related Matters. In accordance with the Technical Requirements, Contractor shall warehouse or otherwise provide appropriate storage (in accordance with manufacturers’ recommendations) for all materials, supplies and equipment required for permanent and temporary construction of the DB Project, and shall provide for the procurement or disposal of, as appropriate, all soil, gravel and similar materials required for performance of the DB Work hereunder. All materials, supplies and equipment which are stored at a location other than on the Project Right of Way shall be (a) stored in a bonded warehouse or other appropriate location, and (b) properly secured, tagged and identified for the DB Project to establish the rights of title provided under Section 24.15 of this Agreement, and segregated from other goods. Prior to delivery at the Project Right of Way, all equipment shall be labeled with permanently affixed durable nameplates which will include the manufacturer’s name, equipment model number, equipment serial number, equipment tag number and all appropriate design parameters.

2.1.14 Utilities; Fuel; Asphalt.

2.1.14.1 If not already approved by Concessionaire and the Department in connection with the Early Work, Contractor shall, within the time required by the Technical Requirements, prepare and submit the Utilities Plan for Concessionaire’s Approval. The Utilities
Plan will detail the schedule and proposed activities of Contractor and the Utility Owners during the DB Work Period and will otherwise meet the requirements set forth in the Technical Requirements. Contractor shall coordinate, design and relocate all Utilities as required by the Utilities Plan and the Technical Requirements. The resolution of any conflicts between Utilities and the construction of the DB Project shall be the responsibility of Contractor. No additional compensation or time will be granted for any delays, inconveniences, or damage sustained by Contractor or its Subcontractors due to interference from Utilities or the operation of relocating Utilities, except as expressly set forth in this Agreement. Additional DB Work required due to changes in Utility Owners’ requirements shall be at Contractor’s risk. In addition, Contractor shall arrange, install and pay for all temporary Utilities and temporary Utility Relocations.

2.1.14.2 Contractor shall supply all fuel, chemicals and consumables, which are required to enable Contractor to perform the DB Work hereunder, including DB Project construction, start-up and testing. The Parties acknowledge that pursuant to Sections 3.5.2-3.5.4 of the Technical Requirements, the Department has agreed to allow adjustments to the monthly progress payments under the Comprehensive Agreement up or down as appropriate for cost changes in fuel and certain types of asphalt materials as set forth in Sections 3.5.2-3.5.4 of the Technical Requirements, and in turn Concessionaire will, subject to Section 2.13.3, pass through such corresponding cost adjustments to Contractor as they are received. Contractor will timely prepare all supporting documentation necessary to be presented by Concessionaire to the Department under the Comprehensive Agreement in order to claim such cost adjustments.

2.1.15 Spare Parts. Contractor shall submit for Concessionaire’s Approval a proposed list of operating spare parts for all items of equipment which are part of the DB Work necessary for the first year of operation of the DB Project and, following Concessionaire’s Approval thereof, shall procure spare parts included in such approved list. The costs of such spare parts shall be reimbursed by Concessionaire to Contractor with Contractor’s overhead & profit of ten percent (10%). Contractor shall use all reasonable efforts to secure the lowest pricing obtainable for such spare parts and shall store them under its control until Final Acceptance; provided, however, each such item shall be clearly labeled as a part designated for the DB Project. Contractor shall have the right to purchase at its own expense any additional spare parts that Concessionaire does not require Contractor to purchase and, to the extent any such additional spare parts are not used prior to Final Acceptance, shall remain the property of Contractor. Nothing contained herein shall (i) obligate Concessionaire to procure any spare parts, or (ii) be construed to excuse Contractor from the performance of any of its obligations under this Agreement in the event that any particular spare part has not been procured for the DB Project.

2.1.16 Clean-Up and Waste Disposal. Contractor shall dispose of all water, soil, rock, gravel, sand, minerals, timber and other materials developed, obtained or excavated by Contractor or Subcontractors in the course of performance of the DB Work in compliance with all Laws. Contractor shall generally keep the Project Right of Way free from accumulation of waste materials, rubbish and other debris related to the DB Work in accordance with the Standard of Care. On or before the date of Final Acceptance, Contractor shall remove from the Project Right of Way all waste materials, rubbish and other debris related to the DB Work, as well as Contractor’s and Subcontractors’ other tools, construction equipment, machinery testing equipment and surplus material to which Concessionaire does not hold title, and shall leave the
Project Right of Way in a neat, clean and usable condition. All cleanup and waste disposal shall be conducted in accordance with the Standard of Care, Laws, Applicable Standards, the Technical Requirements, this Agreement and the other Contract Documents. No materials shall be disposed of on or at the Project Right of Way. Contractor’s obligations under this Section 2.1.16 shall include removal and disposal of all temporary Utility facilities, all temporary buildings, structures, equipment and installations associated with the DB Work which Concessionaire does not wish to retain and all Hazardous Substances associated with performance of the DB Work, but shall not include removal or disposal of Hazardous Substances for which Contractor is not responsible pursuant to Section 2.1.17.

2.1.17 Hazardous Substances.

2.1.17.1 Contractor shall be fully responsible for any Hazardous Substances brought on the Project Right of Way by any Contractor Party and for the proper handling, removal, transportation and disposal of such Hazardous Substances. Such Hazardous Substances shall be stored and used in accordance with the Standard of Care, Laws, Applicable Standards, the Technical Requirements, this Agreement and the other Contract Documents. Contractor shall minimize the use of Hazardous Substances in the construction of the DB Project and shall not utilize, or permit or cause any Subcontractor to utilize, such Hazardous Substances as are prohibited from being imported into the United States or used in the Commonwealth of Virginia under Laws. Contractor shall maintain an updated file of all material safety data sheets for all Hazardous Substances used by Contractor or any Subcontractor at the DB Project or at any construction area related to the DB Project and shall deliver an update of such file to Concessionaire no more than ten (10) Business Days after the end of each month. Contractor shall maintain an accurate record and current inventory of all Hazardous Substances that are the subject of material safety data sheets, which inventory shall identify quantities, location of storage, use and final disposition. Contractor shall implement and administer a Hazardous Substances handling program for all of its employees and all Subcontractors which shall include development of guidelines and training with respect to the proper handling, use and disposal of Hazardous Substances for which Contractor is responsible hereunder and the development, implementation and enforcement of procedures for notification of Concessionaire and appropriate Governmental Authorities about, and clean-up of, spills and other emissions of such Hazardous Substances. Under Section 16.04(a) of the Comprehensive Agreement, the Department agreed to be deemed the generator of Pre-Existing Hazardous Substances and Third Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition within the Project Right of Way, and has agreed to be identified as the generator of such Pre-Existing Hazardous Substances and Third Party Hazardous Substances in waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Authority. Contractor will be deemed the generator of Hazardous Substances introduced to the Project Right of Way by a Contractor Party, the presence of which constitutes a Hazardous Environmental Condition within the Project Right of Way. Contractor agrees to be identified as the generator of such Hazardous Substances in waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Authority.

2.1.17.2 Contractor shall be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and/or disposal of any Hazardous Substances, the presence of which constitutes a Hazardous Environmental Condition that are
discovered on, in or under the Project Right of Way on which the DB Work is performed after
the earlier to occur of (i) the issuance of an LNTP (but limited to the portion of the Project Right
of Way on which the DB Work is performed pursuant to such LNTP) or (ii) the issuance of the
Notice to Proceed; provided, that Contractor will not be responsible for, nor be deemed the
generator of, Hazardous Substances introduced to the Project Right of Way by Concessionaire.

2.1.17.3 After the earlier of (i) the issuance of an LNTP (but limited to
the portion of the Project Right of Way on which the DB Work is performed pursuant to such
LNTP) or (ii) issuance of the Notice to Proceed, if Contractor encounters any Hazardous
Environmental Condition that must be managed, treated, handled, stored, monitored, removed,
transported or disposed of (collectively, “Remedial Actions”), then Contractor will promptly
(within twelve (12) hours) notify Concessionaire thereof. In the case of Hazardous
Environmental Conditions that are attributable to Known Pre-Existing Hazardous Substances,
Contractor will proceed with such Remedial Actions in accordance with Contractor’s
Environmental Management Plan. In the case of all other Hazardous Environmental Conditions
and to the extent not covered by the Environmental Management Plan, Contractor will develop a
Remedial Action Plan setting out the scope of the Remedial Actions that Contractor proposes to
take in relation to the relevant Hazardous Environmental Condition, such actions to include, but
not be limited to: (i) conducting such further investigations as may be necessary or appropriate to
determine the nature and extent of the Hazardous Substances and submitting copies of such data
and reports to Concessionaire for Concessionaire’s Approval (which shall be subject to receipt of
the Department’s approval until Substantial Completion). Contractor’s obligations in this Section
include fulfilling the obligations of Concessionaire under Section 16.01(c)-(e) of the
Comprehensive Agreement until Substantial Completion, and Contractor shall coordinate with
Concessionaire as appropriate such that Concessionaire may timely and fully perform such
obligations. The Parties acknowledge that the Department has the right to inspect areas and
locations that require Remedial Actions in accordance with Section 16.01(c) of the
Comprehensive Agreement.

2.1.17.4 Contractor shall be entitled to claim a Scope Change Order
pursuant to Section 12.5 hereof in respect of a CA Delay Event resulting from the discovery of
(a) Unknown Pre-Existing Hazardous Substances or (b) Hazardous Substances spilled or
otherwise placed on the Project Right of Way after the Agreement Date other than by a
Contractor Party in the course of performing of the DB Work, in each case for which Contractor
does not have responsibility pursuant to Section 2.1.17.1, to the extent Contractor’s performance
of the DB Work is materially adversely affected thereby and Contractor cannot, in the absence of
impacting the Critical Path, overcome the effect thereof.

2.1.17.5 Contractor shall also be entitled to claim a Scope Change
Order pursuant to Section 12.7 hereof in respect of Contractor’s costs incurred in taking
Remedial Actions with respect to Unknown Pre-Existing Hazardous Substances and Third Party
Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition, but only to the extent that Contractor’s actual costs, plus costs incurred in seeking the recovery, exceed any amounts that Contractor recovers from third parties (including, but not limited to, the Virginia Petroleum Storage Tank fund). At all times during the term hereof, prior to proceeding with any such Remedial Actions Contractor shall provide cost estimates with respect to such Remedial Actions which may be paid by Concessionaire, for Concessionaire’s Approval (which shall be subject to the Department’s approval in accordance with Section 16.02(c) of the Comprehensive Agreement); provided, that in the case of a sudden release of any Hazardous Substances, Contractor may take all reasonable actions necessary to stabilize and contain the release without prior submission of such cost estimates.

2.1.17.6 [Reserved]

2.1.17.7 During the period of any clean-up or mitigation activities, Contractor shall continue the DB Work to the maximum extent possible on unaffected parts of the DB Project and areas of the Project Right of Way. Except as otherwise expressly provided in this Agreement, no Scope Change Order shall be issued in the event of the discovery of Hazardous Substances at the Project Right of Way.

2.1.18 Progress Reports. Contractor shall submit a Monthly Progress Report to Concessionaire together with each request for payment made pursuant to Section 4.2.1 hereof. In addition, Contractor shall provide to Concessionaire a weekly report as required by the Technical Requirements and, whenever required by Concessionaire, a general written description of the arrangements and methods which Contractor proposes to adopt for the execution of the DB Work. No significant alteration to such arrangements or methods shall be made without informing Concessionaire and the Department.

2.1.19 Taxes. Contractor shall administer and pay all sales and use taxes, gross receipts, customs duty, import duty and other taxes and contributions imposed by any taxing authority upon the sale, purchase or use of materials, supplies, equipment, services or labor incorporated in the DB Project or used in the DB Work, as well as taxes measured by Contractor’s receipts hereunder or measured by wages earned by employees of Contractor or any Subcontractor (collectively, “Taxes”), and shall furnish to the appropriate taxing authorities all required information and reports in connection with such Taxes and promptly furnish to the appropriate taxing authorities all required information and reports in connection with such Taxes. Taxes are included within the Contract Sum, and Contractor shall not be entitled to an adjustment to the Contract Sum in the event the amount of Taxes payable by Contractor exceeds the amount estimated by Contractor, but the foregoing shall not preclude Contractor from recovering amounts payable as Taxes as otherwise expressly provided in this Agreement. For the avoidance of doubt, Concessionaire shall be solely responsible for and shall pay all real property taxes assessed on the Project Right of Way, all ad valorem taxes or personal property taxes on the DB Project and all income taxes imposed on Concessionaire’s operations.

2.1.20 Employee Identification. All employees of Contractor and its Subcontractors shall be identified by the use of a distinctive badge approved by Concessionaire, which approval shall not be unreasonably withheld.
2.1.21  **Adjoining Utilities.** Contractor shall do all things necessary or expedient to protect any and all parallel, converging and intersecting Utilities, highways, waterways, railroads, drainage ditches, culverts, fences, walls, gates and any and all property of others from damage as a result of its performance of the DB Work hereunder. To the extent that any such property is damaged or destroyed in the course of the performance of the DB Work hereunder, Contractor shall be responsible for such damage or destruction, and Contractor shall at its own expense rebuild, restore or replace such damaged or destroyed property to a condition at least equal to the condition of such property before such damage or destruction occurred.

2.1.22  **Site Security.** Contractor shall be responsible for providing appropriate security for that portion of the Project Right of Way that Contractor or its Subcontractors use or occupy for purposes of performing the DB Work until Substantial Completion of the DB Work. The Parties agree that the Department shall have access to the Project Right of Way at all times but has no responsibility for site security.

2.1.23  **Protection of Property.** Contractor shall provide and shall require each Subcontractor provides proper and ample protection from damage or loss to the DB Project, the Project Right of Way, materials, construction equipment and tools during its performance of the DB Work hereunder. Where ingress and egress to and from the Project Right of Way requires the traverse of public or private lands, Contractor shall limit the movement of its crews and equipment and of all Subcontractors so as to cause as little damage as possible to crops or other property and shall use all reasonable efforts to avoid marred such lands, and shall in all respects comply with all obligations of and any restrictions imposed on Concessionaire by the Project Right of Way. All surviving fences and walls which must be opened or moved during construction of the DB Project shall be replaced by Contractor. Contractor shall not be reimbursed by Concessionaire for costs associated with loss of or damage to property, whether on or off the Project Right of Way, caused by or arising in connection with the DB Work hereunder, other than to the extent contemplated as a result of Contractor’s acquisition services necessary to acquire the Project Right of Way or as a result of damage caused by Concessionaire.

2.1.24  **Coordination with Concessionaire and Other Contractors.** Contractor shall permit Concessionaire Contractors to introduce and store materials and perform their services. Contractor shall cooperate with Concessionaire and Concessionaire Contractors to coordinate and schedule the DB Work with the work of Concessionaire Contractors working in the Project Right of Way. Contractor’s obligations include fulfilling Concessionaire’s coordination and scheduling obligations under the Technical Requirements in connection with the DB Work. If invited, Contractor shall attend any negotiations or meetings that Concessionaire has with a third party, including the Department, on a matter which is or shall become Contractor’s responsibility hereunder, including a meeting of Contractor’s Project Director, the Concessionaire’s Field Representative and the Concessionaire’s Project Manager with the Department, as required by Section 1.2.9(A) of the Technical Requirements, within ten (10) days after the earlier of (i) the initial LNTP issued in accordance with the Comprehensive Agreement or (ii) the Financial Close Date, to discuss issues affecting the administration of the DB Work and to implement the necessary procedures, including those relating to submittals and approvals, to facilitate the ability of the Parties to perform their obligations under this Agreement. Contractor agrees that if any such negotiation or meeting occurs without a presence of a Contractor’s representative, such event shall not constitute a breach of this
Agreement unless such events occur repeatedly due to Concessionaire’s intentional exclusion of Contractor from such negotiations or meetings.

2.1.25 Transportation Management Plan. Under Section 8.12(a) of the Comprehensive Agreement, the Department is to develop, fund and implement a transportation management plan for the Project setting forth a program for traffic management and related activities to ensure safety and mobility for the traveling public on the I-95 Corridor during the DB Work Period (the “Transportation Management Plan”) and is required to provide Concessionaire with a reasonable opportunity to comment on the Transportation Management Plan. Concessionaire will in turn provide Contractor with a reasonable opportunity to comment on the Transportation Management Plan and will submit, in its reasonable discretion, any Contractor’s comments to the Department. In connection with the Transportation Management Plan, Contractor shall (i) develop, and implement during the DB Work Period, the Maintenance of Traffic Plan, which shall be consistent with and included as part of the Transportation Management Plan, (ii) be responsible for Concessionaire’s share of public outreach for the Transportation Management Plan pursuant to the Technical Requirements and (iii) be responsible for traffic and operational analysis for lane closures, roadway configurations and detours. Contractor shall carry out any DB Work in accordance with the Transportation Management Plan.

2.1.26 Contract Documents at Project Right of Way and Electronic Document Management System. Contractor shall maintain at the Project Right of Way, on a current basis, one record copy of all of the Contract Documents, in good order and marked currently to record all changes, and a complete set of all working drawings required to be maintained for the DB Project pursuant to Laws. These shall be available upon request of Concessionaire, the Department and the Independent Engineer. In addition, Contractor shall establish and maintain, in accordance with Section 1.2.8(A) of the Technical Requirements, an electronic document management system to store and record all material documents generated on the DB Project, including those records required under Law and shall permit Concessionaire, the Department and their agents and consultants access to such document management system as required by the Technical Requirements.

2.1.27 Commissioning. Commencing as soon as practicable prior to start-up operations, but in any event in accordance with the Project Schedule, Contractor shall commission the DB Project as more specifically provided in Section 6.1 hereof.

2.1.28 Operating Manual. Not later than six (6) months before the projected Substantial Completion Date as set forth on the Project Schedule, Contractor shall submit for Concessionaire’s Approval a draft of the complete equipment and system instructions and procedures for the operation and maintenance of the systems and items of plant and equipment incorporated into the DB Project as part of the DB Work. If Concessionaire does not approve the draft, it shall provide comments thereon to Contractor within thirty (30) days after receipt, and Contractor promptly shall incorporate or otherwise respond to Concessionaire’s comments and submit a revised draft for Concessionaire’s Approval. Such procedure shall be repeated until receipt of Concessionaire’s Approval therefor, and the revised product shall be the “Operating Manual.” Not later than forty-five (45) days before the projected date of Substantial Completion as set forth on the Project Schedule, Contractor shall prepare in individually numbered bound
volumes and deliver to Concessionaire ten (10) sets of such approved Operating Manual for the DB Project as well as one (1) set to the Department, and shall also provide each of Concessionaire and the Department the same in an electronic form that may be edited and revised electronically.

2.1.29 **Start-up and Initial Operation.** The DB Work shall include the start-up of components, calibration of controls, initial operation of the DB Project and each portion thereof, total system function and verification tests and all other start-up and initial operation functions pertaining to the DB Project.

2.1.30 **Quality Management System.** In accordance with the Standard of Care, Laws, Applicable Standards, the Technical Requirements, this Agreement and the other Contract Documents, Contractor shall be responsible for all quality assurance and quality control activities necessary to manage the development, design and construction of the DB Project and shall develop and provide to Concessionaire the Quality Management System Plan in accordance with this Agreement and the Technical Requirements. Contractor shall fully observe and implement, and cause all Subcontractors to fully observe and implement, the Quality Management System Plan (including the provisions thereof relating to the non-conforming work) until Final Acceptance. Contractor shall provide oversight and management of the DB Project to control the scope, quality, cost, and on-time delivery of the DB Work and if the DB Work is not being performed in compliance with the Quality Management System Plan, Contractor shall increase and improve its management and oversight efforts such that repair or replacement of non-conforming items does not require any increase in Concessionaire’s oversight of the DB Project. The Parties acknowledge that, pursuant to Section 8.03(a)(ii)(C) of the Comprehensive Agreement, the Department has the right to review Contractor’s Quality Management System Plan, including the right to inspect DB Work and/or activities and to verify the accuracy and adequacy of quality management documentation. Contractor agrees to provide, and cause its Subcontractors to provide, the access and assistance as the Department may reasonably require conducting such reviews. All tests, inspections and quality assurance procedures required by this Agreement, or recommended by Subcontractors, shall be in addition to, and not in lieu of, applicable Quality Management System Plan activity. Contractor shall regularly document and report to Concessionaire its compliance with the Quality Management System Plan in accordance with the procedures contained therein.

2.1.31 **Public Information.** Contractor will provide information to the public concerning the DB Work in accordance with the Technical Requirements. Contractor shall prepare and implement the Public Information and Communications Plan setting forth a program for public information dissemination and related activities to be implemented by Contractor during the DB Work Period in connection with the construction of the DB Project. The Public Information and Communications Plan shall meet the requirements therefor set forth in the Comprehensive Agreement and the Technical Requirements and shall be subject to Concessionaire’s Approval. The Parties acknowledge that the Public Information and Communications Plan is also subject to the Department’s approval in accordance with Section 8.03(a)(ii)(E) of the Comprehensive Agreement. Prior to and during the construction of the DB Project, Contractor shall assist Concessionaire with providing information to the public concerning the DB Project in accordance with the Public Information and Communications Plan.
2.1.32  **Further Assurances.** Contractor shall execute and deliver all further instruments and documents, and take all further action, including but not limited to assisting Concessionaire in filing a notice of commencement and a notice of completion with the appropriate state and local lien recording offices, that Concessionaire may reasonably request in order to enable Contractor to complete performance of the DB Work or to effectuate the purposes or intent of the Contract Documents.

2.2  **Contractor’s Assumption of Risk for Project Right of Way Conditions; No Concessionaire’s Warranties for Site Information.**

2.2.1  **Contractor’s Assumption of Risk of Project Right of Way Conditions.** Concessionaire expressly disclaims any responsibility for, and Contractor expressly waives its right to seek any increase in the Contract Sum or extension to the Guaranteed Substantial Completion Date for, any conditions at or on the Project Right of Way on which DB Work is performed except as expressly provided in this Agreement.

2.2.2  **No Concessionaire’s Warranties for Site Information.** Concessionaire makes no warranties or representations as to any surveys, data, reports or other information provided by Concessionaire, the Department or other Persons to Contractor, including the data and other information set forth in Exhibit T (Known Geotechnical Conditions) and Exhibit K (Known Pre-Existing Hazardous Substances), concerning surface or subsurface conditions, the existing condition of the roadway and other “Assets” (as defined in the Comprehensive Agreement), drainage, the presence of Utilities, Hazardous Substances, contaminated ground water, archeological, paleontological and cultural references and endangered and threatened species, affecting the Project Right of Way or surrounding locations. Without prejudice to Contractor’s right to claim a Scope Change Order under Sections 12.5, 12.6 and 12.7, Contractor acknowledges that such information is for Contractor’s reference only and has not been verified by Concessionaire or the Department, and that Contractor is responsible for conducting all surveys, studies and assessments as it deems appropriate for the DB Work.

2.3  **Commencement of the DB Work.**

2.3.1  **Notice to Proceed.** Except for the Early Work or as may be authorized pursuant to Section 2.3.2, Contractor shall commence performance of the entire DB Work on the date Financial Close occurs (the “Commencement Date”) as specified by Concessionaire in a written notice that shall be delivered to Contractor upon Financial Close in the form set forth as Exhibit A hereto (the “Notice to Proceed”); provided, that the Commencement Date may not occur unless and until (i) Financial Close has occurred and (ii) the Department has issued the “Design Work Notice to Proceed” and “Construction Notice to Proceed” to Concessionaire under the Comprehensive Agreement. If the “Design Work Notice to Proceed” and “Construction Notice to Proceed” have not been issued by the Department prior to or upon Financial Close, the Parties agree to cooperate to fulfill the conditions to issuance of such notices to proceed by the Department and to cause the Department to issue them as promptly as possible.

2.3.2  **Limited Notice to Proceed.** Contractor may request that Concessionaire issue one or more Limited Notices to Proceed (“LNTP”) authorizing Contractor to commence certain portions of the DB Work as set forth in this Section 2.3.2. Prior to issuance
of a LNTP, the Parties will agree upon the conditions to the issuance of such LNTP (which conditions shall include any conditions that may be agreed, with Contractor’s consent not to be unreasonably withheld, between Concessionaire and the Department to the issuance of the corresponding LNTP under the Comprehensive Agreement), as well as the scope, schedule and payment terms (if applicable) for such portion of the DB Work. Contractor will deliver notice to Concessionaire upon the satisfaction of the agreed conditions to the issuance of any LNTP and Concessionaire will respond to such request, within twenty-five (25) days following receipt of such request, by delivery to Contractor of the applicable LNTP or disapproval of such request and written notice specifying in reasonable detail the reasons for such disapproval. If Concessionaire disapproves such request, Contractor shall then re-submit a revised request to Concessionaire as promptly as reasonably possible and Concessionaire will respond to such request within fourteen (14) days following the receipt of a re-submittal; provided, that in no event shall Concessionaire be obligated to issue an LNTP until and unless the Department has issued a corresponding LNTP to Concessionaire under Section 8.02 of the Comprehensive Agreement.

2.4 Standard of Performance. With respect to Contractor’s performance of the DB Work, subject to the terms and conditions of this Agreement, (i) Contractor shall comply with, and shall cause the DB Work and the DB Project and all components thereof (including the design, engineering, construction, testing and start-up of the DB Project and all equipment included within the DB Project) to comply with, the Standard of Care, Laws, Applicable Standards, the Technical Requirements and the Contract Documents, (ii) all engineering and design services shall be provided in accordance with the Contract Documents, Laws, Applicable Standards, the Technical Requirements and the Standard of Care, and (iii) the DB Project shall be constructed and erected in a good and workmanlike manner in accordance with the preceding clauses (i) and (ii). Except as otherwise expressly provided in this Agreement, the standard of performance set forth in this Section 2.4 shall apply to all aspects of the DB Work, and this Section 2.4 shall be deemed to be incorporated by reference into each provision of the Contract Documents describing the DB Work, Contractor’s obligations to perform the DB Work, or referring to the “requirements of this Agreement” or words of similar effect.

2.5 Compliance with Laws. Contractor shall comply with and shall cause the DB Work and the DB Project and all components thereof (including without limitation the design, engineering and construction of the DB Project) to comply with all Laws as they may be in effect at the time of Contractor’s performance hereunder. Notwithstanding the foregoing, the effect of any Change in Law (excluding therefrom any change in Governmental Approvals resulting from the acts or omissions of Contractor or any Subcontractor) shall be determined under Sections 12.3, 12.5 and 12.6. In addition, Contractor shall maintain all licenses required by Law and, if the Department makes a direct payment to Contractor, comply with the requirements of the eVA Business to Government Vendor System or its successor.

2.6 Independent Engineer. The documents which govern Concessionaire’s transactions with the Financing Parties for the Project may provide to the Independent Engineer certain rights of review, inspection, certification and consultation with Concessionaire concerning the Project and the DB Work in order that the Independent Engineer may regularly and completely apprise the Financing Parties of the progress and other aspects of the Project and the DB Work. Contractor shall fully and promptly cooperate with the Independent Engineer as
reasonably requested by Concessionaire. Any acceptance or comment by the Independent Engineer, the Department or the Financing Parties shall not be construed to impose on the Independent Engineer, the Department or the Financing Parties any control of any portion of the DB Work, or relieve Contractor of any of its duties, liabilities or obligations under the Contract Documents. All communications to and from the Independent Engineer regarding the DB Work shall be made through Concessionaire, except as Contractor is otherwise directed by Concessionaire.

2.7 Safety Precautions

2.7.1 General Requirements. Contractor recognizes the importance of performing the DB Work in a safe manner so as to prevent damage, injury or loss to: (i) all individuals at the Project Right of Way, whether working or visiting; (ii) the DB Work, including materials and equipment incorporated into the DB Work or stored on-site or off-site; and (iii) all other property at the Project Right of Way or adjacent thereto. Contractor assumes responsibility for implementing and monitoring all safety precautions and programs related to the performance of the DB Work. Contractor and Subcontractors shall comply with: (i) all Laws relating to safety; (ii) Contractor’s Health, Safety and Security Plan; and (iii) any Concessionaire-specific safety requirements set forth in the Contract Documents, provided that such Concessionaire-specific requirements do not violate any Laws. Contractor will immediately report in writing any safety-related injury, loss, damage or accident arising from the DB Work to Concessionaire’s Field Representative and, to the extent mandated by Laws, to all Governmental Authorities having jurisdiction over safety-related matters involving the DB Project or the DB Work. Contractor shall, prior to commencing construction, designate a “Safety Representative” with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the DB Work. Unless otherwise required by the Contract Documents, Contractor’s “Safety Representative” shall be an individual stationed at the Project Right of Way who may have responsibilities on the DB Project in addition to safety. The “Safety Representative” shall make routine daily inspections of the Project Right of Way and shall hold weekly safety meetings with Contractor’s personnel, Subcontractors and others as applicable. Contractor shall provide minutes of each weekly safety meeting held by Contractor to Concessionaire within five (5) days of such meeting.

2.7.2 No Relief. Contractor’s responsibility for safety under this Section 2.7 is not intended in any way to relieve Subcontractors of their own contractual and legal obligations and responsibility for: (i) complying with all Laws, including those related to health and safety matters; and (ii) taking all necessary measures to implement and monitor all safety precautions and programs to guard against injury, Losses or accidents resulting from their performance of the DB Work.

2.8 Federal and State Requirements. In performing the DB Work Contractor shall comply, and cause all Subcontractors to comply, with all Laws applicable to the Project as a result of the costs of the Project being financed in part with State funds, federal-aid funds and State bond proceeds, including the applicable Federal Requirements attached as Exhibit V. Contractor acknowledges and agrees that the USDOT will have certain approval rights with respect to the Project, including the right to provide certain oversight and technical services with
respect to the Work. Contractor will (i) cooperate with USDOT and provide such access to the DB Project and information as USDOT may request in the exercise of USDOT’s duties, rights and responsibilities in connection with the Project and (ii) upon Concessionaire’s request, provide to Concessionaire data and other information regarding the DB Project to allow Concessionaire to comply with Section 5.10 of the Comprehensive Agreement. Furthermore, in accordance with Section 2.2-4311.1 of the VA Code, Contractor hereby certifies that it does not and agrees that it will not, during the term hereof, knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986. Contractor further agrees that it will require all of its Subcontractors to certify that they do not and will not knowingly employ an unauthorized alien as defined by such Act.

2.9 Ethical Standards. Within sixty (60) days after the Commencement Date, Concessionaire and Contractor shall develop and adopt written policies establishing ethical standards of conduct for Contractor’s directors, officers and supervisory or management personnel in dealing with the Department and employment relations, which policies will comply with the requirements set forth in Section 25.02 of the Comprehensive Agreement, be set forth in Exhibit O hereto, and be provided by Concessionaire to the Department. Contractor shall comply with and enforce such policies. Without limiting the foregoing, Contractor further agrees: (i) no gifts, gratuities, or favors of any nature whatsoever will be given or offered by it to personnel of the Department; and (ii) it will not employ any personnel of the Department for any services during the DB Work Period without the prior written consent of the Department. If the Department determines, after investigation, that Contractor or any of its employees, representatives, or agents of any person acting in its behalf have violated this provision, Contractor may, at the discretion of the Department, be disqualified from bidding on future contracts with the Department for a period of six (6) months from the date of the Department’s determination of such a violation. Any implicated employees, agents, or representatives of Contractor may be prohibited from working on any contract awarded by the Department for the period of disqualification.

2.10 Concessionaire’s Right to Carry Out DB Work. If Contractor defaults or neglects to carry out the DB Work in accordance with the requirements of this Agreement or if there are defects or deficiencies in the DB Work that Contractor refuses or neglects to repair, in each case after giving effect to and without limiting Contractor’s right to cure or repair or correct performance as provided in this Agreement, and Contractor fails within thirty (30) days after receipt of written notice from Concessionaire to commence and continue correction of such default, neglect, defect or deficiency with diligence and promptness, Concessionaire may, without prejudice to any other remedy Concessionaire may have, correct same or cause it to be corrected in accordance with this Agreement. In the event Concessionaire exercises its rights hereunder, an appropriate Scope Change Order shall be issued by Concessionaire deducting from the payments then or thereafter due Contractor the reasonable, documented, out-of-pocket cost of correcting such default, neglect, defect or deficiency. If the payments then or thereafter due Contractor are not sufficient to cover such amount, Contractor shall pay the difference to Concessionaire within thirty (30) days after Concessionaire issues an invoice for such amount together with supporting documentation.

2.11 Concessionaire and Department Approvals; Technical Requirements.
2.11.1 In all cases where an approval (including Concessionaire’s Approval), review (including Concessionaire’s Review), comment, consent, notification, determination, decision or other response (a “Response”) is required to be provided hereunder, such Response will not be withheld or delayed unreasonably (it being agreed that, without affecting Contractor’s other rights hereunder, if the Department withholds such corresponding Response under the Comprehensive Agreement, it shall be reasonable for Concessionaire to withhold such Response hereunder) and such determinations will be made reasonably (and not unreasonably delayed) except in cases where a different standard (such as, by way of example only, sole discretion) is specified in this Agreement, Exhibit Q or the Technical Requirements. In cases where sole discretion is specified for an approval, consent, determination or other decision, the decision will not be subject to the dispute resolution procedures hereunder; in other cases, Contractor may refer the matter to the dispute resolution process set forth in Article 19. Concessionaire will provide within fourteen (14) days after a request by Contractor its rationale (including the Department’s rationale, to the extent made known to Concessionaire), in reasonable detail, for any disapproval or deemed disapproval of any matter where Concessionaire has sole discretion to approve or disapprove.

2.11.2 Subject to Section 2.12 below, if Concessionaire must submit a submittal or request made by Contractor under this Agreement to the Department for review and response more than twice due to Contractor’s failure to comply with the requirements of this Agreement, Contractor shall, through Concessionaire, pay the Department its “Allocable Costs” incurred thereafter in re-reviewing any portions of such submittal or request, as required by Section 10.05(h) of the Comprehensive Agreement. If Concessionaire must submit a submittal or request made by Contractor under this Agreement more than twice due to the Department’s failure to comply with the requirements of the Comprehensive Agreement, under Section 10.05(h) of the Comprehensive Agreement the Department is to pay Concessionaire its “Allocable Costs” incurred thereafter in preparing or submitting any portions of such submittal or request, and, subject to Section 2.13.3, Concessionaire shall pay over to Contractor its portion of such “Allocable Costs” solely if and to the extent received by Concessionaire from the Department.

2.11.3 Concessionaire’s review of a resubmittal or request will be limited to the issue, condition or deficiency which gave rise to the Concessionaire’s disapproval and will not extend to other aspects for which a notice of disapproval was not previously provided to Contractor unless the issue, condition or deficiency which gave rise to Concessionaire’s disapproval reasonably relates to Concessionaire’s disapproval for which notice was previously provided. Contractor is in no way obligated to incorporate Concessionaire’s comments unless necessary to comply with a specific requirement of this Agreement.

2.11.4 Where the Technical Requirements impose an obligation on Concessionaire to act by or within a specified time and Contractor is obligated as part of the DB Work to fulfill such obligation on behalf of Concessionaire, Contractor shall fulfill such obligation within the time specified by the Technical Requirements, and, unless this Agreement or Exhibit Q provides otherwise with respect to a given item (including when an item is subject to Concessionaire’s Review or Concessionaire’s Approval), Contractor shall provide such item to the Concessionaire for its review at least four (4) days prior to the date such item must be submitted to the Department, and Concessionaire shall provide any comments at least four (4)
days prior to the date such item must be submitted to the Department. Any such review by
Concessionaire, or Concessionaire’s election or failure not to perform a review, will not diminish
the Contractor’s obligations or liabilities under this Agreement or Concessionaire’s rights under
this Agreement. No reference to the Technical Requirements in this Agreement is intended to
obligate Contractor to perform the work that is expressly excluded from the DB Work in the
Scope Document or elsewhere in this Agreement.

2.12 **Department Oversight.** Contractor acknowledges that pursuant to Section 10.02
of the Comprehensive Agreement, the Department has the right to oversee the Work, including
the DB Work, and Contractor shall cooperate with Concessionaire and Department to facilitate
the Department’s conduct of such oversight of the DB Work. If at any time Concessionaire fails
to perform any of its obligations in any material respect under the Comprehensive Agreement,
the Department, with written notice to Concessionaire given concurrently with the increase in the
Department’s monitoring or as soon as practicable thereafter, is entitled, pursuant to Section
10.04(b) of the Comprehensive Agreement, to adequately and appropriately increase the level of
its monitoring of the Project and Concessionaire’s compliance with its obligations pursuant to
the Comprehensive Agreement, until such time as Concessionaire has demonstrated to the
Department’s reasonable satisfaction that it will perform and is capable of performing such
obligations. If such failure by Concessionaire to perform its obligations under the
Comprehensive Agreement is a result of Contractor’s failure to perform its obligations
hereunder, then Contractor (i) will, on behalf of Concessionaire, as required by Section 10.04(b)
of the Comprehensive Agreement, compensate the Department for all “Allocable Costs” incurred
by the Department as a result of such increased level of monitoring from and after the date on
which such increased level of monitoring begins, not to exceed $2,000,000 in the aggregate;
provided, that if the increased monitoring is due to a delay in achieving Substantial Completion
or Final Acceptance, Contractor will compensate the Department (through Concessionaire) for
such increased monitoring solely by payment of liquidated damages pursuant to Section 7.2, and
(ii) as permitted by Section 10.04 (d) of the Comprehensive Agreement, may submit a cure plan
to the Department (through Concessionaire) describing specific actions Contractor will undertake
to improve its performance and avoid the need for increased monitoring, which the Department
may accept or reject under the Comprehensive Agreement, and if the Department accepts a cure
plan, the Department has agreed under the Comprehensive Agreement not to increase its
monitoring or other oversight services unless Concessionaire (or Contractor for the purposes of
this Agreement) fails to diligently pursue such cure plan. In addition, Contractor shall, on behalf
of Concessionaire, accommodate the Department’s and FHWA’s rights under Section 10.03 of
the Comprehensive Agreement with respect to the DB Work, including, but not limited to, the
right of access to the Project Right of Way and the right to inspect the DB Work-related records
subject to and in accordance with the requirements of the Comprehensive Agreement.
Notwithstanding anything to the contrary in this Agreement, this Agreement shall not impose
any obligations, duties or liabilities upon the Department beyond those obligations, duties, or
liabilities expressly assumed by the Department under the Comprehensive Agreement. Further,
nothing in this Agreement shall create any direct cause of action by Contractor against the
Department, except to the extent this Agreement is assigned to the Department pursuant to
Article 16.

2.13 **Pay-if-Paid Provisions; Department Relief.**
2.13.1 Whenever a provision in this Agreement provides that Contractor shall only be entitled to compensation in the event and only to the extent (or words of similar effect) that Concessionaire actually receives the corresponding compensation under the Comprehensive Agreement, or that Contractor’s entitlement to compensation shall be conditional upon and only to the extent (or words of similar effect) that Concessionaire receives the corresponding compensation under the Comprehensive Agreement, or other similar language providing that a payment to Contractor is conditional upon receipt of the relevant amount by Concessionaire from any other Person, then payment of the amount in question by the Department to Concessionaire pursuant to the Comprehensive Agreement will be a strict condition precedent to the obligation of Concessionaire to make a payment to Contractor under the relevant provision of this Agreement.

2.13.2 In addition, whenever a provision in this Agreement provides that Contractor shall only be entitled (or words of similar effect) to relief if the Department provides Concessionaire with the corresponding relief under the Comprehensive Agreement, or that Contractor’s entitlement (or words of similar effect) to relief shall be conditional upon Concessionaire’s receipt of the corresponding relief under the Comprehensive Agreement, then Concessionaire’s receipt of the corresponding relief in question from the Department pursuant to the Comprehensive Agreement will be a strict condition precedent to the obligation of Concessionaire to grant relief to Contractor under the relevant provision of this Agreement.

2.13.3 Notwithstanding the provisions of Sections 2.13.1 and 2.13.2, if Concessionaire’s failure to receive payment or other relief (including approvals and consents) to which it is otherwise entitled under the Comprehensive Agreement (and to which Contractor is entitled hereunder) is solely a result of Concessionaire’s failure to comply with its obligations under this Agreement and the Comprehensive Agreement that is not attributable to Contractor, Contractor will be entitled to such payment or other relief from Concessionaire hereunder that Contractor would be otherwise entitled hereunder but for such Concessionaire’s failure to so comply.

2.14 Flow-Down from Department to Contractor. Subject in each case to Sections 12.14 and 12.15, Concessionaire shall diligently and in good faith (a) seek any approvals, consents, determinations and other responses from the Department under the Comprehensive Agreement which correspond with any such approvals, consents, determinations and other responses being requested by Contractor under this Agreement, (b) seek any compensation, time extensions and other relief from the Department under the Comprehensive Agreement which correspond with any such compensation, time extension and other relief being requested by Contractor under this Agreement and (c) pass through to Contractor under this Agreement the benefit of any approvals, consents, determinations and other responses, and any compensation, time extensions and other relief which it actually obtains from the Department under the Comprehensive Agreement.

ARTICLE 3

SUBCONTRACTS
3.1 **Project Subcontractors.** Contractor may enter into Subcontracts for discrete portions of the DB Work, but may not subcontract the entire DB Work. The identity of vendors supplying the equipment specified in Exhibit S shall require Concessionaire’s Approval, not to be unreasonably withheld. Contractor will not enter into any Subcontract with any Person if that Person or any of its affiliates (as “affiliate” is defined in 29 CFR § 98.905), or any of their respective officers, directors and employees, (i) is then suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any federal or State department or agency, (ii) has been convicted, pled guilty or nolo contendere to a violation of Law involving fraud, conspiracy, collusion, bribery, perjury, material misrepresentation, or any other violation that shows a similar lack of moral or ethical integrity or (iii) is then barred or restricted from owning, operating or providing services for the Project under Law, including the Foreign Investment and National Security Act of 2007, 50 USC App. 2170 (HR556).

3.2 **Payments to Subcontractors.** From and after the Commencement Date, Contractor shall be solely responsible for paying each Subcontractor and any other Person to whom any amount is due from Contractor for services, equipment, materials or supplies in connection with the DB Project. Pursuant to VA. Code § 2.2-4354, Contractor agrees that, within seven (7) days following receipt of monies from Concessionaire for DB Work performed by any Subcontractor, Contractor shall either: (a) pay the Subcontractor for the proportionate share of the total payment received from Concessionaire attributable to the DB Work performed by the Subcontractor (excluding contractual retainage); or (b) notify Concessionaire and Subcontractor, in writing, of Contractor’s intention to withhold all or a part of the Subcontractor’s payment, specifying the reason for the non-payment. Contractor also agrees that it shall include in all of its Subcontracts a provision that: (a) obligates Contractor to pay interest to Subcontractors on all amounts owed by Contractor that remain unpaid after seven (7) days following receipt of monies from Concessionaire for DB Work performed by any Subcontractor, except for amounts withheld as allowed in this Section 3.2; (b) states, “Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month.”; and (c) obligates each Subcontractor to include or otherwise be subject to the same payment and interest requirements as specified in this Section 3.2 with respect to each lower-tier Subcontractor. Contractor’s obligations to pay an interest charge to a Subcontractor shall not be construed to be an obligation of Concessionaire, nor shall any modification to this Agreement be allowed for the purpose of providing reimbursement for the interest charge. Cost reimbursement Claims shall not include any amount for reimbursement for the interest charge.

3.3 **Subcontractor Warranties.** Subject to Section 10.1.5, Contractor shall, for the protection of Concessionaire and the Department, obtain from all Subcontractors guarantees and warranties on all machinery, equipment, services, materials, supplies and other items used and installed hereunder, and such guarantees and warranties shall not be amended, modified or otherwise discharged without the prior written consent of Concessionaire. Contractor shall use Commercially Reasonable Efforts to cause such guarantees and warranties from Subcontractors having Subcontracts for amounts in excess of $500,000 to cover periods of not less than two (2) years from the date of Substantial Completion and to include parts, shipping, service and labor for all warranty repairs with respect thereto. Contractor shall enforce guarantees and warranties to the fullest extent thereof on behalf of Concessionaire and the Department until expiration of the Warranty Period. Subject to Section 10.1.5, at Concessionaire’s request or, if later, upon the
expiration of the Warranty Period, Contractor shall assign to Concessionaire or, as directed by Concessionaire or the Department, all guarantees and warranties of all Subcontractors then remaining in effect; provided, however, that (i) such assignment shall not relieve Contractor of its warranty obligations under the Contract Documents and (ii) Contractor shall have the prior right to enforce the guarantees and warranties of Subcontractors to the extent necessary to enforce any claims of Contractor against such Subcontractor and to assure satisfaction of Contractor’s warranty obligations to Concessionaire under the Contract Documents. Neither Contractor, nor any Subcontractor or any Person under Contractor’s control, shall take any action which could release, void, impair or waive any warranties or guarantees on equipment, materials or services that it procures from others.

3.4 No Privity. Concessionaire shall not be deemed by virtue of this Agreement to have any contractual obligation to or relationship with any Subcontractor.

3.5 Subcontracts. In addition to the requirements set forth in Section 3.2, each Subcontract that Contractor executes for the performance of the DB Work will:

(i) include a provision requiring the Subcontractor to maintain all licenses required by Law and, if the Department is to make a direct payment to such Subcontractor, comply with the requirements of the eVA Business to Government Vendor System or its successor;

(ii) contain or incorporate by reference the essential terms of this Agreement;

(iii) provide that such Subcontract may be freely assigned to Concessionaire upon the request of Concessionaire following termination of this Agreement or to the Department upon the request of the Department if the Department assumes Concessionaire’s rights and obligations under this Agreement as described in Section 16.2 hereof; and

(iv) name the Department as third-party beneficiaries of all Subcontractor’s representations and warranties contained in such Subcontract; provided, that the Department has agreed under the Comprehensive Agreement that it will only exercise its rights under such representations and warranties only so long as Contractor, Concessionaire or any Financing Party is not pursuing remedies under such Subcontract.

3.6 Review and Approval not Relief of Contractor’s Liability. Concessionaire’s Review and Concessionaire’s Approval of the identity of vendors supplying equipment on Exhibit S shall not relieve Contractor of any of its duties, liabilities or obligations under the Contract Documents. Any inspection, review or approval by Concessionaire or any other Person permitted under the Contract Documents of any portion of the DB Work or of any DB Work in progress by Contractor or Subcontractors shall not relieve Contractor of any duties, liabilities or obligations under the Contract Documents.
ARTICLE 4

PRICE AND PAYMENT

4.1 Contract Sum and Allowances.

4.1.1 Contract Sum. As consideration to Contractor for the full and complete performance of the DB Work in accordance with the terms hereof and all costs incurred in connection therewith, Concessionaire shall pay, and Contractor shall accept, a firm, fixed-price, lump sum equal to Six hundred ninety one million one hundred forty eight thousand US Dollars ($691,148,000), to be paid in installments as set forth in Section 4.2 hereof (such amount, as it may be adjusted from time to time in accordance with this Agreement, herein referred to as the “Contract Sum”). The Contract Sum (i) includes the ROW Allowance and payments from such allowance shall be made by Concessionaire as provided in Section 2.1.6 hereof, (ii) includes the Law Enforcement Allowance, and payments from such allowance shall be made by Concessionaire as provided in Section 4.1.4, and (iii) excludes amounts described in Section 4.1.2 hereof and other amounts expressly stated to be payable by Concessionaire under this Agreement. The Public Funds Amount described in Section 4.10 hereof will be utilized to pay a portion of the Contract Sum for specific elements of the DB Work as set forth on Exhibit EE. Contractor agrees that, subject to Section 2.13.3, any failure of Concessionaire to pay that portion of any Scheduled Payment due to Contractor under this Agreement for the elements of the DB Work to which such Public Funds Amount funds have been allocated (as set forth on Exhibit EE) that was to be paid with the proceeds of the Public Funds Amount shall not constitute a breach or default by Concessionaire to the extent resulting from the failure by the Department to make the Public Funds Amount available to Concessionaire at the time and in the amounts set forth in the Comprehensive Agreement and Exhibit R; provided, however, that Contractor may nevertheless suspend the applicable portion of the DB Work until payment is made, which suspension shall be treated as a suspension by Concessionaire entitling Contractor to claim a Scope Change Order under Section 15.1.1 hereof. Concessionaire agrees to pursue all rights it may have under the Comprehensive Agreement as a result of such Department’s failure and to provide Contractor with the benefit of any relief obtained by Concessionaire thereunder. Other than as expressly specified in this Agreement, the Contract Sum is not subject to adjustment for any reason other than pursuant to a Scope Change authorized by Concessionaire or to which Contractor is entitled to claim as specified herein.

4.1.2 Allowances for DB Work.

4.1.2.1 The Parties acknowledge that the Contract Sum includes certain agreed quantities set forth in the Technical Requirements (the “Baseline Quantities”) and associated unit prices and markups for (i) concrete sign foundations, (ii) electric service panel feeds, and (iii) undercut excavation (collectively, the “Allowance Items”) as set forth in the Technical Requirements. If the actual quantities of the Allowance Items in the DB Work exceed the Baseline Quantities, Contractor will be entitled to payment by Concessionaire of an amount equal to the agreed unit price and markup multiplied by the actual quantities which exceed the Baseline Quantities; provided, however, that such payment by Concessionaire to Contractor will not exceed $15,000,000 US Dollars.
4.1.2.2 Contractor will perform landscaping work only if and to the extent directed or approved by Concessionaire and the Department, and all such landscaping work performed by Contractor will be treated as a Department Change, as more fully set forth in the Technical Requirements; provided, however, that the maximum amount of landscaping work to be performed by Contractor will not exceed $2,000,000 US Dollars, unless otherwise directed by Concessionaire.

4.1.2.3 Concessionaire will pay Contractor for fuel price adjustments and certain asphalt price adjustments for paving operations as described in Section 2.1.14.2 hereof and as set forth in the Technical Requirements.

4.1.2.4 Under the Comprehensive Agreement, the Department has paid or will pay for the acquisition of stream and wetland credits in accordance with the Technical Requirements. Contractor will perform stream restoration construction activities in accordance with the Technical Requirements.

4.1.3 The Parties acknowledge that the Department has agreed pursuant to Section 8.16 of the Comprehensive Agreement to pay to Concessionaire the amounts described in Sections 4.1.2.1 through 4.1.2.3 above for further payment to Contractor. Subject to Section 2.13.3, payment by Concessionaire to Contractor of the amounts described in Sections 4.1.2.1 through 4.1.2.3 above shall be subject to prior receipt thereof by Concessionaire from the Department under the Comprehensive Agreement and Concessionaire shall have no liability to Contractor for any failure of the Department to pay such amounts as and when due under the Comprehensive Agreement. Contractor will timely prepare all supporting documentation necessary to be presented by Concessionaire to the Department under the Comprehensive Agreement in order to claim any of the amounts described in Sections 4.1.2.1 through 4.1.2.3 above.

4.1.4 Allowance for Law Enforcement Utilization. The Parties acknowledge that the Contract Sum includes an estimated budget of $1,392,300 (the “Law Enforcement Allowance”) to be used by Contractor for the cost of law enforcement through Substantial Completion, plus an 18% markup on the Law Enforcement Allowance. If the aggregate cost (excluding the 18% markup) of law enforcement used by Contractor until Substantial Completion is less than the Law Enforcement Allowance, Contractor will rebate such difference to Concessionaire plus an 18% markup, and Concessionaire will pay over such amount to the Department pursuant to Section 1.8.8 of the Technical Requirements. If the aggregate cost of law enforcement as of Substantial Completion exceeds the Law Enforcement Allowance, Concessionaire will, subject to Section 2.13.3, upon receipt of payment therefor from the Department, reimburse Contractor for such excess cost above the Law Enforcement Allowance, without a markup. The law enforcement utilization in lieu of using flag persons will be excluded from the total cost. It is understood by all parties that Contractor will work with and comply with the direction of Concessionaire and the Department to determine the use of law enforcement.

4.2 Payment Schedule. Other than the first installment of the Contract Sum, which is payable on the Commencement Date and shall not be subject to the conditions for payment set forth in this Section 4.2, the Contract Sum shall be paid by Concessionaire to Contractor in
monthly installments ("Scheduled Payments") based on percentage completion of the DB Work (other than Scheduled Payments designated as "Mobilization Payments" on the Payment and Values Schedule, which shall be payable at the times specified in the Payment and Values Schedule), subject to the Maximum Cumulative Drawdown Schedule and in accordance with the Payment and Values Schedule, as may be adjusted from time to time pursuant to the terms of this Agreement. The Parties agree that any Early Work that has been performed and invoiced but not paid prior to the Agreement Date shall be payable at Financial Close. In addition, the Parties agree that Contractor’s first request for payment hereunder may include an invoice for the full amount that would have been due under the Interim Agreement for any Early Work performed but not invoiced prior to the Agreement Date.

4.2.1 Request for Payment. By no later than the twenty-third (23rd) day of each month, Contractor shall submit to Concessionaire its request for payment consisting of (a) an invoice in the amount of the applicable Scheduled Payment; (b) a certificate signed by the Contractor that Contractor has achieved the appropriate percentage of completion required for such Scheduled Payment in accordance with the Payment and Values Schedule and attaching reasonable documentary evidence of the performance of the relevant portion of the DB Work sufficient for Concessionaire and the Independent Engineer to reasonably determine that such portion of the DB Work has been properly performed to include at a minimum a current statused cost-loaded baseline schedule with activities sorted and subtotaled at the Payment and Values Schedule level; (c) copies of the lien waivers specified in Section 4.5 or a bond meeting the requirements set forth in Section 4.5 with respect to any lien not waived; and (d) all certifications, affidavits and information as required by Section 4.10. Notwithstanding anything to the contrary contained herein, Concessionaire shall not be obligated to make any payment to the extent that such payment, when added to all other previous payments, exceeds the total amount designated as the “Maximum Cumulative Contract Sum Payment” for the corresponding month on the Maximum Cumulative Drawdown Schedule or exceeds the total cumulative physical percent complete of the DB Work as derived by the progress schedule. Also, with each payment request, Contractor shall furnish to Concessionaire all cost details relating to such payment request as necessary for Concessionaire to satisfy the requirements of the Financing Parties and the legal requirements of all Governmental Authorities. Such information shall be subject to audit in accordance with Section 20.2 hereof. Concessionaire and Contractor shall use all reasonable efforts to cooperate with each other to cause each request for payment to be reviewed and certified by the end of each calendar month. Contractor agrees that no information shall be submitted to the Independent Engineer or the Department under this Section 4.2.1 without its first being submitted to Concessionaire for Concessionaire’s Review and Concessionaire’s Approval.

4.2.2 Conditions to Scheduled Payments. Subject to the terms of this Agreement, and provided that Concessionaire has received Contractor’s request for payment in accordance with Section 4.2.1 above, Concessionaire shall make, or cause to be made, the undisputed portion of the corresponding Scheduled Payment to Contractor within thirty (30) days after Concessionaire received such request for payment, such payment to comply with VA. Code § 2.2, et seq., which addresses prompt payment; provided, however, that Concessionaire may withhold all or part of any Scheduled Payment upon the occurrence of any of the following events, and provided, further, that, other than upon the occurrence of an event described in (i), (ii)(B), (vii) and (viii) below, Concessionaire will only withhold such portion of the Scheduled
Payment necessary to protect itself, and upon the occurrence of the event described in (vi) below, Concessionaire will only withhold such portion of the Scheduled Payment not approved by the Independent Engineer:

(i) Contractor’s request for payment does not meet the requirements of Section 4.2.1(a), (b) and (d) hereof;

(ii) Contractor has not supplied Concessionaire with (A) the certification and the interim lien waivers as described in Section 4.5 hereof or (B) the Monthly Progress Report for the month for which the request for payment has been made as described in Section 2.1.18 hereof;

(iii) one or more third parties have filed a mechanics’ lien or similar Claim against Concessionaire or the Project or Project Right of Way resulting from the actions or inactions of Contractor, any Subcontractor, or any person for whom Contractor is legally responsible and Contractor has not furnished in respect thereof a bond meeting the requirements of the penultimate sentence of Section 4.5 hereof;

(iv) Contractor has failed to make timely payments to Subcontractors as required under applicable Subcontracts and Law; provided, however, that the foregoing shall not apply if Concessionaire has wrongfully withheld payments due to Contractor;

(v) Contractor fails to pay any amounts owing to Concessionaire under the Contract Documents;

(vi) the Independent Engineer does not approve the request for payment;

(vii) any event which would permit a Termination For Cause of this Agreement by Concessionaire has occurred and is continuing beyond any applicable cure period; or

(viii) this Agreement is terminated before the Final Payment is made, in which event Concessionaire shall not be obligated to make further Scheduled Payments or other payments except in accordance with Section 4.4 or Section 15.2 hereof, as applicable.

4.2.3 Deferral of Scheduled Payments. Contractor shall re-invoice at the next regular monthly invoicing date any Scheduled Payment or portion thereof withheld under Section 4.2.2 once the cause for such withholding has been removed or resolved, and Concessionaire shall make such Scheduled Payment, other than any portion thereof in dispute, without interest, if all the conditions to the Scheduled Payment have been satisfied. Contractor shall continue to perform the DB Work, notwithstanding a withholding by Concessionaire under Section 4.2.2.
4.2.4 **Interest on Late Payments.** Any undisputed amount not paid when due shall bear interest at the Bank Rate from the date such payment is due until the date it is actually paid. Any disputed amount which is ultimately determined to be payable shall bear interest at the Bank Rate from the date of such determination until the date it is actually paid.

4.3 **Final Payment.** Concessionaire shall pay the unpaid balance of the Contract Sum (the “Final Payment”), within thirty (30) days after the latest to occur of (i) Final Acceptance, (ii) receipt by Concessionaire of a final list and summary of the DB Work performed by all Subcontractors, the amount due to each Subcontractor, and certification by Contractor that all undisputed amounts due to Subcontractors have been paid in full, (iii) receipt by Concessionaire of a final lien waiver, in the form of Exhibit B, of all liens that Contractor may have against Concessionaire, the Project and the Project Right of Way, (iv) receipt by Concessionaire from Contractor of final lien waivers in the form of Exhibit C (or, solely in the case of vendors providing materials or equipment valued at less than $50,000 in the aggregate, other evidence reasonably satisfactory to Concessionaire demonstrating that such vendor has waived or is not entitled to place any lien on any part of the Project or the Project Right of Way) from each Subcontractor with a Subcontract of more than $50,000 in value (and from such other Subcontractors as may be necessary such that the aggregate value of all Subcontracts for which a final release and waiver has not been obtained does not exceed $1,000,000) or, if Contractor is unable to obtain all such waivers, a letter of credit or bond that has received Concessionaire’s Approval to protect Concessionaire, the Department, the Project and the Project Right of Way from any and all Claims made on account of such liens, and (v) the satisfaction of all other conditions to a Scheduled Payment contained in this Agreement or to which Contractor has otherwise agreed. Concessionaire may withhold from the Final Payment the sum of (x) one hundred fifty percent (150%) of the amount reasonably estimated by Concessionaire to cover the costs of causing the DB Project to reach Final Acceptance if not achieved by the Guaranteed Final Acceptance Date, plus (y) the unpaid amount of all Subcontracts for which a final release and waiver has not been obtained or for which Contractor has not provided a satisfactory payment bond to protect the Project and Concessionaire. Concessionaire shall pay over to Contractor the relevant portions of such withheld amount when the DB Work required to achieve Final Acceptance has been completed (less Concessionaire’s cost of completing such DB Work) and when the statutory period by which any liens may be created has expired without such liens having been created.

4.4 **Termination Payment.** Upon a termination of this Agreement pursuant to Section 15.3 hereof, Contractor shall be entitled to receive a termination payment (the “Termination Payment”) equal to the sum of (i) that portion of the Contract Sum, which is due and payable to Contractor by Concessionaire and applicable to the DB Work completed up to the date of termination and which has not previously been paid to Contractor, (ii) the direct, out-of-pocket costs reasonably incurred by Contractor in withdrawing its equipment and personnel from the Project Right of Way and in otherwise demobilizing, and (iii) the direct, out-of-pocket costs reasonably incurred by Contractor in terminating contracts with Subcontractors. Representatives of Concessionaire and Contractor shall determine the Contract Sum amount referred to in clause (i) above in accordance with the Payment and Values Schedule, and Contractor shall document in detail the costs claimed under clause (ii) above to Concessionaire’s reasonable satisfaction and shall supply Concessionaire with copies of the Subcontractor invoices covering amounts claimed under clause (iii) above. Contractor shall submit an invoice to Concessionaire for the
Termination Payment with the supporting information and documents referred to above, and Concessionaire shall pay such invoice within thirty (30) days after its receipt of same subject to the provisions of this Section 4.4 and unless it disputes certain elements thereof, in which event only the undisputed portion of the Termination Payment need be made within such 30-day period and the dispute over the remainder of the claimed Termination Payment may be submitted to the appropriate dispute resolution process set forth in Article 19. The Termination Payment shall be subject to offset for amounts payable by Contractor to Concessionaire. As a condition precedent to receiving the Termination Payment, Contractor shall comply with all the provisions of Section 15.6 hereof. Payment of the Termination Payment shall be the sole and exclusive liability of Concessionaire, and the sole and exclusive remedy of Contractor, with respect to termination of this Agreement pursuant to Section 15.3 hereof, but it will not affect Contractor’s right to receive amounts otherwise due and unpaid hereunder prior to termination. In no event shall Concessionaire have any further liability to Contractor in any such event for actual, incidental, consequential or other damages, notwithstanding the actual amount of damages that Contractor may have sustained in connection with a termination pursuant to Section 15.3 hereof. Calculation of the Termination Payment has been agreed upon and fixed hereunder because of the difficulty of ascertaining the exact amount of such damages Contractor will actually sustain in the event of a termination of the DB Work pursuant to Section 15.3 hereof, and Concessionaire and Contractor agree that the calculation of the Termination Payment is reasonable.

4.5 All Payments Subject to Release of Liens. At the time of each Scheduled Payment hereunder, Contractor shall (a) certify to Concessionaire that the DB Project, the Project Right of Way and any and all interests and estates therein, and all improvements and materials placed on the Project Right of Way, are, to the extent of the most recent payment received by Contractor, free from any and all Claims, liens, security interests or encumbrances in the nature of mechanics’, labor or materialmen’s liens or otherwise, arising out of or in connection with performance by Contractor, or any Subcontractor, of the DB Work, and (b) provide an interim lien waiver, in the form of Exhibit D hereto (or, solely in the case of vendors providing materials or equipment valued at less than $50,000 in the aggregate, other evidence reasonably satisfactory to Concessionaire demonstrating that such vendor has waived or is not entitled to place any lien on any part of the Project or the Project Right of Way), of Contractor’s lien Claims, to the extent of the most recent payment received by Contractor, and interim lien waivers, in the form of Exhibit E hereto, from each Subcontractor with a Subcontract in excess of $50,000, to the extent of the most recent payment received by Contractor, as are necessary to support Contractor’s certificate. If any Claim, lien, security interest or encumbrance is filed or notification of withholding money for labor or material furnished under this Agreement is served on Concessionaire, the Department or any Financing Party, Concessionaire may withhold from any Scheduled Payment or other amount payable to Contractor under this Agreement or otherwise, an amount sufficient to discharge any or all such liens or Claims, unless Contractor shall furnish a bond in form, substance and amount reasonably satisfactory to Concessionaire, the Department and the Financing Parties to protect Concessionaire, the Project and the Project Right of Way against such liens or Claims, and, after thirty (30) days from the time such lien or Claim is made, unless Contractor shall have furnished a bond as described above, Concessionaire may discharge such lien or Claim with the moneys withheld, whereupon for purposes of this Agreement such moneys shall be deemed to have been paid to Contractor hereunder. In addition, Contractor shall deliver to Concessionaire a final release and waiver of liens, in the
form of Exhibit C hereto, from each Subcontractor with a Subcontract in excess of $50,000 on the payment date next following the date on which final payment to such Subcontractor is made.

4.6 Payment or Use Not Acceptance. No Scheduled Payment or other payment to Contractor or any use of the DB Project by Concessionaire shall alone constitute an acceptance of any of the DB Work or relieve Contractor of any of its obligations or liabilities with respect thereto.

4.7 Set-Off. Concessionaire may deduct and set-off against any part of the balance due or to become due to Contractor under this Agreement, any amounts due from Contractor to Concessionaire under or in connection with this Agreement, including any Late Completion Payment and Lane Closure Payment due or to become due from Contractor to Concessionaire pursuant to Article 7.

4.8 Guaranty. Contractor shall cause the Guarantor to execute and deliver a guaranty in favor of Concessionaire in the form of Exhibit F hereto (the “Guaranty”) as a security for all obligations of Contractor hereunder. Such Guaranty must be provided by no later than the Agreement Date and must be assignable by Concessionaire to the Department, with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of Concessionaire under this Agreement.

4.9 Letter of Credit. On or before the Financial Close Date, Contractor shall provide Concessionaire with a Letter of Credit in the form of Exhibit H hereto in an amount equal to seven-and-one-half percent (7.5%) of the Contract Sum as additional security for Contractor’s performance of its obligations hereunder. Upon Substantial Completion, the amount of the Letter of Credit shall be adjusted to an amount equal to three percent (3%) of the Contract Sum, and be subject to draw by Concessionaire for the first two (2) years of the Warranty Period. If any General Warranty Claims remain unresolved as of the date the Letter of Credit (or applicable portion thereof) is otherwise permitted to expire pursuant to the preceding sentence, Contractor shall cause the Letter of Credit (or applicable portion thereof) to remain in effect through the date of resolution of such General Warranty Claims; provided that the amount of the Letter of Credit (or applicable portion thereof) shall be reduced following the end of the first two (2) years of the applicable Warranty Period to an amount equal to one hundred fifty percent (150%) of the total amount of such outstanding Claims. The Letter of Credit will be assignable by Concessionaire to the Department, with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of Concessionaire under this Agreement. The items on Concessionaire’s Punch List shall be completed by Contractor within sixty (60) days after the Guaranteed Final Acceptance Date, and Concessionaire may draw on the Letter of Credit and use the proceeds of such drawing to provide for the prompt completion of the items remaining on Concessionaire’s Punch List after such sixty (60)-day period. In addition, if the items on Concessionaire’s Punch List have not been completed by Contractor within the time set forth in Section 17.08(b)(ii) of the Comprehensive Agreement, Concessionaire will draw on the Letter of Credit and use the proceeds of such drawing to provide for the prompt completion of the remaining items on Concessionaire’s Punch List if the Department so directs.

For so long as Contractor is obligated to maintain the Letter of Credit not later than thirty (30) days prior to the stated expiration date of the Letter of Credit, Contractor shall renew, or
cause the renewal of, outstanding Letter of Credit, or replace, or cause the replacement of, such Letter of Credit with one or more replacement Letters of Credit having a stated amount equal to that of the Letter of Credit being renewed or replaced (or in such lesser amount as may then be required under this Agreement). For so long as Contractor is obligated to maintain the Letter of Credit, in the event (i) the issuer of a Letter of Credit shall fail to meet the requirements of clause (b) of the definition of the “Letter of Credit” hereunder or (ii) an issuer of a Letter of Credit shall fail to honor the beneficiary’s properly documented request to draw on an outstanding Letter of Credit, then within five (5) Business Days thereafter Contractor shall provide a substitute Letter of Credit from an issuer other than the bank that has failed to honor the outstanding Letter of Credit; provided, that if the issuer of a Letter of Credit fails to maintain the ratings specified in clause (c) of the definition of the “Letter of Credit” hereunder, within fifteen (15) days thereafter Contractor shall provide a substitute Letter of Credit from an issuer other than the bank that has been downgraded. If Concessionaire does not receive a replacement Letter of Credit from an issuer within the applicable time specified in either of the two preceding sentences, it may draw on the full available amount of the Letter of Credit. Amounts drawn in such circumstances shall be held directly by Concessionaire (or the Department, as applicable) and shall be available to be applied by Concessionaire or the Department under the conditions set forth in the Letter of Credit. In all cases, the costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing or otherwise administering a Letter of Credit shall be borne by Contractor.

4.10 Public Funds Amount. The Department has agreed, pursuant to Section 7.02(a) of the Comprehensive Agreement, to provide to Concessionaire payments of the Public Funds Amount in accordance with the terms set forth in Exhibit R. The Public Funds Amount may be adjusted pursuant to Section 7.03(b) of the Comprehensive Agreement and will be utilized by Concessionaire to pay a portion of the Contract Sum in accordance with this Agreement. For any month in which the Public Funds Amount will be utilized to pay a portion of the Contract Sum, Contractor shall provide with its request for payment under Section 4.2.1 all necessary certifications, affidavits and information required by Exhibit R for the disbursement of the Public Funds Amount from the Department (or the trustee) to the Concessionaire under the Comprehensive Agreement.

ARTICLE 5

CONCESSIONAIRE’S OBLIGATIONS

5.1 Representatives. Concessionaire shall designate a representative (the “Concessionaire’s Project Manager”) to administer the Contract Documents on behalf of Concessionaire. Concessionaire’s Project Manager shall have the authority to (a) issue Concessionaire’s instructions and other communications to Contractor, (b) determine achievement of milestones under the Payment and Values Schedule, (c) issue Concessionaire’s determination regarding Substantial Completion, Final Acceptance, the Contractor’s Punch List and the Concessionaire’s Punch List, and (d) execute Proposal Requests and Scope Change Orders. Concessionaire’s Project Manager shall be the recipient of notices and other written communications from Contractor under the Contract Documents. In furtherance of his/her responsibilities described hereunder, Concessionaire’s Project Manager may conduct observations and inspections of the DB Project throughout design, procurement and construction,
provided that no such observations or inspections shall relieve Contractor of any of its obligations under the Contract Documents. Concessionaire shall also designate a representative to observe the DB Work on the Project Right of Way (“Concessionaire’s Field Representative”). Concessionaire’s Field Representative shall have the right to be present at the Project Right of Way at all times, to occupy the field office of Concessionaire at the Project Right of Way and to participate in weekly DB Project status meetings conducted by Contractor. Concessionaire’s Field Representative shall have the right to observe and inspect the progress of procurement and construction of the DB Project, and may offer advice to Contractor about the conformance of the DB Work with the Contract Documents. Contractor shall notify Concessionaire’s Field Representative before commencing any significant items of construction for the DB Project. However, Concessionaire’s Field Representative shall not have the authority to make decisions or give instructions binding upon Concessionaire, except to the extent expressly authorized by Concessionaire in writing. In the event Concessionaire employs or designates a different Concessionaire’s Project Manager or Concessionaire’s Field Representative, Concessionaire shall give Contractor written notice of the identity of the new Concessionaire’s Project Manager or Concessionaire’s Field Representative. Concessionaire’s Project Manager or Concessionaire’s Field Representative may delegate any or all of his/her authority to one or more delegates, but no such delegation shall be effective unless made in a written instrument from him/her delivered to Contractor naming the delegate, his/her tenure and the extent of his/her authority. In addition, Concessionaire shall have the right to retain one or more independent consultants to monitor and inspect the DB Work at the Project Right of Way or specific portions of the DB Work.

5.2 Project Right of Way; Real Estate Rights. Concessionaire shall furnish all Department Existing ROW and Real Estate Rights that are provided to Concessionaire from the Department under the Comprehensive Agreement, such Department Existing ROW and Real Estate Rights to be made available to Contractor by the later of the Agreement Date or the Commencement Date.

5.3 Governmental Approvals. Concessionaire shall cooperate with Contractor in connection with Contractor’s efforts to obtain the Governmental Approvals that are designated as Contractor’s responsibility hereunder.

5.4 Payments of Contract Sum. Concessionaire shall make all undisputed payments of the Contract Sum due to Contractor in accordance with Article 4.

5.5 Start-Up Personnel. Concessionaire shall engage the OS&S Contractor to provide all necessary start-up personnel for Commissioning and testing of the DB Work, all in accordance with the Performance Testing and Commissioning Plan and Program.

5.6 Hazardous Substances. The Parties acknowledge that pursuant to Section 16.02 of the Comprehensive Agreement, the Department (a) has assumed, to the extent permitted by Law, responsibility for third party claims against “Concessionaire Parties” (as defined under the Comprehensive Agreement), including Contractor, for personal injury, damages or harm to property or business due to any Pre-Existing Hazardous Substances and Third Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition, and all related penalties, fines and administrative or civil sanctions arising out or relating to such
Pre-Existing Hazardous Substances and Third Party Hazardous Substances; except to the extent such Claims are due to the negligence, recklessness, or willful misconduct of a “Concessionaire Party” (as defined under the Comprehensive Agreement) and (b) has agreed to pay Concessionaire, to the extent permitted by Law, its “Allocable Costs” for Remedial Actions with respect to Unknown Pre-Existing Hazardous Substances and Third Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition, and Concessionaire shall, pursuant to Sections 2.1.17.5 and 12.7 hereof, make available to Contractor any relief provided by the Department to Concessionaire under Section 16.02 of the Comprehensive Agreement. Concessionaire shall not be considered in breach of this Agreement in the event of the discovery of Unknown Pre-Existing Hazardous Substances and Third Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition, so long as it is using Commercially Reasonable Efforts to pursue its rights under the Comprehensive Agreement with respect thereto. The provisions of Section 12.15 hereof shall apply in the event Contractor and Concessionaire cannot agree on the amount of any Claim to be made against the Department pursuant to the Comprehensive Agreement as a consequence of the discovery of Unknown Pre-Existing Hazardous Substances or Third Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition.

5.7 Comprehensive Agreement. Concessionaire shall perform, or cause Concessionaire Contractors to perform, its specified obligations under the Comprehensive Agreement to the extent such obligations are not required to be performed by Contractor hereunder and will use Commercially Reasonable Efforts to include Contractor where appropriate in dealings with the Department to the extent permitted by the Department.

5.8 Scope Change Order. In the event Concessionaire initiates and authorizes a Scope Change Order and the forecasted cost to carry out such Scope Change Order exceeds the amount of Concessionaire’s remaining overrun contingency built in to the financial model approved by the Financing Parties as of Financial Close Date, Concessionaire shall reasonably demonstrate to Contractor that it has sufficient funds to pay for such Scope Change Order.

ARTICLE 6

COMMISSIONING, COMPLETION AND ACCEPTANCE OF DB PROJECT

6.1 DB Project Commissioning. At least ninety (90) days before Commissioning of the DB Project is scheduled to begin, Contractor shall propose, for Concessionaire’s Approval and the Independent Engineer’s review and acceptance, a Performance Testing and Commissioning Plan and Program, including a Commissioning schedule, an organization chart of Contractor’s personnel conducting the Commissioning, and a comprehensive procedure for the review of the Operating Manual and the application of its contents to the DB Project systems. Concessionaire shall supply its start-up personnel as provided in Section 5.5 hereof to perform the labor necessary to start-up the DB Project and to observe and verify Commissioning tasks performed by Contractor. Upon Concessionaire’s and the Independent Engineer’s acceptance of the Performance Testing and Commissioning Plan and Program for the DB Project, Contractor shall proceed to commission the DB Project. As Commissioning progresses, Contractor shall provide Concessionaire and the OS&S Contractor’s personnel with comprehensive classroom
and on-the-job training in the operation and maintenance of the DB Project or the applicable portion thereof. Contractor shall coordinate all training sessions in a manner sufficient to provide Concessionaire and the OS&S Contractor’s personnel with an adequate understanding of the basic and principal design, and the operation and maintenance aspects, of each dimension of the DB Project as an integrated whole.

6.2  [Reserved]

6.3  **DB Project Start-Up.** Contractor shall present to Concessionaire for Concessionaire’s Approval a completed checklist of all documentation, equipment and systems reviewed during the Commissioning of the DB Project. Following confirmation by Concessionaire that such checklist is complete and accurate and that Substantial Completion has been achieved, Contractor shall start up the DB Project in accordance with the Standard of Care, the Contract Documents and a schedule of start-up procedures delivered by Contractor to, and approved by, Concessionaire at least ninety (90) days prior to start-up.

6.4  **Performance Tests.** Provided the DB Project and all DB Project systems included therein are capable of safe and continuous operation in accordance with the Standard of Care, the Operating Manual, the Performance Guarantees, the Technical Requirements and the Contract Documents, subject to Concessionaire’s Approval, Contractor shall conduct the Performance Tests. At least sixty (60) days prior to the date Contractor wishes to commence a Performance Test, Contractor shall provide to Concessionaire, for Concessionaire’s Approval and approval of the Independent Engineer, complete test procedures developed in accordance with the Performance Testing and Commissioning Plan and Program. Thereafter, Contractor shall give Concessionaire, the Department and the Independent Engineer at least five (5) Business Days’ prior written notice of the date on which Contractor intends to commence each Performance Test. A Performance Test shall consist of the operation of the equipment and applicable systems included in the DB Work necessary for operation of the HOT Lanes in accordance with the Contract Documents and the Performance Testing and Commissioning Plan and Program. Concessionaire shall designate and make available qualified and authorized representatives to observe the Performance Tests and to monitor the taking of measurements to determine the level of achievement of the Performance Guarantees, all in accordance with the Contract Documents and the Performance Testing and Commissioning Plan and Program. The Department will be included in such Performance Tests for purposes of demonstrating effective information transfer across system interfaces, where applicable. Contractor shall not attempt to perform a Performance Test if any Commissioning, start-up or initial test procedures have not been completed as required prior to the Performance Test or any aspect of the DB Project has not been completed sufficiently to assure the safe and continuous operation of all or any part of the DB Project during the Performance Test in accordance with the Standard of Care, the Operating Manual, the Contract Documents and the Performance Testing and Commissioning Plan and Program.

6.5  **Completed Performance Test.** When Contractor believes it has successfully completed a Performance Test, Contractor shall provide Concessionaire and the Independent Engineer a written report of the test results as part of the Substantial Completion delivered under Section 6.6 hereof. The performance results will be calculated in accordance with the Performance Testing and Commissioning Plan and Program and the Performance Guarantees,
including any adjustments to reflect deviations from the Performance Guarantees to be calculated as set forth in the Performance Testing and Commissioning Plan and Program.

6.6  **Substantial Completion of the DB Project.**

6.6.1  **Conditions to Substantial Completion.** Substantial Completion of the DB Project shall be achieved hereunder if the following conditions have been met:

(i) all lanes of traffic (including ramps, interchanges, overpasses, underpasses, and other crossings) set forth in the Construction Documentation are in their final configuration and available for normal and safe use and operation;

(ii) all major safety features which are part of the DB Project are installed and functional, including, as required, shoulders, guard rails, striping and delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences, safety end treatments, terminal anchor sections and crash attenuators;

(iii) all required illumination for normal and safe use and operation which is part of the DB Project is installed and functional in accordance with the Technical Requirements;

(iv) all required signs and signals for normal and safe use and operation which are part of the DB Project are installed and functional in accordance with the Technical Requirements;

(v) the need for temporary traffic controls or for lane closures at any time which are part of the DB Project has ceased (except for any then required for routine maintenance, and except for temporary lane closures during hours of low traffic volume in accordance with and as permitted by a Department-approved traffic management plan solely in order to complete Concessionaire’s Punch List items);

(vi) Contractor has completed the toll commissioning process described in the Technical Requirements, and the ETTM System is completed, has passed all demonstration and performance testing in accordance with the Construction Documentation and the Technical Requirements, including demonstration of interoperability with E-ZPass or any successor to E-ZPass then utilized on State Highways, and is ready for normal operation unless the foregoing conditions have been previously satisfied under Section 9.02(a)(viii) of the Comprehensive Agreement;

(vii) the TMS (if any) and safety features for TMS components are installed and functional;
(viii) Contractor has concluded a Performance Test in which the DB Project demonstrates a level of achievement deemed satisfactory in accordance with the Performance Testing and Commissioning Plan and Program;

(ix) Contractor has delivered either (i) (A) an interim lien waiver, in the form of Exhibit D hereto, of Contractor’s lien Claims to the extent of most recent payment received by Contractor and (B) interim lien waivers, in form of Exhibit E hereto, from each Subcontractor with a Subcontract in excess of $50,000, to the extent of the most recent payment received by such Contractor, as are necessary to support Contractor’s certificate (or solely in the case of vendors providing materials or equipment valued at less than $50,000 in the aggregate, other evidence reasonably satisfactory to Concessionaire demonstrating that such vendor has waived or is not entitled to place any lien on any part of the Project or the Project Right of Way); or (ii) written evidence of posting of a bond by Contractor in the amount equal to the aggregate of amounts of all liens on any part of the Project or the Project Right of Way that remain outstanding as of the date of Substantial Completion (or, if earlier, the date of the most recent payment to Contractor);

(x) Contractor has otherwise completed the DB Work in accordance with this Agreement, including the Technical Requirements, other Contract Documents and the Construction Documentation, such that the DB Project is in a physical condition that it can be used for normal and safe vehicular travel in all lanes and at all points of entry and exit, except for any remaining items listed in Concessionaire’s Punch List;

(xi) “Substantial Completion” has occurred under the Comprehensive Agreement as evidenced by the Department’s issuance of a “Substantial Completion Certificate” thereunder; and

(xii) as provided in Section 6.6.3, Concessionaire has delivered to Contractor the Substantial Completion Certificate signed by Contractor and countersigned by each of Concessionaire and the Independent Engineer.

The Parties agree to cooperate to fulfill the above conditions to Substantial Completion. The Parties will disregard the status of the landscaping and aesthetic features included in the Construction Documentation in determining whether Substantial Completion has occurred, except to the extent that its later completion will affect public safety or satisfaction of the criterion in Section 6.6.1.

6.6.2 Notice and Report of Substantial Completion of the DB Project. At least forty (40) days prior to the date when Contractor anticipates to achieve Substantial Completion, it shall deliver to Concessionaire a notice thereof (the “Notice of Substantial Completion”) when Contractor believes that conditions (i) through (x) of Section 6.6.1 have been satisfied (or will be satisfied within fourteen (14) days after the Notice of Substantial Completion has been delivered by Contractor to Concessionaire). The Notice of Substantial Completion shall contain a report of results of the Performance Test and a description of all DB Work.
completed in a form reasonably acceptable to Concessionaire and the Independent Engineer and with sufficient detail to enable them to establish whether Substantial Completion has been achieved, as well as a Substantial Completion Certificate signed by Contractor. Within nineteen (19) days after receipt of the Notice of Substantial Completion, Concessionaire shall inspect the DB Project and all DB Work completed by Contractor, review the results of the Performance Test and the report submitted by Contractor, and either (a) deliver to the Independent Engineer (for countersignature) and the Department the signed Substantial Completion Certificate, or (b) if reasonable cause exists for doing so, notify Contractor that Substantial Completion has not been achieved stating in reasonable detail the reasons therefor. If Concessionaire notifies Contractor that Substantial Completion has not been achieved, Contractor shall promptly, at its own cost, take such action or perform such additional DB Work as will permit achievement of Substantial Completion, conduct another Performance Test, if necessary, and issue to Concessionaire a revised Substantial Completion Certificate signed by Contractor. The foregoing process shall be repeated until Concessionaire is satisfied with the Notice of Substantial Completion and concurs that Substantial Completion has occurred, whereupon it shall countersign the Substantial Completion Certificate and forward the same to the Independent Engineer and the Department.

6.6.3 **Achievement of Substantial Completion of the DB Project.** Within twenty (20) days after Concessionaire has provided the Notice of Substantial Completion to the Independent Engineer and the Department, then Concessionaire, Contractor, the Independent Engineer and the Department will meet, confer and exchange information on a regular basis with a goal being Concessionaire’s issuance of the Substantial Completion Certificate countersigned by the Independent Engineer; provided that Concessionaire’s issuance of such Substantial Completion Certificate hereunder shall be contingent upon issuance of a “Substantial Completion Certificate” by the Department under Section 8.08 of the Comprehensive Agreement. Contractor acknowledges that, pursuant to Section 8.08(e) of the Comprehensive Agreement, the Department is to conduct an inspection of the DB Project and review the final Construction Documentation and such other matters as may be necessary to determine whether Substantial Completion is achieved and will deliver a report of findings and recommendations to Concessionaire. If the Department notifies Concessionaire in accordance with Section 8.08 of the Comprehensive Agreement that it will not issue the “Substantial Completion Certificate” under the Comprehensive Agreement and identifies any defects and deficiencies in the DB Work, Concessionaire shall promptly provide such notice to Contractor, and Contractor shall promptly correct such defects and deficiencies in the DB Work identified by the Department. The foregoing process shall be repeated until Substantial Completion has been achieved as evidenced by Concessionaire’s and the Independent Engineer’s countersigning of the Substantial Completion Certificate. For all purposes of this Agreement, the date of achievement of Substantial Completion shall be the date on which Concessionaire issues to Contractor such Substantial Completion Certificate that is countersigned by each of Concessionaire and the Independent Engineer. Concessionaire will provide to Contractor with such Substantial Completion Certificate the Concessionaire’s Punch List of items to be completed by Contractor to achieve Final Acceptance. The Parties acknowledge that under Section 8.08(f) of the Comprehensive Agreement if the Department has not notified Concessionaire of its approval or disapproval of whether Substantial Completion has been achieved within twenty-one (21) days after such Concessionaire notice under the Comprehensive Agreement (or ten (10) days with respect to any resubmittal of the notice), and if the delay is not a result of an action or inaction of a “Concessionaire Party” (as defined in the Comprehensive Agreement), then such Department’s
delay will constitute a CA Delay Event and a CA Compensation Event hereunder and provisions of Sections 12.5 and 12.6 shall apply.

6.6.4 Substantial Completion of Segments. Concessionaire may, with Contractor’s consent, request the Department to accept a Segment prior to the issuance of “Substantial Completion Certificate” for the balance of the Project under the Comprehensive Agreement. If the Department agrees pursuant to Section 8.13 of the Comprehensive Agreement to such acceptance of a Segment, Contractor shall, on behalf of Concessionaire, fulfill all the conditions to acceptance of such Segment relating to the DB Work as developed by the Department and Concessionaire under the Comprehensive Agreement and agreed to by Contractor.

6.6.5 Failure to Achieve Substantial Completion by Long Stop Date; Substantial Completion Recovery Plan. Contractor will achieve Substantial Completion of the DB Project by the Long Stop Date. The Long Stop Date will be extended one time if (i) Contractor submits to Concessionaire for Concessionaire’s Approval (which approval will be subject to the Department’s approval under Section 8.15(b) of the Comprehensive Agreement) a written recovery plan (the “Substantial Completion Recovery Plan”) not later than ninety (90) days prior to the Long Stop Date, (ii) the Substantial Completion Recovery Plan outlines the actions Contractor proposes to take in order to cause Substantial Completion to occur as promptly as reasonably possible, which plan may include increasing work hours to the extent permitted under applicable Law and utilizing additional labor and equipment and other appropriate acceleration techniques to improve schedule progress and will set forth a proposed new Long Stop Date, (iii) such Substantial Completion Recovery Plan and new Long Stop Date is subject to Concessionaire’s Approval (which approval shall be contingent upon the Department’s approval under the Comprehensive Agreement) within thirty (30) days in its reasonable discretion, (iv) Contractor diligently implements the Substantial Completion Recovery Plan and (v) Contractor agrees to continue to pay Late Substantial Completion Payments pursuant to Section 7.2 (at the same daily rate for up to the number of additional days by which the Long Stop Date is so extended at Contractor’s request) notwithstanding the limit on Contractor’s liability for such Late Substantial Completion Payments set forth in Section 7.6. If all the conditions to the approval of the Substantial Completion Recovery Plan set out in the preceding sentence have been satisfied, the Long Stop Date hereunder shall be extended for the same number of days the corresponding “Long Stop Date” has been extended under the Comprehensive Agreement. In addition, Concessionaire may, in its sole discretion, consent (which consent will be subject to the Department’s consent under Section 8.15(b) of the Comprehensive Agreement) to a second Substantial Completion Recovery Plan upon such terms and conditions as it may establish in its sole discretion.

6.7 Final Acceptance of the DB Project. Final Acceptance of the DB Project may be achieved hereunder pursuant to Section 6.7.1 below.

6.7.1 Conditions to Final Acceptance. Final Acceptance of the DB Project shall be achieved hereunder if the following conditions have been met:

(i) the DB Project is free and clear of all liens, Claims, security interests or encumbrances arising out of or in connection with the
performance of the DB Work by Contractor or any Subcontractor during the DB
Work Period;

(ii) all items on Concessionaire’s Punch List have been
completed by Contractor in accordance with the Contract Documents;

(iii) all DB Project Documentation, including Final As-Built
Drawings and Documentation as required by Section 17.2, to be submitted on or
before the Final Acceptance have been submitted and approved by
Concessionaire, the Department and the Independent Engineer, as applicable (to
the extent such approvals are required from the Independent Engineer under the
Project financing documents, the Department under the terms of the
Comprehensive Agreement or Concessionaire under the terms of this Agreement,
as applicable);

(iv) Contractor has paid for all DB Work required to achieve
Final Acceptance which was performed by third parties that Contractor is
obligated to pay (other than disputed amounts and amounts that are not yet due
and payable);

(v) Contractor has delivered all required certifications from the
engineer of record and architect of record to all necessary Governmental
Authorities and to Concessionaire;

(vi) Contractor has made all deliveries of Work Product to
Concessionaire that are required to be made pursuant to this Agreement;

(vii) Contractor has otherwise performed all of the DB Work
required by the Contract Documents;

(viii) Substantial Completion has occurred in accordance with
Section 6.6.3 and “Substantial Completion” has occurred under the
Comprehensive Agreement;

(ix) “Final Acceptance” has occurred under the Comprehensive
Agreement as evidenced by the Department’s issuance of a “Final Acceptance
Certificate” thereunder; and

(x) as provided in Section 6.7.3, Concessionaire has delivered
to Contractor the Final Acceptance Certificate signed by Contractor and
countersigned by each of Concessionaire and the Independent Engineer.

The Parties agree to cooperate to fulfill the above conditions to Final Acceptance.

6.7.2 Notice and Report of Final Acceptance of the DB Project. At least
forty (40) days prior to the date when Contractor anticipates to achieve Final Acceptance, it shall
deliver to Concessionaire a notice thereof (the “Notice of Final Acceptance”) when Contractor
believes that conditions (i) through (viii) of Section 6.7.1 have been satisfied (or will be satisfied
within fourteen (14) days after the Notice of Final Acceptance has been delivered by Contractor to Concessionaire. The Notice of Final Acceptance shall contain a report in a form reasonably acceptable to Concessionaire and the Independent Engineer and with sufficient detail to enable them to establish that Contractor has completely performed all of the DB Work under the Contract Documents, including the items listed in Concessionaire’s Punch List, as well as a Final Acceptance Certificate signed by Contractor. Concessionaire shall, within nineteen (19) days following receipt of the Notice of Final Acceptance, inspect the DB Project and all DB Work hereunder and review the report submitted by Contractor and either (a) deliver to the Independent Engineer (for countersignature) and the Department the signed Final Acceptance Certificate, or (b) if reasonable cause exists for doing so, notify Contractor that Final Acceptance has not been achieved, stating in reasonable detail the reasons therefor. If Concessionaire notifies Contractor that Final Acceptance has not been achieved, Contractor shall, at its own cost, promptly take such action or perform such additional DB Work as will permit achievement of Final Acceptance, conduct another Performance Test, if necessary, and issue to Concessionaire and a revised Final Acceptance Certificate signed by Contractor. The foregoing process shall be repeated until Concessionaire is satisfied with the Notice of Final Acceptance and concurs that Final Acceptance has occurred, whereupon it shall countersign the Final Acceptance Certificate and forward the same to the Independent Engineer and the Department.

6.7.3 Achievement of Final Acceptance of the DB Project. Within twenty (20) days after Concessionaire has provided the Notice of Final Acceptance to the Independent Engineer and the Department, then Concessionaire, Contractor, the Independent Engineer and the Department will meet, confer and exchange information with the goal being Concessionaire’s issuance of the Final Acceptance Certificate countersigned by the Independent Engineer; provided that Concessionaire’s issuance of such Final Acceptance Certificate hereunder shall be contingent upon issuance of a “Final Acceptance Certificate” by the Department under Section 8.09 of the Comprehensive Agreement. Contractor acknowledges that, pursuant to Section 8.09(c) of the Comprehensive Agreement, the Department is to conduct an inspection of the completed Concessionaire’s Punch List items, a review of the Final As-Built Drawings and Documentation and such other investigation as may be necessary to evaluate whether the conditions for Final Acceptance of the DB Project have been satisfied. If the Department notifies Concessionaire that it will not issue the “Final Acceptance Certificate” under Section 8.09 of the Comprehensive Agreement and identifies any defects and deficiencies in the DB Work, Concessionaire shall promptly provide such notice to Contractor (together with the explanation provided by the Department for its determination under Section 8.09(d) of the Comprehensive Agreement), and Contractor shall promptly correct such deficiencies in the DB Work identified by the Department. The foregoing process shall be repeated until Final Acceptance has been achieved as evidenced by Concessionaire’s and the Independent Engineer’s countersigning the Final Acceptance Certificate; provided, however, Contractor is obligated to achieve Final Acceptance within ninety (90) days after the date of Substantial Completion, as such date may be extended hereunder (the “Guaranteed Final Acceptance Date”). If Concessionaire reasonably and in good faith determines that Contractor is not proceeding with all due diligence to complete the DB Work in order to achieve Final Acceptance by the Guaranteed Final Acceptance Date, Concessionaire may complete such DB Work at Contractor’s expense. If Concessionaire completes such DB Work, Concessionaire shall have the right to set-off in accordance with Section 4.7 any amounts Contractor owes it pursuant to the preceding sentence and Contractor shall pay to Concessionaire the remaining balance, if any, within thirty
(30) days of the receipt of Concessionaire’s invoice therefor. For all purposes of this Agreement, the date of achievement of Final Acceptance shall be the date on which Concessionaire issues to Contractor such Final Acceptance Certificate that is countersigned by each of Concessionaire and the Independent Engineer. The Parties acknowledge that under Section 8.09(d) of the Comprehensive Agreement if the Department has not notified Concessionaire of its approval or disapproval of whether Final Acceptance has been achieved within twenty-one (21) days after such Concessionaire notice under the Comprehensive Agreement (or ten (10) days with respect to any resubmittal of the notice), and if the delay is not a result of an action or inaction of a “Concessionaire Party” (as defined in the Comprehensive Agreement), then such Department’s delay will constitute a CA Delay Event and a CA Compensation Event hereunder and provisions of Sections 12.5 and 12.6 shall apply.

6.8 Concessionaire’s Punch List. At any time after the commencement of DB Project start-up, Concessionaire may submit Concessionaire’s Punch List to Contractor, and may thereafter revise the same from time to time; provided that Concessionaire does not have the right to submit or revise Concessionaire’s Punch List after Concessionaire issues fully countersigned Final Acceptance Certificate; notwithstanding the foregoing, Concessionaire shall retain the right to confirm that punch list items performed by Contractor are properly completed. Concessionaire shall not be precluded from listing any item of DB Work on the Concessionaire’s Punch List that was not included on Contractor’s Punch List.

6.9 Operation and Maintenance of the DB Project.

6.9.1 Upon Substantial Completion, Concessionaire shall have care, custody and control of the DB Project. Contractor will assist Concessionaire in the implementation of the Turnover Plan to the extent applicable to the DB Work.

6.9.2 Except as otherwise specifically provided for in a LNTP, after the Commencement Date and prior to Substantial Completion, Contractor will (A) have care, custody and control of the Design-Build Right of Way for the DB Project and (B) be responsible for the security and protection of active construction areas on the DB Project and the Project Right of Way and (1) all materials, equipment, supplies and any other property of any Contractor Party and (2) all materials, equipment, supplies and any other property of Concessionaire or the Department being held in a secure location at or on the DB Project or otherwise being used or procured in connection with the DB Work, whether or not on the Project Right of Way. Notwithstanding the foregoing, Contractor and Concessionaire acknowledge that during the DB Work Period, the Department has agreed, pursuant to Section 9.01(a) of the Comprehensive Agreement, to (i) except as otherwise provided in the Comprehensive Agreement, operate and maintain the existing HOV Lanes and access ramps at its own cost and expense to the extent they are not actively under construction as provided in Section 9.07 of the Comprehensive Agreement (the “HOV Assets”), (ii) have care, custody and control of the HOV Assets and (iii) be responsible for the security and protection of the HOV Assets and all materials, equipment, supplies and any other property of the Department at or on the HOV Assets, in all cases except as otherwise provided in Section 9.02 of the Comprehensive Agreement, and through the coordination process set forth in the Technical Requirements, Concessionaire (with guidance from Contractor) and the Department will determine from time to time which portions of the existing HOV Lanes will be open for traffic or under construction.
6.9.3 The Parties acknowledge that the Department has agreed, pursuant to Section 9.03(b)(i) of the Comprehensive Agreement, at its own cost, to remove snow and ice from the HOV Lanes that are open to traffic prior to the Service Commencement Date.

6.9.4 The Parties acknowledge that responsibility for the maintenance, repair and replacement of the existing drainage system located within and outside of the Project Way has been allocated between Concessionaire and the Department in the Technical Requirements. As part of the DB Work, Contractor shall fulfill the obligations of Concessionaire under the Technical Requirements during the DB Work Period with respect to such drainage system.

6.10 Acceptance by Concessionaire Not a Release of Contractor. The acceptance by Concessionaire or Concessionaire’s Approval of the Design Documentation, or any other part of the DB Work or the DB Project, shall not constitute a waiver or relinquishment by Concessionaire of any of its rights under this Agreement, nor exonerate or relieve Contractor from any obligation, warranty or liability hereunder, except to the extent expressly provided herein. Each such acceptance by Concessionaire or Concessionaire’s Approval shall be given in reliance upon, and subject to, the performance by Contractor of its obligations hereunder.

ARTICLE 7

LATE COMPLETION PAYMENTS; LANE CLOSURE PAYMENT

7.1 Guaranteed Substantial Completion and Guaranteed Final Acceptance. Subject only to the adjustments permitted in accordance with this Agreement, Contractor guarantees that Substantial Completion will be achieved on or before the Guaranteed Substantial Completion Date and that Final Acceptance will be achieved on or before the Guaranteed Final Acceptance Date.

7.2 Late Completion Payments. If Substantial Completion has not occurred on or before the Guaranteed Substantial Completion Date, then for each calendar day (or portion thereof) by which Substantial Completion occurs after the Guaranteed Substantial Completion Date, subject to the limitation set forth in Section 7.6 hereof, Contractor hereby agrees to pay to Concessionaire, as part of the consideration for awarding the contract, an amount equal to the sum of (x) the applicable Concessionaire Delay Damages Rate, plus (y), to the extent Concessionaire is then obligated to pay the same to the Department pursuant to Section 8.10(a) of the Comprehensive Agreement, $14,000 per calendar day, not to exceed $5,110,000 in the aggregate, to be paid over to the Department, all as liquidated damages and not as a penalty (the “Late Substantial Completion Payment”). In addition, if Final Acceptance has not occurred on or before the Guaranteed Final Acceptance Date and if Concessionaire is then obligated to pay the same to the Department pursuant to Section 8.10(b) of the Comprehensive Agreement, then for each calendar day (or portion thereof) by which Final Acceptance occurs after the Guaranteed Final Acceptance Date, Contractor hereby agrees to pay to Concessionaire, as part of the consideration for awarding the contract, $5,000 per calendar day to be paid over to the Department, all as liquidated damages and not as a penalty (the “Late Final Acceptance Payment,” and collectively with the Late Substantial Completion Payment, “Late Completion Payments”).
7.3 Payment of Late Completion Payments. Late Completion Payments shall be paid by Contractor or withheld by Concessionaire, as applicable, in arrears at the payment intervals applicable to Scheduled Payments beginning after the Guaranteed Substantial Completion Date or the Guaranteed Final Acceptance Date, as applicable, with the last such payment to occur on the date on which Substantial Completion or Final Acceptance, as applicable, actually occurs. Concessionaire’s rights of set-off under Section 4.7 hereof expressly apply to any amounts of the Late Completion Payment not timely paid to Concessionaire hereunder.

7.4 Late Completion Payments for Delay Only. The Late Completion Payments shall be the full measure of Contractor’s liability only for delay in achieving the Substantial Completion and/or Final Acceptance, and shall not limit Contractor’s liability for defects or deficiencies in the DB Work or for Contractor’s failure to perform its other obligations under the Contract Documents. The Late Completion Payments are in lieu of Concessionaire’s right to terminate this Agreement solely as a result of any schedule delay, except to the extent such delay otherwise constitutes a Contractor Default under Section 15.2.1(v)(A).

7.5 Lane Closure Liquidated Damages. In its performance of the DB Work during the DB Work Period, Contractor may temporarily close existing lanes on the Project Right of Way only in accordance with the Technical Requirements, and any such closure that does not conform with or exceeds the time period permitted therefor in the Technical Requirements is a “Non-Permitted Closure.” Contractor agrees that it will fully reopen the closed lanes to traffic by the required time, and that if it fails to do so, it shall pay Concessionaire the amount that Concessionaire must pay to the Department pursuant to Section 8.14 of the Comprehensive Agreement (the “Lane Closure Payment”) as liquidated damages and not as penalty, not to exceed $200,000 per incident for any Non-Permitted Closure. The Lane Closure Payment shall be the measure of Contractor’s liability only for delay in re-opening the lanes pursuant to this Section 7.5, and shall not limit Contractor’s liability for defects or deficiencies in the DB Work or for Contractor’s failure to perform its other obligations under the Contract Documents. The Lane Closure Payment shall be paid by Contractor or withheld by Concessionaire, as applicable, in arrears at the payment intervals applicable to Scheduled Payments beginning after the designated time for re-opening of the affected lanes. Concessionaire’s rights of set-off under Section 4.7 hereof expressly apply to any amounts of the Lane Closure Payment not timely paid to Concessionaire hereunder.

7.6 Limitation on Liquidated Damages. Contractor’s liability to Concessionaire under this Agreement for Late Substantial Completion Payments shall not exceed an amount equal to the product of (x) the sum of the applicable Concessionaire Delay Damages Rate plus $14,000, multiplied by (y) 365. This Section 7.6 shall not be construed to limit Contractor’s other obligations or liabilities arising under or in connection with this Agreement.

7.7 Liquidated Damages Reasonable. Concessionaire and Contractor hereby acknowledge and agree that the terms, conditions and amounts fixed pursuant to Section 7.2 for Late Completion Payments and pursuant to Section 7.5 for Lane Closure Payment are fair and reasonable, considering the reduction in value of the DB Project to Concessionaire and the actual costs that Concessionaire will incur in the event of Contractor’s failure to achieve Substantial Completion by the Guaranteed Substantial Completion Date and/or Final Acceptance by the Guaranteed Final Acceptance Date or to re-open the lanes to traffic after the temporary closure.
The amount of liquidated damages is agreed upon and fixed hereunder because of the difficulty of ascertaining the exact amount of Losses that will be actually incurred by Concessionaire for late occurrence of Substantial Completion, Final Acceptance or lane re-opening, and Concessionaire and Contractor agree that the liquidated damages amounts specified in Sections 7.2 and 7.5 represent a reasonable estimate of fair compensation of Losses that may be reasonably anticipated for such late occurrences and shall be applicable regardless of the amount of such costs actually incurred by Concessionaire.

ARTICLE 8

PERFORMANCE GUARANTEES

8.1 Performance Guarantees. Contractor guarantees that the DB Project will achieve all of the performance specifications referred to in the Contract Documents (the “Performance Guarantees”). Contractor agrees to exhaust all reasonable repair and replacement alternatives in order that the DB Project might attain the Performance Guarantees.

8.2 Equipment Performance. Contractor shall use all reasonable efforts to cause Subcontractors supplying any equipment to the DB Project to achieve the performance standards guaranteed by the suppliers of such equipment. Any damages payable by a supplier to Contractor shall be remitted to Concessionaire, except for that portion of such damages required to compensate Contractor for amounts paid to Concessionaire hereunder as a result of the failure of such supplier’s equipment to achieve the required standards under this Agreement and for other reasonable costs incurred by Contractor as a result of such failure. No such damages paid to Concessionaire shall relieve Contractor from any of its obligations under this Agreement and any such damages remitted to Concessionaire shall not be applied to reduce Contractor’s liability hereunder.

ARTICLE 9

LIABILITY AND DAMAGES

9.1 Limitation of Certain Contractor Liabilities. Notwithstanding anything herein to the contrary, the total liability of Contractor in contract, tort, equity or otherwise (including negligence, warranty, strict liability or otherwise) relative to or arising out of this Agreement shall not exceed an amount equal to forty percent (40%) of the Contract Sum; provided, that the foregoing limitation shall not apply to or include:

(i) the proceeds of insurance, not to exceed amounts required to be maintained by Contractor in accordance with the terms of this Agreement;

(ii) costs, liabilities or obligations that arise from Gross Negligence, willful misconduct or actual fraud of Contractor;
(iii) costs, liabilities or obligations that arise from Contractor’s abandonment of the DB Work or from a Contractor Default described in Section 15.2.1(vii);

(iv) Contractor’s breach of its obligations in Section 10.4; or

(v) Contractor’s indemnity obligations under Article 13.

9.2 CONSEQUENTIAL DAMAGES. NEITHER CONCESSIONAIRE NOR CONTRACTOR SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE OR EXEMPLARY DAMAGES, INCLUDING LOSS OF USE OR LOSS OF PROFIT, AND CONCESSIONAIRE AND CONTRACTOR EACH HEREBY RELEASES THE OTHER AND ITS CONTRACTORS AND AGENTS FROM ANY SUCH LIABILITY. THE FOREGOING EXCLUSION (I) SHALL NOT PRECLUDE RECOVERY, WHERE APPLICABLE, OF LIQUIDATED DAMAGES PURSUANT TO SECTIONS 7.2 AND 7.5 AND (II) SHALL NOT BE CONSTRUED TO LIMIT RECOVERY UNDER ANY INDEMNITY IN ARTICLE 13 FOR THIRD PARTY CLAIMS FOR DAMAGE TO OR DESTRUCTION OF PROPERTY OF, OR DEATH OF OR BODILY INJURY TO, ANY PERSON.

9.3 Further Limitation of Liability. The limitations of liability and the exclusions of consequential damages set forth in this Agreement shall apply irrespective of whether a Party or any Affiliate thereof, or any partner, shareholder, officer, director or employee of a Party or an Affiliate thereof, asserts a theory of liability in contract, tort, negligence, misrepresentation (including negligent misrepresentation), strict liability or any other theory of liability.

ARTICLE 10

WARRANTIES

10.1 Warranties.

10.1.1 Contractor warrants and guarantees (the “General Warranty”) to Concessionaire and the Department as follows:

(i) The design of the DB Project shall satisfy the requirements of this Agreement, the Comprehensive Agreement and the Technical Requirements;

(ii) All DB Work (except as described in Section 10.1.1(i) hereof), including materials and equipment furnished as part of the construction, shall be (A) complete and conform to Good Industry Practice, (B) new unless otherwise specified herein or in the Technical Requirements, of good quality, in conformance with the Standard of Care, Laws, Applicable Standards, the Technical Requirements, this Agreement and the other Contract Documents, and (C) once completed, free of all defects and deficiencies in design, materials and workmanship and fit for its intended purpose; and
(iii) The Final As-Built Drawings and Documentation shall be accurate and complete, comply with the requirements of the Contract Documents, and accurately reflect the condition of the DB Project as of Final Acceptance.

10.1.2 If Concessionaire (or the Department) notifies Contractor in writing during the Warranty Period, or no later than fifteen (15) days after the expiration of the Warranty Period, that a breach of the General Warranty has occurred during the Warranty Period, Contractor shall promptly investigate and determine the source of the deficiency or defect (including any inaccuracy or other deficiency in the Final As-Built Drawings and Documentation), and promptly rectify any defects or deficiencies in the DB Work at its expense without recourse to Concessionaire or the Department. Contractor’s liability for such defects shall include labor, parts, transportation, factory repair and testing, dismantling, re-designing, re-construction, re-erecting, re-testing and re-Commissioning associated with the correction of such defects which are needed or appropriate to assure the continued performance of the DB Project for its intended functions as a complete operating system. If Contractor fails to repair and/or replace a defect or deficiency within reasonable time following Concessionaire’s (or the Department’s) notice of a breach of the General Warranty, Concessionaire (or the Department pursuant to the Comprehensive Agreement) shall have the right to employ another contractor to correct the deficiency or defect and complete the DB Work at Contractor’s expense; provided, that the Department has agreed under Section 8.11(a)(iii) of the Comprehensive Agreement that it will only have the right to exercise remedies under the General Warranty so long as Concessionaire or any Financing Party is not pursuing such remedies.

10.1.3 The “Warranty Period” for all DB Work shall be sixty (60) months commencing on the date of Substantial Completion; provided, however, that:

(i) the Warranty Period shall be extended for an additional twelve (12) months from the date of repair or replacement with respect to any portion of the DB Work that is repaired or replaced during the final year of the initial Warranty Period;

(ii) the Warranty Period as to the individual pieces of equipment shall be twenty-four (24) months from the date of incorporation of the specific piece of equipment into the DB Project unless Contractor is able to obtain from the vendor thereof longer durations on commercially reasonable terms; and

(iii) any warranties from third party suppliers longer than the Warranty Period shall be passed through to Concessionaire and the Department.

10.1.4 Following the expiration of the first two (2) years of the Warranty Period, the General Warranty shall extend only to repairs which exceed $15,000 per single occurrence (but such threshold shall not apply if the same type of defect causes same type of repair more than twice), subject to an aggregate annual exclusion of $60,000 in each of the third, fourth and fifth year of the Warranty Period.

10.1.5 If and to the extent Contractor obtains general or limited warranties from any Subcontractor with respect to design, materials, workmanship, construction,
equipment, tools, supplies, software or services in accordance with Section 3.3, Contractor will
cause such warranties to be expressly extended to Concessionaire and the Department.
Concessionaire agrees that it will only have the right to exercise remedies under any such
warranty so long as Contractor is not pursuing such remedies; provided, that the foregoing
requirement will not apply to standard, pre-specified manufacturer warranties of mass-marketed
materials, products (including software products), equipment or supplies where the warranty
cannot be extended to Concessionaire and the Department using Commercially Reasonable
Efforts.

10.1.6 The duties, liabilities and obligations of Contractor under this Section 10.1 do not extend to any repairs, adjustments, alterations, replacements or maintenance of
materials which are required as a result of normal corrosion, erosion, or wear and tear in the
operation of the DB Project other than as caused by the negligence of or breach of the Contract
Documents by Contractor.

10.2 [Not used]

10.3 Concessionaire’s Right to Proceed. If, within fourteen (14) days after notification
by Concessionaire of a breach of any warranty hereunder, Contractor has not, to the reasonable
satisfaction of Concessionaire, commenced re-performance, repair, replacement or other
performance as required herein or notified Concessionaire of its disagreement with such alleged
breach and, within seven (7) days after such notice, provide reasonable evidence in support of its
position, Concessionaire may retain a third party to undertake such re-performance, repair,
replacement or other performance and the costs of retaining such third party shall be for the
account of Contractor. Concessionaire’s retention of such third-party contractor shall not in any
way diminish Contractor’s obligations or liabilities under the Contract Documents or reduce its
warranty obligations under this Article 10 with respect to the work undertaken by such third
party. Nothing herein shall be deemed to preclude Concessionaire from retaining a third-party
contractor at its own cost to undertake any re-performance, repair, replacement or other
performance of warranty claims hereunder. In addition, Contractor acknowledges and agrees
that the Department shall have such rights and remedies as provided by Section 8.11(b) of the
Comprehensive Agreement, and that to the extent the exercise of such rights and remedies in
respect of “Non-Conforming Work” (as defined in the Comprehensive Agreement) for which
Contractor is responsible under this Agreement interferes with Contractor’s performance of the
DB Work, then, subject to Contractor’s right to assert a CA Delay Event and a CA
Compensation Event, Contractor shall not be entitled to relief under this Agreement.

10.4 No Liens or Encumbrances. Contractor warrants and guarantees that title to the
DB Project, any portion or component of the DB Project, and all DB Work provided hereunder
shall pass to the Department as provided under Section 24.15 hereof, free and clear of all liens,
Claims, security interests and other encumbrances (other than inchoate liens provided by Laws to
secure payments not yet delinquent), and that none of such DB Work, materials, supplies or
equipment shall be acquired by Contractor subject to any agreement under which a security
interest or other lien or encumbrance is retained by any Person. Such warranty shall become
effective as title to DB Work passes to the Department under Section 24.15 hereof, subject to
Concessionaire’s obligation to pay for such DB Work in accordance with the Contract
Documents.
10.5 EXCLUSIVE REMEDIES. ARTICLE 8, THIS ARTICLE 10 AND SECTION 15.2 HEREOF SET FORTH CONCESSIONAIRE’S EXCLUSIVE REMEDIES AGAINST CONTRACTOR, AND CONCESSIONAIRE HEREBY WAIVES ALL OTHER REMEDIES, REGARDING DEFECTS OR DEFICIENCIES IN THE DB WORK, WHETHER PATENT OR LATENT OR ARISING IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR PURSUANT TO OTHER LEGAL THEORY, EXCEPT FOR DEFECTS AND DEFICIENCIES IN THE DB WORK RESULTING FROM THE FRAUD OR DECEIT OF CONTRACTOR. CONTRACTOR MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, RELATING TO THE QUALITY OF THE DB WORK, PROVIDED, HOWEVER, THAT CONTRACTOR SHALL CONTINUE TO BE RESPONSIBLE FOR ALL OF ITS OTHER OBLIGATIONS UNDER THIS AGREEMENT, INCLUDING THE DESIGN AND CONSTRUCTION OF THE DB PROJECT, NOTWITHSTANDING THE PARTIES’ AGREEMENT TO EXCLUSIVE REMEDIES FOR BREACH OF WARRANTY UNDER THIS SECTION 10.5.

ARTICLE 11

FORCE MAJEURE

11.1 Excused Performance. If a Party is rendered wholly or partially unable to perform its obligations under the Contract Documents because of a Force Majeure Event, then that Party will be excused (but in the case of Contractor, solely to the extent provided in a Scope Change Order entered into pursuant to Section 12.5) from whatever performance is affected by the Force Majeure Event to the extent so affected; provided, that:

(i) the affected Party gives the other Party notice describing the particulars of the occurrence promptly after the occurrence of the Force Majeure Event, and, in no event more than seven (7) days after the affected Party becomes aware of such occurrence;

(ii) within seven (7) days after giving the notice described in clause (a) above, the affected Party gives the other Party its best estimate of the occurrence’s expected duration and probable impact on the performance of such Party’s obligations hereunder, and continues to furnish timely regular reports with respect thereto during the continuation of the Force Majeure Event;

(iii) the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure Event;

(iv) no monetary obligations or default of either Party which arose before the occurrence of the Force Majeure Event causing the suspension of performance shall be excused as a result of the occurrence, but so long as the affected Party shall have commenced and is diligently continuing to attempt to cure such default prior to the occurrence of the Force Majeure Event, the cure period (if any) provided in Article 15 with respect to such default shall be extended on a day-for-day basis to the extent a cure actually is prevented as a result of the Force Majeure Event;
(v) the affected Party shall exercise all reasonable efforts to mitigate or limit damages to the other Party; and

(vi) the affected Party shall use all reasonable efforts to continue to perform its obligations hereunder and to correct or cure the event or condition excusing performance.

A Scope Change Order shall be executed by Concessionaire and Contractor as provided in Section 12.5 to account for the actual effect, if any, on Contractor’s performance of its obligations as a result of a Force Majeure Event.

11.2 Disputes; Burden of Proof. If Concessionaire and Contractor are unable in good faith to agree that a Force Majeure Event has occurred, either Party may submit the dispute to dispute resolution under Article 19; provided, however, that the burden of proof as to whether a Force Majeure Event has occurred and whether the Force Majeure Event excuses the Party from performance under Section 11.1 shall be upon the Party claiming such Force Majeure Event.

ARTICLE 12

SCOPE CHANGES

12.1 Scope Change Orders. A “Scope Change” means a material addition to, deletion from, suspension of or other modification to, the quality, function or intent of the DB Project as delineated in the Scope Document, or a material change to the requirements of this Agreement, but shall not include refinement, correction or detailing of the DB Work by Concessionaire and Contractor from time to time. Concessionaire may order Scope Changes to the DB Work, in which event, as more specifically set forth in this Article 12, one or more of the Contract Sum, the Payment and Values Schedule, the Maximum Cumulative Drawdown Schedule, the Project Schedule, the Guaranteed Substantial Completion Date, the Guaranteed Final Acceptance Date, the Long Stop Date, the Scope Document and any other applicable terms and conditions of the Contract Documents shall be adjusted accordingly, if necessary, as agreed by Concessionaire and Contractor or determined pursuant to dispute resolution under Article 19; provided, that Contractor shall use reasonable efforts to mitigate the impacts of any Scope Change. If either Concessionaire or Contractor believes a Scope Change is necessary, it shall proceed as set forth in this Article 12. If Concessionaire believes that a particular item of DB Work is within the then-existing scope of DB Work but Contractor believes that such DB Work constitutes a Scope Change, the Contactor shall diligently proceed with such DB Work as directed in writing by Concessionaire; provided, that if the disputed item of DB Work is subsequently determined to constitute a Scope Change (whether by mutual agreement of the Parties or by operation of the dispute resolution provisions in Section 12.14), then such DB Work shall be deemed to have been the subject of a Work Order under Section 12.9 and Concessionaire shall issue a Scope Change Order with respect thereto as provided in Section 12.10 hereof; otherwise, Contractor shall not be entitled to a Scope Change Order with respect to such item of DB Work. All Scope Changes may be subject to the Department’s consent, as described in Section 24.8 hereof. In the event the Department requires modifications to the Contract Documents as a condition of its approval of any Scope Change, the Parties shall cooperate to effect such modifications.
As a condition to Concessionaire’s obligation under this Article 12 to make payments to Contractor in respect to a Scope Change Order or Work Order, Contractor shall increase the amount of the Letter of Credit by an amount equal to seven-and-one-half percent (7.5%) of the increase in the Contract Sum resulting from the Scope Change Order or Work Order to the extent the aggregate increase in the Contract Sum resulting from all Scope Changes exceeds Seventeen million, five hundred thousand U.S. Dollars ($17,500,000); in lieu of increasing the Letter of Credit by the full amount required, Contractor may notify Concessionaire to withhold as retainage from payments of the Contract Sum the amount not provided pursuant to a Letter of Credit, such retainage not to exceed seven-and-one-half percent (7.5%) of each installment payment of the Contract Sum. Amounts withheld as retainage may be applied by Concessionaire to the same purposes for which draws on the Letter of Credit may be applied, and shall be released to Contractor in whole or in part if the Letter of Credit is increased as required, or otherwise at the time the amount of the Letter of Credit may be reduced pursuant to Section 4.9 hereof, it being understood that the Parties intend that the Letter of Credit is to be the primary form of additional security during the Warranty Period, and that amounts withheld as retainage will continue to be withheld during the Warranty Period only to the extent the amount of the Letter of Credit does not satisfy the requirements of Section 4.9.

12.2 Scope Change by Concessionaire. If a Scope Change is initiated by Concessionaire (including a Scope Change resulting from a change in Applicable Standards after the Agreement Date that Concessionaire determines should apply to the DB Work, if such changes do not otherwise constitute a Change in Law covered by Section 12.5 hereof or a Technical Requirements Revision covered by Section 12.3.2 hereof), Concessionaire shall give Contractor a written “Proposal Request” (herein so called) setting forth in detail the nature of the requested change, and if the forecasted cost to carry out such Scope Change exceeds the amount of remaining overrun contingency built in the financial model, Concessionaire shall reasonably demonstrate to Contractor that it has sufficient funds to pay for the costs of such Scope Change. Within twenty-one (21) days after receipt of a Proposal Request, Contractor shall provide Concessionaire with a preliminary written response, and within a reasonable time thereafter (not to exceed thirty (30) days) provide to Concessionaire two (2) completed copies of its definitive “Change Order Proposal” (herein so called) setting forth in detail, to the extent known at such time, with a separate pay item (addition or deletion) for purchase and installation of equipment and materials and an otherwise suitable breakdown of costs by trades and DB Work classifications, a stipulated sum proposed as an adjustment to the Contract Sum for the performance of the Scope Change set forth in the Proposal Request, together with any proposed adjustment to the Guaranteed Substantial Completion Date, the Scope Document and the Payment and Values Schedule or other changes in the Contract Documents necessary because of such proposed Scope Change. The adjustment, if any, to the Guaranteed Substantial Completion Date and the Payment and Values Schedule specified in any Change Order Proposal shall be limited to the delays to the Critical Path directly attributable to and necessarily incurred as a result of the proposed Scope Change. Each Change Order Proposal shall be accompanied by appropriate data reasonably acceptable to Concessionaire supporting the proposed adjustments therein, including but not limited to bids, cost estimates, quotations from suppliers and wage schedules. If Concessionaire approves Contractor’s Change Order Proposal, Concessionaire will issue and Contractor will execute and accept a written Scope Change Order in the form attached to this Agreement as Exhibit G, and the Contract Sum, the Payment and Values Schedule, the Guaranteed Substantial Completion Date and any other appropriate changes in the Contract
Documents shall be adjusted as set forth in such Scope Change Order. If Concessionaire does not approve Contractor’s Change Order Proposal, Concessionaire may, at its option, execute and deliver to Contractor a Work Order in accordance with Section 12.9 hereof in lieu of the Scope Change Order.

12.3 Scope Change by the Department. The Department has the right, at any time and from time to time during the term of the Comprehensive Agreement, to authorize and/or require Scope Changes in the Work or in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work) by initiating a Department Change pursuant to Section 14.02 of the Comprehensive Agreement, provided, however, that the Department has no right to require any Scope Change that (i) is not in compliance with Law, (ii) would contravene an existing Governmental Approval and such contravention cannot be corrected by the issuance of a further or revised Governmental Approval, (iii) would cause an insured risk to be uninsurable, or (iv) would give rise to a material and adverse health or safety issue. If the Department initiates a Department Change prior to Final Acceptance, the obligations of Concessionaire under the Comprehensive Agreement with respect to the Department Change, as described below in Sections 12.3.1 and 12.3.2, shall be fulfilled by Contractor. The provisions of Section 12.15 hereof shall apply in the event Contractor and Concessionaire cannot agree on the amount of any Claim to be made against the Department pursuant to the Comprehensive Agreement in respect of a Department Change.

12.3.1 Department Change Proposal.

12.3.1.1 If the Department desires to initiate a Department Change, then the Department will issue to Concessionaire a “Request for Change Proposal” under the Comprehensive Agreement setting forth the nature, extent and details of the proposed Department Change (“Department Request for Change Proposal”), which Concessionaire will promptly forward to Contractor.

12.3.1.2 Within thirteen (13) days following Contractor’s receipt of the Department Request for Change Proposal, Contractor shall provide Concessionaire with a preliminary written response, and within a reasonable time thereafter (not to exceed twenty-six (26) days, or if another timeframe is agreed upon between Concessionaire and the Department under the Comprehensive Agreement, such other timeframe less four (4) days), with a definitive written response (a “Department Change Proposal”), as to whether, in Contractor’s opinion, the Department Change constitutes a CA Compensation Event, and, if so, (a) to the extent known at the time, detailed assessment of the cost of the proposed Department Change and an estimate of any compensation to be requested if the proposed Department Change constitutes a CA Compensation Event, (b) the effect of the proposed Department Change on Contractor’s performance of its obligations hereunder, to the extent known at the time and (c) a TIA if applicable.

12.3.1.3 Within thirty-four (34) days following the delivery by Concessionaire of the Department Change Proposal to the Department pursuant to Section 12.3.1.2 above, Concessionaire and Contractor shall exercise Commercially Reasonable Efforts to negotiate a mutually acceptable Scope Change Order, including adjustments to the Project
Schedule, and if the Department Change constitutes a CA Compensation Event, an adjustment to the Contract Sum.

12.3.1.4 Pursuant to Section 14.02(b)(iv) of the Comprehensive Agreement, the Department has agreed pay Concessionaire’s “Allocable Costs” for preparing a Department Change Proposal and conducting preliminary work to respond to a Department Request for Change Proposal at the Department’s request, and Concessionaire will pay Contractor’s portion thereof over to Contractor to the extent, subject to Section 2.13.3, actually received by Concessionaire from the Department under the Comprehensive Agreement. The Parties acknowledge that upon payment of such “Allocable Costs” by the Department under the Comprehensive Agreement, the Department will own all Work Product included in the Department Change Proposal.

12.3.1.5 Contractor shall perform the DB Work required to implement the Department Change in a timely manner; provided, that:

(a) a “Change Order” (as defined in the Comprehensive Agreement) setting forth the adjusted scope of DB Work and adjustment to the Project Schedule will have been mutually agreed upon between the Department and Concessionaire and issued by the Department under the Comprehensive Agreement, and a Scope Change Order reflecting such “Change Order” shall have been mutually agreed upon between Concessionaire and Contractor and issued by Concessionaire under this Agreement;

(b) the Department and Concessionaire (if applicable) will have identified sufficient funds that may be made available to Contractor to perform the DB Work required to implement the Department Change; and

(c) all Governmental Approvals necessary to commence the DB Work to implement the Department Change have been obtained.

12.3.1.6 If the Department and Concessionaire agree under the Comprehensive Agreement that the DB Work in question constitutes a Department Change and are unable to reach an agreement on a “Change Order,” the Department may deliver to Concessionaire a Directive Letter pursuant to Section 14.02(d)(i) of the Comprehensive Agreement, directing Concessionaire to proceed with the performance of the Work in question, notwithstanding such disagreement. If the Department and Concessionaire disagree under the Comprehensive Agreement whether the Work in question constitutes a Department Change, the Department has the right pursuant to Section 14.02(d)(ii) of the Comprehensive Agreement to issue a Directive Letter, directing Concessionaire to proceed with the performance of the Work in question and such Directive Letter will include any changes to the Technical Requirements, if applicable, necessary to proceed with the Work covered by the Directive Letter. Upon Concessionaire’s receipt of a Directive Letter, Concessionaire shall issue a Work Order pursuant to Section 12.9 hereof and Contractor shall implement and perform the DB Work in question in accordance with the Work Order, which will entitle Contractor to a Scope Change Order under Section 12.10. Under the Comprehensive Agreement the Department is to make payments to Concessionaire on a monthly basis for the reasonable “Allocable Costs” of such DB Work performed pursuant to Section 14.02(e) of the Comprehensive Agreement, and, subject to
Section 2.13.3, to the extent such payments are received from the Department, Concessionaire shall make payments of Contractor’s portion thereof to Contractor as provided in Section 12.9. The provisions of Section 12.15 hereof shall apply in the event Contractor and Concessionaire cannot agree on the amount or other terms of any claim to be made against the Department pursuant to the Comprehensive Agreement in respect of a Department’s Directive Letter.

12.3.2 Technical Requirements Revisions Treated as Department Change. The Department has the right in accordance with Section 14.02(f) of the Comprehensive Agreement to require or authorize, during the DB Work Period, a change in the terms and conditions of the Technical Requirements, including changes in the standards applicable to the DB Work (the “Technical Requirements Revisions”). Such Technical Requirements Revisions shall be considered Department Changes and handled pursuant to the Scope Change Order procedures for a Department Change set forth above in Section 12.3.1. In the absence of a Scope Change Order or Work Order relating to such Technical Requirements Revisions, Contractor shall not incorporate the same into its design and construction of the DB Project prior to Substantial Completion.

12.3.3 Any standard or specification with which Contractor is required to comply by a provision of this Agreement during the DB Work Period, shall be the specific edition or version identified in the Technical Requirements, and Contractor shall not be required during the DB Work Period to comply with any newer, updated or revised edition or version unless the Parties so agree or Concessionaire is so directed by the Department as a Department Change.

12.4 Scope Change by Contractor. If Contractor desires to initiate a Scope Change because of a Force Majeure Event or otherwise, Contractor shall, within ten (10) Business Days after first becoming aware (or should have been aware, using all reasonable due diligence) that a Scope Change may be necessary, provide notice thereof to Concessionaire. Except as otherwise specified in Sections 12.5 and 12.6, within seven (7) Business Days thereafter, Contractor shall deliver to Concessionaire (i) a Change Order Proposal meeting the requirements specified in Sections 12.2 and 12.3, together with a detailed description of the proposed Scope Change, a reasonably detailed explanation of why Contractor believes the proposed Scope Change is necessary, all relevant back up documentation, including drawings (original vs. latest), relevant technical/commercial agreement references, and a description of the critical activity which is directly affected, and by how long, or (ii) such of the foregoing information as is known to Contractor at the time, together with its estimate of the date by which a full Change Order Proposal will be submitted to Concessionaire. Subject to the final sentence of this Section 12.4, Concessionaire shall approve a Change Order Proposal evidencing Contractor’s entitlement to claim a Scope Change Order under Sections 12.5, 12.6, 12.7, 12.8 and 12.10 due to any of the causes specified therein, but if Concessionaire has a reasonable basis for objecting to any such Change Order Proposal, Concessionaire shall state such objections in writing to Contractor within ten (10) days of receipt of Contractor’s Change Order Proposal and the Parties promptly shall meet to resolve their differences; Concessionaire is under no obligation to approve any other Change Order Proposal initiated by Contractor. If the Parties cannot agree on the Scope Change Order, either Party may submit the dispute for resolution pursuant to Section 12.14. Contractor shall not be entitled to submit a package of one or more Change Order Proposals more than once in any month (other than a Change Order Proposal which Contractor provides
pursuant to Section 12.3 or which Concessionaire must approve as set forth in the second preceding sentence, as to which there shall be no limits).

Contractor acknowledges and agrees that timely notice as set forth in the first sentence of this Section 12.4 is essential to allow Concessionaire to review the Change Order Proposal while the facts and conditions underlying the request therefor are contemporaneous, that Concessionaire need not approve any Change Order Proposal to which Contractor is otherwise entitled under this Agreement if Contractor has failed to provide such timely notice, and that the Department is not obligated under the Comprehensive Agreement to provide any relief in the event a CA Compensation Event or CA Delay Event is not claimed within thirty (30) days after Concessionaire first becomes aware (or should have been aware, using all reasonable due diligence) of such CA Compensation Event or CA Delay Event. Contractor may also request Concessionaire to approve any material proposed or actual change, deviation, modification, alteration or exception from any of the Technical Requirements (the “Technical Requirements Deviations”) by submitting a Change Order Proposal containing details required by clause (i) of this Section 12.4 and other relevant items required by Section 14.03(a) of the Comprehensive Agreement, in addition to setting forth Contractor’s detailed estimate of impacts on costs and schedule attributable to the proposed Technical Requirements Deviation, and Concessionaire may in its sole discretion pass such Change Order Proposal for the Department’s consideration pursuant to Section 14.03 of the Comprehensive Agreement. No Technical Requirements Deviations shall exist or be effective for the purposes of the DB Project and the Contract Documents unless and until a written notice of the Department’s approval thereof is provided to Contractor by Concessionaire.

12.5 Scope Changes Due to CA Delay Events.

12.5.1 Delay Event Notice and Determination.

12.5.1.1 If Contractor is affected by a CA Delay Event, it will give written notice to Concessionaire within twenty (20) days following the date on which Contractor first became aware (or should have become aware using all reasonable due diligence) that an event has occurred and that it is or will become a CA Delay Event (provided, that in the case of the same CA Delay Event being a continuing cause of delay, only one notice will be necessary) (a “CA Delay Event Notice”). Such CA Delay Event Notice will include, in such form and substance as is required to satisfy Concessionaire’s obligations under the Comprehensive Agreement: (i) a detailed description of the CA Delay Event, (ii) details of the circumstances from which the CA Delay Event arises and (iii) an estimate of the duration of the delay in the performance of obligations pursuant to this Agreement attributable to such CA Delay Event and information in support thereof, if known at that time. Subject to Sections 12.14 and 12.15, Concessionaire shall submit a “Delay Event Notice” under Section 13.01 of the Comprehensive Agreement based on the CA Delay Event Notice submitted by Contractor hereunder and thereafter assert its rights under the Comprehensive Agreement with respect to the CA Delay Event claimed by Contractor. Contractor will also provide such further information relating to the CA Delay Event as Concessionaire or the Department may reasonably require. Contractor will bear the burden of proving the occurrence of a CA Delay Event and the resulting impacts in accordance with the Comprehensive Agreement.
12.5.1.2 Subject to Sections 12.14 and 12.15, if for any reason Contractor fails to deliver a CA Delay Event Notice within such twenty (20)-day period, Contractor will be deemed to have irrevocably and forever waived and released any Claim or right to time extensions or any other relief with respect to such CA Delay Event pursuant to this Agreement.

12.5.1.3 Upon the occurrence of a CA Delay Event, Contractor will promptly undertake efforts to mitigate the effects of such CA Delay Event, including all steps that would generally be taken in accordance with Good Industry Practice. Contractor will promptly deliver to Concessionaire an explanation of the measures being undertaken to mitigate the delay and other consequences of the CA Delay Event. Contractor will notify the Concessionaire within twenty (20) days following the date on which it first became aware (or should have become aware using all reasonable due diligence) that such a CA Delay Event has ceased.

12.5.1.4 Notwithstanding the occurrence of a CA Delay Event, Contractor will continue its performance and observance pursuant to this Agreement of all of its obligations and covenants to be performed to the extent that it is reasonably able to do so and will use its reasonable efforts to minimize the effect and duration of the CA Delay Event. Without limiting the foregoing, the occurrence of a CA Delay Event will not excuse Contractor from timely payment of monetary obligations that are due and payable by Contractor pursuant to this Agreement (including liquidated damages and amounts payable as indemnities), from compliance with Law, or from compliance with the Technical Requirements, except temporary inability to comply with the Technical Requirements as a direct result of the CA Delay Event.

12.5.1.5 Subject to Contractor’s giving the notice required in Section 12.5.1.1 and to the provisions of Section 12.5.2, but solely to the extent performance by Concessionaire is, subject to Section 2.13.3, excused by the Department under the Comprehensive Agreement, a CA Delay Event will result in an extension of the Guaranteed Substantial Completion Date, the Guaranteed Final Acceptance Date and/or the Long Stop Date by an equal number of days that the corresponding deadline, if applicable, is extended under the Comprehensive Agreement and the Project Schedule shall be adjusted accordingly. All changes to the Guaranteed Substantial Completion Date, the Guaranteed Final Acceptance Date or the Long Stop Date and conforming changes to the Project Schedule shall be reflected in a Scope Change Order entered into pursuant to Section 12.1.

12.5.2 Delays Affecting Performance of the DB Work. Contractor acknowledges and agrees that pursuant to Section 13.02 of the Comprehensive Agreement, a CA Delay Event occurring during the DB Work Period will excuse Contractor from performance of its obligations to perform the DB Work pursuant to this Agreement but only to the extent that such obligations are directly affected by such CA Delay Event. In addition, during the DB Work Period, extensions of milestones and/or activities identified on the Project Schedule for CA Delay Events affecting the DB Work will be made based on Time Impact Analysis, using the then current Project Schedule and taking into account impacts of the CA Delay Events on Critical Path items, in accordance with the Technical Requirements, and will extend the Guaranteed Substantial Completion Date, the Guaranteed Final Acceptance Date and the Long Stop Date. For avoidance of doubt, the Long Stop Date may be extended in accordance with this
Agreement by reason of a CA Delay Event that occurs during the period after the Guaranteed Substantial Completion Date. The provisions of Section 12.15 hereof shall apply in the event Contractor and Concessionaire cannot agree on the length of the extension to be sought from the Department pursuant to the Comprehensive Agreement in respect of such a Scope Change Order resulting from a CA Delay Event. For the avoidance of doubt, a change to the Technical Requirements, including as a result of a Change in Law, shall be treated as a Department Change pursuant to Section 12.3.2 hereof.

12.6 Scope Changes Due to CA Compensation Events.

12.6.1 CA Compensation Event Notice.

12.6.1.1 If Contractor is affected by a CA Compensation Event, it will give written notice to Concessionaire within twenty (20) days following the date on which Contractor first became aware (or should have become aware using all reasonable due diligence) that an event has occurred and that it is or will become a CA Compensation Event (a “CA Compensation Event Notice”). The CA Compensation Event Notice will set forth, in such form and substance as is required to satisfy the Concessionaire’s obligations under the Comprehensive Agreement for such notice: (A) the CA Compensation Event and its date of occurrence in reasonable detail, (B) the amount by which Contractor claims the Contract Sum should be adjusted as a result of the CA Compensation Event and (C) details of the calculation thereof; provided, that if the amount of such Contract Sum adjustment and details of such calculation are not available within the twenty (20)-day notice period, Contractor may submit an estimate of the amount claimed, or if known, the actual amount claimed, and details thereof no later than forty-five (45) days from the submission of a CA Compensation Event Notice, and Contractor may update the amount of claimed Contract Sum adjustment and details thereof every thirty (30) days. Concessionaire shall submit a “Compensation Event Notice” to the Department under Section 14.01(a)(i) of the Comprehensive Agreement based on the CA Compensation Event Notice submitted by Contractor and such other information provided by Contractor pursuant to this Section 12.6.1.1 and thereafter assert its rights under the Comprehensive Agreement with respect to the CA Compensation Event claimed by Contractor.

12.6.1.2 Subject to Sections 12.14 and 12.15, if, for any reason, Contractor fails to deliver such CA Compensation Event Notice within the such twenty (20)-day period, Contractor will be deemed to have irrevocably and forever waived and released any Claim or right to an adjustment to the Contract Sum or other adverse effects on costs, expenses and liabilities attributable to such CA Compensation Event.

12.6.1.3 After Concessionaire submits a “Compensation Event Notice” under the Comprehensive Agreement based on a CA Compensation Event claimed by Contractor, under Section 14.01(a)(iii) of the Comprehensive Agreement the Department may but it is not required to obtain, at its sole cost, (A) a comprehensive report as to Concessionaire’s estimate of the net cost impact attributable to the CA Compensation Event (which will incorporate the adjustment to the Contract Sum sought by Contractor) and (B) from a traffic and revenue consultant a traffic and revenue study, prepared in accordance with Good Industry Practice, analyzing and calculating the estimated net revenue impact attributable to the CA Compensation Event. Under the Comprehensive Agreement, within 90 days after receiving a
“Compensation Event Notice” and the supporting documentation, the Department is to provide to Concessionaire a copy of such reports as it has elected to obtain and Concessionaire will provide a copy of such report to Contractor. Under Section 14.01(a)(iii) of the Comprehensive Agreement, if the Department disagrees with the entitlement to or the amount of “Concessionaire Damages” claimed by Concessionaire (which will incorporate the adjustment to the Contract Sum sought by Contractor), Concessionaire and the Department are to commence good faith negotiations to resolve the dispute within 120 days after the delivery of the “Compensation Event Notice.” The provisions of Section 12.15 hereof shall apply in the event Contractor and Concessionaire cannot agree on the amount to be sought from the Department pursuant to the Comprehensive Agreement in respect of such a Scope Change Order resulting from a CA Compensation Event. All changes to the Contract Sum and corresponding changes to the Payment and Values Schedule and other appropriate changes to the Contract Documents shall be reflected in a Scope Change Order entered into pursuant to Section 12.1.

12.6.2 Contract Sum Adjustment Determination.

12.6.2.1 The Contract Sum shall be adjusted only in an amount necessary to compensate Contractor for all reasonable, unavoidable costs and expenses (including additional Taxes) attributable to the CA Compensation Event and mitigate or avoid the effects of the CA Compensation Event (net of any savings incurred by Contractor as a result of the CA Compensation Event) plus Contractor Overhead & Profit (collectively, the “Contract Sum Adjustment”).

12.6.2.2 The Contract Sum Adjustment associated with a CA Compensation Event will be net of all applicable insurance proceeds payable to Contractor associated with such CA Compensation Event (or that would be payable to Contractor but for the failure by Contractor to comply with the insurance requirements set forth herein), except as any payment of such insurance proceeds is affected by the bankruptcy or insolvency of the provider of such insurance, and will include all costs of asserting a Claim for such insurance proceeds and any increased insurance premiums resulting from such Claim; provided, that any portion of an increased insurance premium resulting from any such Claim is certified in writing by Contractor’s insurance provider prior to payment by Concessionaire.

12.6.2.3 Contractor will share with Concessionaire and the Department all data, documents and information pertaining to the proposed Contract Sum Adjustment on an Open Book Basis. Contractor will take all steps reasonably necessary to mitigate the amount of the Contract Sum Adjustment attributable to, and other consequences of, any CA Compensation Event, including all steps that would generally be taken in accordance with Good Industry Practice, including filing a timely claim for insurance and pursuing such claims.

12.6.2.4 Under the Comprehensive Agreement, if Concessionaire and the Department are unable to agree upon the amount of the “Concessionaire Damages” within 120 days after the delivery of the “Compensation Event Notice,” then either party, by written notice to the other party, may terminate the negotiations and request the dispute be resolved in accordance with Article 21 of the Comprehensive Agreement. Under the Comprehensive Agreement the Department is to make payment to Concessionaire of the undisputed portion of the “Concessionaire Damages” in accordance with Section 14.01(b)(vi) of the Comprehensive

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Agreement without regard to the dispute resolution procedures, and, subject to Section 2.13.3, solely to the extent received from the Department, Concessionaire shall pay the portion thereof attributable to the Contract Sum Adjustment over to Contractor.

12.6.2.5 The Parties acknowledge that under Section 14.01(b)(vii) of the Comprehensive Agreement Concessionaire is not entitled to “Concessionaire Damages” which are de minimis, and, as a result, Contractor will not be entitled to a Contract Sum Adjustment under this Agreement if Concessionaire is denied corresponding “Concessionaire Damages” that are de minimis under the Comprehensive Agreement.

12.6.2.6 Subject to Section 2.13.3, all payments to Contractor of amounts claimed in respect of a CA Compensation Event are strictly subject to Concessionaire’s receipt thereof from the Department; provided, however, that if the amount of “Concessionaire Damages” payable by the Department under Section 14.01 of the Comprehensive Agreement is less than the amount to which the DB Contractor is entitled hereunder in respect of such CA Compensation Event (as agreed by the Parties or determined pursuant to the dispute resolution process set forth in Article 19 hereof) as a result of the application of the proviso to Section 14.01(b)(i) of the Comprehensive Agreement, then Concessionaire shall be responsible for such shortfall.

12.6.3 Sole Remedy and Release of Claims. Without limiting Contractor’s rights with respect to non-monetary relief for CA Delay Events in accordance with Section 12.5, the Contract Sum Adjustment as expressly provided in this Agreement will represent the sole right to compensation and damages for the adverse effects of a CA Compensation Event.

12.6.4 Additional Provisions for Certain CA Compensation Events.

12.6.4.1 If Contractor is affected by a CA Compensation Event described in clause (k) of the definition thereof, Contractor will be entitled to claim a Contract Sum Adjustment under this Agreement for such CA Compensation Event; provided, however, that:

(i) in no event will Contractor be entitled to submit a Claim if the Contract Sum Adjustment for such CA Compensation Event does not equal or exceed $10 million US Dollars per occurrence (“Claim Threshold”);

(ii) if such Contract Sum Adjustment meets the Claim Threshold, the Department has agreed pursuant to Section 14.01(f)(i) of the Comprehensive Agreement to be solely responsible for such costs in excess of $10 million US Dollars for such CA Compensation Event and; provided, however, that Contractor will be solely responsible for such costs up to $10 million US Dollars per occurrence for the first two CA Compensation Events that meet the Claim Threshold; and

(iii) the Department has agreed pursuant to Section 14.01(f)(i) of the Comprehensive Agreement to be responsible for such costs of such CA Compensation Events after the first two such CA Compensation Events occur that meet the Claim Threshold.
For the avoidance of doubt, Contractor will be solely responsible for such CA Compensation Events with a Contract Sum Adjustment under $10 million per occurrence. The costs to Contractor attributable to the CA Compensation Event described in this Section 12.6.4.1 for which the Department bears responsibility pursuant to Section 14.01(f)(i) of the Comprehensive Agreement are to be paid by the Department to Concessionaire, which shall promptly pay over the amount received to Contractor. Concessionaire shall not be liable to Contractor for the payment of any such costs for which the Department is responsible under the Comprehensive Agreement except, subject to Section 2.13.3, to the extent the same are actually received by Concessionaire from the Department.

12.6.4.2 If Contractor is affected by a CA Compensation Event described in clause (l) of the definition thereof, Contractor will be entitled to claim a Contract Sum Adjustment under this Agreement for such CA Compensation Event; provided, however, that:

(i) Contractor may not claim a Contract Sum Adjustment for the first $5 million US Dollars in aggregate increased costs for such CA Compensation Event;

(ii) the Department has agreed pursuant to Section 14.01(f)(ii) of the Comprehensive Agreement to be responsible for such costs in excess of $5 million US Dollars but less than or equal to $10 million US Dollars for such CA Compensation Event; and

(iii) the Department and Contractor will share evenly the costs in excess of $10 million US Dollars for such CA Compensation Event.

The provisions of this Section 12.6.4.2 apply to each event and not in the aggregate. The costs to Contractor attributable to the CA Compensation Event described in this Section 12.6.4.2 for which the Department bears responsibility pursuant to Section 14.01(f)(ii) of the Comprehensive Agreement are to be paid by the Department to Concessionaire, which shall promptly pay over the amount received to Contractor. Concessionaire shall not be liable to Contractor for the payment of any such costs for which the Department is responsible under the Comprehensive Agreement except, subject to Section 2.13.3, to the extent the same are actually received by Concessionaire from the Department.

12.7 Scope Changes Due to Hazardous Substances. Subject to Section 2.1.17.5, if Contractor incurs costs in taking Remedial Actions with respect to (i) Unknown Pre-Existing Hazardous Substances or Third Party Hazardous Substances, the presence of either of which constitutes a Hazardous Environmental Condition, that exceed the amount recovered from any available reimbursement program or third parties, as described in Section 2.1.17.5, or (ii) any Hazardous Substances, the presence of which constitutes a Hazardous Environmental Condition, introduced to the Project Right of Way after the Agreement Date by Concessionaire, Contractor shall be entitled to claim a Scope Change Order in accordance with the procedures of this Article 12 to appropriately adjust the Contract Sum, the Payment and Values Schedule and the Maximum Cumulative Drawdown Schedule. Subject to Section 2.13.3, Concessionaire’s obligation to pay Contractor any increase on the Contract Sum as a result of a Scope Change
Order issued pursuant to clause (i) of this Section 12.7 shall be subject to Concessionaire’s receipt of necessary funds in respect thereof from the Department under Section 16.02(a) of the Comprehensive Agreement. The provisions of Section 12.15 hereof shall apply in the event Contractor and Concessionaire cannot agree on the amount or other terms of any Claim to be made against the Department pursuant to the Comprehensive Agreement in respect of such a Scope Change Order.

12.8 **Scope Changes Due to Concessionaire-Caused Delay.** Except to the extent another consequence is expressly provided in this Agreement, Contractor shall be entitled to claim a Scope Change Order adjusting one or more of the Contract Sum, the Payment and Values Schedule, the Guaranteed Substantial Completion Date, the Guaranteed Final Acceptance Date, the Long Stop Date and other appropriate changes to the Contract Documents to the extent Contractor’s performance of the DB Work is adversely affected by a Concessionaire-Caused Delay and in respect of which Contractor cannot, in the absence of incurring material cost or impacting the Critical Path, overcome the effect thereof. If the Parties cannot agree upon the appropriate adjustment(s), such adjustment(s) shall be determined pursuant to the dispute resolution process set forth in Article 19.

12.9 **Work Orders.** If (i) Contractor’s Change Order Proposal delivered pursuant to Section 12.2 hereof is not agreed to by Concessionaire, Concessionaire may, at its option, issue or (ii) as contemplated by Section 12.3.1.6 hereof, if the Department issues a Directive Letter pursuant to Section 14.02(d) of the Comprehensive Agreement, Concessionaire shall issue, to Contractor a Work Order in lieu of the Scope Change Order ordinarily issued under certain other sections of this Article 12. A “Work Order” is a written instruction from Concessionaire to Contractor to proceed with the Scope Change that is the subject of a Change Order Proposal. Pursuant to Section 14.02(e) of the Comprehensive Agreement, the Department is to make payments to Concessionaire on a monthly basis for the reasonable “Allocable Costs” of such DB Work performed, and, subject to Section 2.13.3, to the extent so received from the Department, Concessionaire shall make corresponding payments to Contractor on a monthly basis for the reasonable costs of the DB Work in question plus Contractor Overhead & Profit (subject to subsequent adjustment through the dispute resolution procedures, as between Concessionaire and the Department, set forth in the Comprehensive Agreement). Contractor shall be entitled to claim a Scope Change Order pursuant to Section 12.10 with respect to Work Orders issued by Concessionaire.

12.10 **Performance of Scope of Changes.** If Concessionaire executes and delivers to Contractor a Work Order, or if Concessionaire and Contractor agree to a Scope Change Order, Contractor promptly shall perform the DB Work described in the Work Order or Scope Change Order. Concessionaire shall not be responsible for premium time work unless (i) Concessionaire has expressly directed the performance of premium time work, (ii) the need for such premium time work was not caused by Contractor, and (iii) such premium time work was not contemplated by Contractor’s original DB Work plan. With respect to DB Work performed pursuant to a Work Order, Contractor shall deliver to Concessionaire, within twenty (20) days after completion, invoices, statements, payroll data and other evidence of the actual cost of the DB Work attributable to the Work Order that Concessionaire may reasonably require. Promptly following (a) completion of the Scope Change required under a Work Order, (b) agreement by Concessionaire and Contractor (or as determined pursuant to the dispute resolution process set
forth in Article 19) as to the adjustments to the Contract Sum, the Payment and Values Schedule, the Guaranteed Substantial Completion Date and other applicable terms and conditions of the Contract Documents which should be permitted as a result of such Work Order, and (c) receipt by Concessionaire of all required invoices, statements, payroll data and other evidence of the actual cost of the DB Work performed pursuant to such Work Order, Concessionaire shall issue a Scope Change Order adjusting one or more of the Contract Sum, the Payment and Values Schedule and the Guaranteed Substantial Completion Date, and making appropriate changes to the Contract Documents. If the Scope Change under a Work Order is performed over a period of more than one (1) month, Contractor may request, and shall be entitled to, payments for the Scope Change performed during each month in the same manner as payments requested for other DB Work. Agreement on any Scope Change Order shall constitute a final settlement on all items covered therein, subject to performance thereof and payment therefor pursuant to this Agreement.

12.11 **Scope Changes Due to Contractor Error.** Notwithstanding anything in this Article to the contrary, no Scope Change Order shall be issued and no adjustment of the Contract Sum, the Guaranteed Substantial Completion Date or the Payment and Values Schedule shall be made in connection with any correction of errors, omissions, deficiencies, or improper or defective DB Work on the part of Contractor or any Subcontractor in the performance of the DB Work hereunder, or correction of any improper, defective or deficient equipment supplied by Contractor or any Subcontractor.

12.12 **Familiarity with Conditions.** Except as otherwise expressly provided in Sections 2.1.17, 5.6, 12.5, 12.6 and 12.7, Contractor accepts the risk of mistake or error relating to all matters within the scope of the DB Work and acknowledges and agrees that no increase or adjustment in the Contract Sum, the Guaranteed Substantial Completion Date or the Payment and Values Schedule will be authorized by Concessionaire as a result of any such mistake or error. Contractor has received from Concessionaire and the Department, for its reference purpose only, certain information pertinent to the Project Right of Way and the DB Work. Neither Concessionaire nor the Department has made and will not make any express or implied warranty to Contractor as to the accuracy and completeness of such information, and neither Concessionaire nor the Department shall be liable to Contractor with respect to such information.

12.13 **Compliance with Guaranteed Substantial Completion Date.** With respect to any Scope Change proposed by Concessionaire or Contractor or required hereunder, Contractor shall whenever possible provide Concessionaire with the option to cause Contractor to perform the Scope Change without an adjustment in the Guaranteed Substantial Completion Date or the Project Schedule; provided that the Contract Sum is adjusted to compensate Contractor for any reasonable additional costs incurred in performing the Scope Change in accordance with such time limitation. If Concessionaire disputes Contractor’s estimate of such reasonable additional costs, such costs shall nonetheless be paid pending the resolution of the dispute. Amounts that are subsequently determined not to have been properly payable to Contractor shall be refunded to Concessionaire together with interest at the Bank Rate. Subject to the foregoing, Concessionaire shall have the right to elect to cause such Scope Change to be performed without an adjustment in the Guaranteed Substantial Completion Date or any schedule for the DB Project whenever possible, or to cause such Scope Change to be performed upon any other terms and conditions set forth in the Change Order Proposal.
12.14 Scope Change Order Dispute; Department Claim Dispute. In the event Contractor makes a claim for a Scope Change Order to which it believes it is entitled under the terms hereof and (a) the Parties are unable to reach agreement regarding the terms of such Scope Change Order within ten (10) Business Days after Contractor’s submission of the Change Order Proposal and supporting documentation, or (b) solely in respect of a proposed Scope Change Order resulting from the claimed occurrence of a CA Compensation Event, a CA Delay Event or pursuant to Section 12.7, Concessionaire determines that seeking relief under the Comprehensive Agreement is not appropriate and as a consequence thereof is unwilling to provide a Scope Change Order to Contractor, the Parties agree to a fast-track adjudication process in accordance with this Section 12.14:

(i) A Party may submit the Claim to a qualified independent third-party arbitrator with substantial experience in highway construction contracts; the Parties agree that any of the Persons named on Exhibit Y hereto (with such additions and deletions from time to time as the Parties mutually agree) will be acceptable arbitrators unless a Party sends a notice objecting to such Person’s inclusion on Exhibit Y prior to the commencement of the adjudication process. The other Party shall submit its response to the arbitrator within ten (10) days of submission of the Claim to the arbitrator by the initiating Party.

(ii) Such independent arbitrator will have fifteen (15) calendar days to make a preliminary determination whether (I) in the case of a dispute described in clause (a) of the first paragraph of this Section 12.14, Contractor’s Claim and proposed cost adjustment amount appears in good faith to be valid, and if the independent arbitrator so determines, he/she shall then advise the Parties of an appropriate interim measure while the Parties proceed with the dispute resolution process as set out in paragraphs (iii), (iv) and (v) below; or (II) in the case of a dispute described in clause (b) of the first paragraph of this Section 12.14, Contractor’s Claim appears in good faith to be valid, and if the independent arbitrator so determines, the Parties shall follow the procedure set forth in Section 12.15 hereof.

(iii) Subject to Concessionaire’s compliance with its obligations under Section 5.8 and to Contractor’s suspension rights set forth in clause (iv) below, the Parties agree that such interim measure shall require Contractor to proceed with the DB Work set out in the disputed Scope Change Order and that Claims and certification for such DB Work shall occur in accordance with the conditions of this Agreement. If a payment has been made according to the terms of this Section 12.14, and the Claim underlying such payment is subsequently determined not to be valid, Contractor shall repay all monies to Concessionaire (including accumulated interest at the Bank Rate);

(iv) Upon certification by the independent arbitrator, Concessionaire shall pay for the disputed Scope Change Order in accordance with this Agreement, and if Concessionaire fails to make such payment, Contractor shall be entitled to suspend only that portion of the DB Work that is required by
the specific disputed Scope Change Order until Concessionaire makes the required payment. Any suspension of the DB Work by Contractor under this Section 12.14 shall entitle Contractor to make a claim for a Scope Change Order under the terms of this Agreement; and

(v) The disputes process employed by the Parties pursuant to this Section 12.14 shall be structured with the goal of fully resolving disputed Scope Change Orders and Contractor’s Claims thereto within ninety (90) days of submission by Contractor of such Scope Change Order; provided, however, that where such process as described herein does not result in a determination in time for Concessionaire to file the corresponding Claim under the Comprehensive Agreement or otherwise preserve its rights thereunder, then the Parties shall seek in good faith to agree on the action to be requested from the Department or, if agreement is not reached, Concessionaire shall present Contractor’s Claim to the Department subject to its right to modify or withdraw the Claim to reflect the outcome of the dispute resolution process hereunder. The Parties shall request the independent arbitrator to allocate the costs of pursuing, modifying or withdrawing the Claim under the Comprehensive Agreement equitably in accordance with the outcome of the dispute resolution process.

Nothing in this Section 12.14 shall be deemed to waive or otherwise affect any requirement in this Article 12 that the Department approve a Scope Change Order before Contractor may issue or implement the same, and Contractor shall have no obligation to do so pending receipt of any required the Department approval.

12.15 Expedited Dispute Resolution Procedure for Claims Against the Department. In the event Contractor and Concessionaire cannot agree on (1) the amount or other terms of any Claim to be presented by Concessionaire to the Department under the Comprehensive Agreement as a result of the occurrence of a CA Compensation Event entitling Contractor to claim a Scope Change Order hereunder or pursuant to Section 12.7, or (2) the period of time by which Concessionaire should request the Department to extend the Guaranteed Substantial Completion Date or the Long Stop Date under the Comprehensive Agreement upon the occurrence of a CA Delay Event entitling Contractor to claim a Scope Change Order hereunder, the Parties shall follow the following procedure:

(a) A Party may submit the dispute to a qualified independent third-party arbitrator with substantial experience in highway construction contracts; the Parties agree that any of the Persons named on Exhibit Y hereto will be acceptable arbitrators unless a Party sends a notice objecting to such Person’s inclusion on Exhibit Y prior to the commencement of the adjudication process. The other Party shall submit its response within ten (10) days of submission of the Claim to the arbitrator by the initiating Party. In their respective submittals, each of the Parties shall specify its “best and final” offer regarding the amount and other terms of the Claim to be presented to the Department or the period of time by which Concessionaire should request the Department to extend the Guaranteed Substantial Completion Date, as applicable.
(b) The independent arbitrator shall, within fifteen (15) calendar days after receipt of the Parties’ submissions, select only one of the “best and final” offers submitted, and shall not craft any alternative or compromise.

(c) The determination of the independent arbitrator shall be final and binding upon the Parties, and Concessionaire shall thereafter exercise its rights under the Comprehensive Agreement to obtain from the Department, in the case of a CA Compensation Event, the Claim amount and other relief terms selected by the arbitrator, or in the case of a CA Delay Event, the length of the extension request selected by the arbitrator, unless in either instance Concessionaire determines to provide a Scope Change Order to Contractor providing the outcome sought in Contractor’s submission without regard for obtaining a corresponding “Change Order” under the Comprehensive Agreement. Concessionaire shall allow Contractor to participate in the presentation of the Claim to and negotiations of the Claim with the Department. Any compromise with the Department that is less favorable to Contractor than the relief selected by the arbitrator shall be subject to Contractor’s approval.

(d) Contractor shall not be entitled to any further relief under this Agreement in respect of such CA Compensation Event or CA Delay Event if (i) Concessionaire successfully obtains the relief in the offer selected by the arbitrator, (ii) Contractor accepts a compromise with the Department pursuant to subsection (c) above, or (iii) the matter is finally resolved in accordance with the dispute resolution process set forth in the Comprehensive Agreement or Article 19 hereof.

(e) Where the process as described herein does not result in a determination in time for Concessionaire to file the corresponding Claim under the Comprehensive Agreement or otherwise preserve its rights thereunder, then the Parties shall seek in good faith to agree on the action to be requested from the Department or, if agreement is not reached, Concessionaire shall present Contractor’s Claim to the Department subject to its right to modify or withdraw the Claim to reflect the outcome of the dispute resolution process hereunder. The Parties shall request the independent arbitrator to allocate the costs of pursuing, modifying or withdrawing the Claim under the Comprehensive Agreement equitably in accordance with the outcome of the dispute resolution process.

12.16 Comprehensive Agreement Modifications. If an amendment to the Comprehensive Agreement that materially increases Contractor’s obligations or diminishes its rights is made without Contractor’s consent, then Concessionaire shall issue a Scope Change Order reasonably acceptable to Contractor addressing the impacts to Contractor of such amendment to the Comprehensive Agreement.

12.17 Election to Restore Following Significant Force Majeure Event. If the Department elects to terminate the Comprehensive Agreement pursuant to Section 20.03(a)(ii) of the Comprehensive Agreement as a result of the occurrence of a Significant Force Majeure Event prior to achievement of Substantial Completion, then Concessionaire shall not, without the Contractor’s prior written consent, elect to restore any resulting damage or destruction and thereby avoid such termination.
ARTICLE 13

INDEMNIFICATION

13.1 Indemnities of Contractor. In addition to the Contractor’s indemnity obligations as set forth elsewhere in this Agreement, Contractor will indemnify, defend, and hold harmless each DB Indemnitee from and against any Losses actually suffered or incurred by such DB Indemnitee (except to the extent such Losses are solely caused by the misconduct, negligence or other culpable act, error or omission of a DB Indemnitee), due to Third Party Claims that are based upon:

(i) any actual or alleged failure by Contractor to comply with, observe or perform any of its covenants, obligations, agreements, terms or conditions in this Agreement, the other Contract Documents or the Technical Requirements, or, any actual or alleged breach by Contractor of its representations or warranties set forth herein or therein;

(ii) any actual or alleged misconduct, negligence or other culpable act, error or omission of a Contractor Party in connection with the Project;

(iii) any actual or alleged patent or copyright infringement or other actual or alleged improper appropriation or use by a Contractor Party of trade secrets, patents, proprietary information, know-how, trade marked or service marked materials, equipment, devices or processes, copyright rights or inventions in connection with the DB Project;

(iv) any actual or alleged inverse condemnation, trespass, nuisance or similar taking of or harm to real property committed or caused by a Contractor Party in connection with the DB Project arising from any actual or alleged (A) failure by Contractor to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement; (B) breach by Contractor of its representations or warranties set forth in this Agreement or (C) misconduct, negligence or other culpable act, error or omission of a Contractor Party; provided, however, that the Contractor will not be required to indemnify, defend or hold harmless a DB Indemnitee from and against any Losses actually suffered or incurred by such DB Indemnitee due to Third Party Claims that are based upon any actual inverse condemnation arising from the establishment of the Project Right of Way as identified in the NEPA Documents and any Real Estate Right outside the Project Right of Way acquired pursuant to this Agreement;

(v) any actual or alleged claim for brokerage commissions, fees or other compensation by any Person who acted on behalf of Contractor, its Affiliates or their respective Representatives in connection with this Agreement;
(vi) payments of, or failure to pay, Taxes relating to Contractor’s income or other Taxes required to be paid by Contractor without reimbursement under this Agreement; or

(vii) nonpayment of amounts due as a result of furnishing materials to Contractor or any Subcontractor in connection with the DB Work to the extent Concessionaire has paid Contractor all undisputed amounts then due and payable from the Concessionaire to Contractor under this Agreement.

13.2 Indemnities of Concessionaire. Concessionaire will indemnify, defend, and hold harmless Contractor Parties from and against any Losses actually suffered or incurred by Contractor Parties (except to the extent such Losses are solely caused by the misconduct, negligence or other culpable act, error or omission of a Contractor Party), due to Third Party Claims that are based upon (i) any actual or alleged failure by Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement or the other Contract Documents, or, any actual or alleged breach by Concessionaire of its representations or warranties set forth herein or therein, or (ii) any actual or alleged misconduct, negligence, violation of Law, or other culpable act, error or omission of Concessionaire or a Concessionaire Contractor in connection with the Project.

13.3 Defense and Indemnification Procedures.

13.3.1 In the event that either Party becomes aware of any Claim for which a Party (the “Indemnifying Party”) may be required to indemnify an Indemnitee hereunder, it will as promptly as practicable notify the other Party in writing of such Claim, and such notice will include a copy of the Claim (if available) and any related correspondence or documentation; provided, that if the Party required to give notice is the Indemnitee, any failure to give such prompt notice will not constitute a waiver of any rights of the Indemnitee, except to the extent that the rights of the Indemnifying Party are actually and materially prejudiced thereby. If any Third Party Claim for which Contractor may be required to indemnify a State Indemnitee hereunder is asserted in writing against a State Indemnitee other than the Department, a failure by such State Indemnitee to give Concessionaire prompt notice in writing of such Claim, together with a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim, will constitute a waiver of any rights of such State Indemnitee to indemnification to the extent, and only to the extent, that the rights of Contractor are actually and materially prejudiced thereby.

13.3.2 The Indemnifying Party will be entitled and obligated to appoint counsel of its choice at the expense of the Indemnifying Party to represent an Indemnitee in any action for which indemnification is sought (in which case the Indemnifying Party will not thereafter be responsible for the fees and expenses of any separate counsel retained by that Indemnitee except as set forth below); provided, that such counsel will be satisfactory to such Indemnitee. Notwithstanding the Indemnifying Party’s appointment of counsel to represent an Indemnitee in any action, such Indemnitee will have the right to employ separate counsel, and the Indemnifying Party will bear the reasonable fees, costs and expenses of such separate counsel, if:
(i) the use of counsel chosen by the Indemnifying Party to represent the Indemnitee would present such counsel with a conflict of interest;

(ii) the actual or potential defendants in, or targets of, any such action include both the Indemnitee and the Indemnifying Party and the Indemnitee will have reasonably concluded that there may be legal defenses available to it and/or other Indemnitees which are different from or additional to those available to the Indemnifying Party, and the Indemnifying Party has not provided the Indemnitee with its own separate counsel satisfactory to such Indemnitee;

(iii) the Indemnifying Party will not have employed counsel to represent the Indemnitee within a reasonable time after notice of the institution of such action; or

(iv) the Indemnifying Party authorizes the Indemnitee to employ separate counsel at the Indemnifying Party’s expense.

13.3.3 The Indemnifying Party will not be liable for any settlement or compromise by an affected Indemnitee of a Third Party Claim except with the Indemnifying Party’s prior written consent, which consent will not be unreasonably withheld or delayed, or except where the settlement or compromise is approved by the court after the Indemnifying Party receives reasonable notice and the opportunity to be heard and such court approval has become final and non-appealable.

13.4 Action in Case of Injunction. If, in any claim, suit or proceeding identified in Section 13.1(iii), a temporary restraining order or preliminary injunction is granted, Contractor shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the suspension of the injunction or restraining order. If, in any such claim, suit or proceeding, the DB Project or any part, combination or process thereof is held to constitute an infringement and its use is permanently enjoined, Contractor shall at its own expense and without impairing performance requirements, either replace the infringing DB Work or part, combination or process thereof with non-infringing components or parts or modify the same so that they become non-infringing. If Contractor is unable to do so within a reasonable time, Contractor shall promptly make every reasonable effort to secure for Concessionaire a license, at no cost to Concessionaire, authorizing continued use of the infringing DB Work. No Guaranteed Substantial Completion Date or any of Contractor’s scheduling requirements under this Agreement shall be extended due to any temporary restraining order or injunction described in this Section 13.4.

13.5 Survival. The provisions of this Article 13 shall survive Final Acceptance and the termination of this Agreement.

ARTICLE 14

INSURANCE
14.1 Contractor-Provided Insurance.

14.1.1 From the Commencement Date Contractor shall provide the insurance coverages required by Section 1 of Exhibit Y to the Comprehensive Agreement in form reasonably satisfactory to Concessionaire and the Department and shall maintain such insurance in full force and effect until Final Acceptance; provided, however, that Contractor shall provide all types of Liability insurance coverage and Workers’ Compensation Coverage required by Section 1 of Exhibit Y to the Comprehensive Agreement for all periods during which Contractor or any of its agents, Subcontractors or employees enters onto the DB Project site and provided, further, that such Liability insurance coverage and Worker’s Compensation Coverage shall continue in full force and effect during the Warranty Period and Contractor shall provide Completed Operations Coverage and Commercial General Liability (“CGL”) and certify to Concessionaire and the Financing Parties that such Completed Operations Coverage and CGL will be in effect for a period of three (3) years after the end of the Warranty Period.

14.1.2 The insurances which Contractor is required to maintain under Section 14.1.1 shall be maintained with insurers that at the time coverage commences are authorized to do business in the State and have a current policyholder’s management and financial size category rating of not less than “A-: VIII” according to A.M. Best’s Financial Strength Rating and Financial Size Category, except as otherwise approved by Concessionaire.

14.1.3 Contractor shall cause its Subcontractors performing any portion of the DB Work to provide and maintain the insurance coverages required by Section 3 of Exhibit Y to the Comprehensive Agreement.

14.2 Certificates. Contractor shall furnish to Concessionaire, the Department, the Financing Parties, the Independent Engineer and their respective permitted assigns and successors, upon request, certificates of insurance required hereunder in a form reasonably acceptable to Concessionaire, the Department, the Financing Parties, the Independent Engineer and their respective permitted assigns and successors, as the case may be. All such certificates shall state that thirty (30) days’ prior written notice shall be given to each such party in the event of cancellation or non-renewal of or material change in the relevant policy. Renewal certificates shall be provided upon request.

14.3 Responsibility for Deductibles. Deductibles under the foregoing policies of insurance shall be borne by Contractor; provided, however, that in no event shall Contractor be required to compensate Concessionaire for loss incurred during the waiting period (which shall be no more than fifteen (15) days) under the delay in start-up endorsement or the business interruption endorsement of the property coverage described in Section 1(e) of Exhibit Y to the Comprehensive Agreement, whether during the construction period or otherwise. The Parties agree that the policies shall contain a single deductible, where available.

14.4 Waiver of Subrogation. All insurance policies supplied by Contractor or Concessionaire under this Article 14 shall include a waiver of any right of subrogation of the insurers thereunder against all State Indemnities, and to the extent reasonably available, against Concessionaire, Contractor, its Subcontractors and the Financing Parties, the Independent Engineer and their respective permitted assigns, successors, subsidiaries, parent companies,
Affiliates, employees insurers and underwriters, and a waiver of any right of the insurers to any set-off or counterclaim or any other deduction, save for outstanding premium under the relevant insurance only, whether by attachment or otherwise, in respect of any liability of any Person insured under any such policy.

14.5 Failure to Procure Insurance. If Contractor fails to procure and maintain the required insurance, or any portion thereof, Concessionaire shall have the right, but not the obligation, to procure and maintain the required insurance for and in the name of Concessionaire and Contractor shall promptly pay the cost thereof and shall furnish all information necessary to acquire and maintain such insurance.

14.6 Additional Policy Requirements. The insurance coverages required to be provided by Contractor hereunder shall include a severability of interest clause, and Contractor agrees that none of the insurance policies required under this Article 14 shall contain a clause that would void coverage due to the individual actions of any other insured parties.

14.7 Contractor’s or Rented Equipment. All equipment, supplies and materials belonging to Contractor or any Subcontractor which are used by or on behalf of Contractor or any Subcontractor for its performance hereunder or is leased or loaned to any of them, shall be brought to and kept at the DB Project site at the sole cost, risk and expense of Contractor or such Subcontractor and Concessionaire shall not be liable for loss or damage thereto, and any insurance policies carried by Contractor, any Subcontractor, or any third party on said equipment, supplies and materials shall provide for a waiver of the underwriters’ right to subrogation against all State Indemnites, Concessionaire, the Financing Parties, the Independent Engineer and their respective permitted assigns, successors, parent companies, subsidiaries, Affiliates, employees, insurers and underwriters.

14.8 Unemployment and Other Insurance Benefits. Contractor agrees to and does hereby accept full and exclusive responsibility and liability for the withholding and payment of any and all Taxes and contributions levied or assessed against Contractor for Unemployment Insurance and for Old Age Retirement Benefits, and for pensions and annuities now imposed, or hereafter imposed, by the Governmental Authorities with respect to, assessed against or measured by wages, salaries or other remuneration paid to persons employed by Contractor in connection with the DB Work hereunder. Contractor further agrees to indemnify and hold harmless the DB Indemnitees from any and all liability therefor.

14.9 Descriptions Not Limitations. The coverages referred to in this Article 14 and Section 1 of Exhibit Y to the Comprehensive Agreement are set forth in full in the respective policy forms, and the descriptions of such policies in this Agreement and Section 1 of Exhibit Y to the Comprehensive Agreement and are not intended to be complete, nor to alter or amend any provision of the actual policies and in matters, if any, in which the said descriptions may be conflicting with such instruments, the provisions of the policies of insurance shall govern; provided, however, that neither the content of any insurance policy or certificate nor Concessionaire’s Approval thereof shall relieve Contractor or any of its obligations under the Contract Documents.
14.10 **Additional Insureds.** All insurance policies furnished by Contractor or its design engineer pursuant to this Article 14 (except Worker’s Compensation Insurance, Automobile, Employer’s Liability Insurance and Professional Indemnity Insurance) shall name all State Indemnitees, Concessionaire, the Financing Parties, the Independent Engineer and their respective permitted assigns, successors, subsidiaries and Affiliates as additional insureds as their respective interests may appear; provided, however, that the Department shall also be named an additional insured on a primary, non-contributory basis under Contractor’s Automobile Liability Insurance.

14.11 **No Limitation of Liability.** The required coverages referred to and set forth in this Article 14 shall in no way affect, nor are they intended as a limitation of, Contractor’s liability with respect to its performance of the DB Work hereunder.

14.12 **Insurance Primary.** All policies of insurance provided by Contractor pursuant to this Article 14 shall be written as primary policies, not contributing with, and not in excess of, the coverage that Concessionaire, the Independent Engineer, the Department, the Financing Parties and their respective permitted assigns, successors, parent companies, subsidiaries and Affiliates may carry against the same hazards.

14.13 **Capitalized Terms.** Capitalized terms used in this Article 14 and not otherwise defined in this Agreement shall have the respective meanings generally ascribed to them in the commercial insurance industry in the United States.

14.14 **Proof of Coverage.** Contractor will deliver to Concessionaire true and correct copies of policies, material forms, endorsements and premium indications of each insurance policy certified by Contractor’s insurance broker to be true and correct copies of such policies, forms, endorsements and premium indications, as a condition to receiving the Notice to Proceed set forth in this Agreement, and annually thereafter no later than twenty (20) days prior to policy renewal or replacement. Contractor will also deliver to Concessionaire duplicate originals or copies of each Project-specific insurance policy and endorsements for the Project coverage of each other insurance policy certified by Contractor’s insurance broker to be true and correct copies of the originals no later than fifty (50) days after receiving the Notice to Proceed set forth in this Agreement and annually thereafter no later than fifty (50) days after policy renewal or replacement, and also whenever reasonably requested by Concessionaire.

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**ARTICLE 15**

**SUSPENSION OF DB WORK; TERMINATION**

15.1 **Suspension of the DB Work.**
15.1.1 **Concessionaire’s Right to Suspend the DB Work.** Concessionaire may elect to suspend completion of all or any part of the DB Work upon ten (10) days’ prior written notice to Contractor (or, in emergency situations, upon such prior notice as circumstances may permit) indicating (a) the portion of the DB Work the completion of which Concessionaire has elected to defer, (b) Concessionaire’s estimate of the duration of such suspension and (c) the effective date of such suspension of the DB Work. Upon receipt of and consistent with the effective date of such notice, Contractor shall stop performance of the portion of the DB Work which Concessionaire has elected to defer and shall continue to complete performance of the balance of the DB Work hereunder. In the event of a suspension of the DB Work pursuant to this Section 15.1.1, Concessionaire will authorize a Scope Change Order or, at its option, a Work Order if appropriate, making required adjustments to one or more of the Guaranteed Substantial Completion Date, the Contract Sum or the Payment and Values Schedule, and such other adjustments as are appropriate, with any disputes being resolved pursuant to the dispute resolution process set forth in Article 19. Contractor shall mitigate to the fullest extent reasonable possible any additional expenses to be borne by Concessionaire as a result of suspension of the DB Work pursuant to this Section 15.1.1. In the event the entire DB Work is suspended pursuant to this Section 15.1.1 for a period of four hundred and eighty-six (486) consecutive days, Contractor may terminate this Agreement upon written notice to Concessionaire. In the event Contractor terminates this Agreement pursuant to this Section 15.1.1, Concessionaire shall pay the Termination Payment to Contractor in accordance with Section 4.4 as Contractor’s sole and exclusive remedy, but it will not affect Contractor’s right to receive amounts otherwise due but unpaid hereunder prior to termination.

15.1.2 **Department’s Right to Suspend the DB Work.**

15.1.2.1 Contractor acknowledges and agrees that under Section 10.07 of the Comprehensive Agreement the Department has the right and authority, without liability to Concessionaire or Contractor, to suspend any affected portion of the DB Work by written order to Concessionaire to comply with any court order or judgment, to protect against a risk to the public health, safety or welfare (as more particularly set forth in Section 24.04(b) of the Comprehensive Agreement and Section 15.1.2.2 hereof), including to workers, other personnel or the general public from unsafe or dangerous conditions, or upon the occurrence of the events described in Section 10.07(a) of the Comprehensive Agreement. In accordance with Section 10.07(b) of the Comprehensive Agreement, the Department is to lift the suspension order promptly after it is permitted by the terms of the court order or judgment, after the dangerous or unsafe condition is rectified, or after Contractor (acting on behalf of the Concessionaire) fully cures and corrects the applicable breach or failure to perform. Contractor may direct Concessionaire to dispute the Department’s suspension order by written notice to Concessionaire, which notice will provide supporting information for Contractor’s position. Unless directed otherwise by Concessionaire after receipt of such notice, Contractor will carry out the DB Work required by the Department. If it is determined in accordance with the dispute resolution procedures in the Comprehensive Agreement that Contractor was in compliance with its obligations under this Agreement, then the suspension order and any additional DB Work required by the Department under the Comprehensive Agreement will be treated as a Department Change hereunder.
15.1.2.2 The Parties acknowledge that the Department under Section 24.04(b) of the Comprehensive Agreement may require Concessionaire to suspend any DB Work or other activities related to the DB Project, which, in the sole discretion of the Department, presents a risk to the public health, safety or welfare, and to take such other actions as the Department may require to prevent such risk; provided, that if it is determined in accordance with the dispute resolution procedures in the Comprehensive Agreement that Contractor was in compliance with its obligations under this Agreement, then the suspension order will be treated as a Department Change hereunder. If the DB Work is so suspended for reasons attributable to Contractor, then Contractor shall not be relieved of any of its obligations under this Agreement and shall be fully liable to Concessionaire for any failure to timely and fully fulfill such obligations in accordance with the terms of this Agreement.

15.1.3 Contractor Right to Suspend the DB Work. Contractor may suspend performance of the DB Work pursuant to Sections 12.14(iv) and 15.3.2 hereof and as otherwise expressly permitted in this Agreement.

15.2 Termination of Contractor for Cause.

15.2.1 Concessionaire may elect, by ten (10) Business Days written notice to Contractor, at Concessionaire’s sole option, to terminate this Agreement if any of the following events (“Contractor Defaults”) shall occur:

(i) Contractor or the Guarantor makes a general assignment for the benefit of its creditors, is generally unable to pay its debts as they become due, or becomes the subject of any voluntary or involuntary bankruptcy, insolvency, arrangement, reorganization or other debtor relief proceeding under any Law, now in existence or hereafter becoming effective, and, in the case of any such involuntary proceeding, it is not dismissed or stayed within sixty (60) days after it is commenced;

(ii) Contractor fails to pay to Concessionaire when due any undisputed amount in excess of $100,000, adjusted annually by the percentage increase in CPI, payable to Concessionaire pursuant to this Agreement in the amount and within the time period required by this Agreement, and such failure, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of thirty (30) days following the date Concessionaire delivers to Contractor written notice thereof (which notice requirement shall be waived if Law prohibits the giving of such notice);

(iii) Contractor fails, for any reason other than failure of Concessionaire to make payments to Contractor when obligated and in accordance with this Agreement, to make undisputed payments due to Subcontractors, which failure continues for thirty (30) days after written notice of such non-payment (which notice requirement shall be waived if Law prohibits the giving of such notice);
(iv) Contractor intentionally or negligently disregards Laws in the performance of the DB Work and such failure continues for fifteen (15) days after written notice from Concessionaire (which notice requirement shall be waived if Law prohibits the giving of such notice), or, if such failure is not capable of being cured within such fifteen (15) day period, if Contractor has not commenced the cure within such period and thereafter diligently pursued the same until a cure is effected, not to exceed an additional thirty (30) days unless the failure is not susceptible of cure;

(v) (A) Contractor fails to achieve Substantial Completion of the DB Project by the Long Stop Date, as such date may be extended pursuant to this Agreement, or (B) if a new Long Stop Date has been established pursuant to Section 6.6.5, Contractor fails to diligently implement the Substantial Completion Recovery Plan;

(vi) Contractor fails to diligently implement a corrective action plan adopted pursuant to Section 2.1.1.4;

(vii) Contractor abandons the DB Work;

(viii) Contractor fails to maintain (A) the Letter of Credit in effect in the amount required hereunder or (B) insurance in the amount, terms and coverage required hereunder, and such failure continues without cure for six (6) Business Days following the date Concessionaire delivers to Contractor written notice thereof;

(ix) the Guarantor fails to maintain the Guaranty in effect as required hereunder, and such failure continues without cure for six (6) Business Days following the date Concessionaire delivers to Contractor and Guarantor written notice thereof;

(x) a “Concessionaire Default” (as defined in the Comprehensive Agreement) occurs under Section 19.01(h) of the Comprehensive Agreement with respect to Contractor, Fluor Enterprises, Inc. or Lane Construction Corporation and is not cured within the time allowed thereunder;

(xi) Contractor otherwise is in default of any provision of or has failed to perform its obligations under the Contract Documents and such failure continues for thirty (30) days after written notice from Concessionaire (which notice requirement shall be waived if Law prohibits the giving of such notice), or, if such failure is not capable of being cured within such thirty (30)-day period, if Contractor has not commenced the cure within such period and thereafter diligently pursued the same until a cure is effected, not to exceed an additional ninety (90) days unless the failure is not susceptible of cure; provided, that a debarment pursuant to the provisions set forth in Section 24.16.2 (relating to SWaM participation) will not constitute a Contractor Default, and provided,
further, that this Section 15.2.1(xi) will not apply to events covered by other provisions of this Section 15.2.1; or

(xii) the Department terminates the Comprehensive Agreement as a result of a breach by Contractor of its obligations hereunder (including its obligations to fulfill Concessionaire’s obligations under the Comprehensive Agreement to the extent required under this Agreement).

15.2.2 With respect to any termination by Concessionaire pursuant to Section 15.2.1 (a “Termination For Cause”):

(a) If Concessionaire terminates this Agreement in accordance with Section 15.2.1, Concessionaire may cause the DB Work to be completed by other contractors, and Contractor shall pay for the cost of such completion and Losses suffered by Concessionaire to the extent the same exceeds the Contract Sum. Concessionaire shall, within a reasonable period of time after the DB Project is fully and finally completed by the work of one or more other contractors, determine the total cost (including contractor fees) to Concessionaire for completing the DB Work, including all sums previously paid or then owned to Contractor pursuant to this Agreement. If the Contract Sum is less than the sum of (i) the cost incurred by Concessionaire to fully and finally complete the DB Work, (ii) all other Losses suffered by Concessionaire as a result of a default or breach by Contractor of its obligations under the Contract Documents, and (iii) all amounts previously paid to Contractor pursuant to this Agreement, Contractor shall pay to Concessionaire on demand the amount of such difference. Any amount owed by Concessionaire to Contractor, including for the month and level of completion of the DB Work shall be retained by Concessionaire until after completion of the DB Work and applied by Concessionaire to pay any amounts and Losses owed by Contractor pursuant to this Section 15.2.2 or otherwise. Any excess shall be remitted to Contractor within sixty (60) days after the DB Project is fully and finally completed.

(b) If a Contractor Default has occurred for which a cure period is envisioned above in Section 15.2.1, Contractor shall prepare a remedial program and submit the same for Concessionaire’s Approval, and Contractor shall remedy such Contractor Default in accordance with the agreed remedial program. To the extent Contractor fails to cure such Contractor Default and Concessionaire elects not to exercise its termination rights hereunder, Concessionaire may remedy such Contractor Default with the cost thereof to be borne by Contractor.

(c) No compensation shall be payable to Contractor in the event of a Termination For Cause except to the extent provided in Section 15.2.2(a).

15.3 Concessionaire Default

15.3.1 The following events shall constitute “Concessionaire Defaults”:

(i) Concessionaire makes a general assignment for the benefit of its creditors, is generally unable to pay its debts as they become due, or becomes the subject of any voluntary or involuntary bankruptcy, insolvency, arrangement,
reorganization or other debtor relief proceeding under any Law, now in existence or hereafter becoming effective, and, in the case of any such involuntary proceeding, it is not dismissed or stayed within sixty (60) days after it is commenced;

(ii) Concessionaire fails to pay to Contractor any portion of a Scheduled Payment which is not in dispute and such failure continues for thirty (30) days after written notice of such non-payment (which notice requirement shall be waived if Law prohibits the giving of such notice); or

(iii) only if relief cannot be provided by issuance of a Scope Change Order under Section 12.8, Concessionaire otherwise is in default or has failed to perform any of its other material obligations under the Contract Documents and such failure continues for thirty (30) days after written notice from Contractor (which notice requirement shall be waived if Law prohibits the giving of such notice), or, if such failure is not capable of being cured within such thirty (30) day period, if Concessionaire has not commenced the cure within such period and thereafter diligently pursued the same until a cure is effected, not to exceed an additional ninety (90) days unless the failure is not susceptible of cure.

15.3.2 Upon the occurrence of a Concessionaire Default under Section 15.3.1(ii), Contractor may suspend performance of the DB Work hereunder and, if Concessionaire fails to pay the undisputed portion of the Scheduled Payment within ninety (90) days after written notice of such non-payment (which notice requirement shall be waived if Law prohibits the giving of such notice), terminate this Agreement upon ten (10) Business Days written notice to Concessionaire. In the case of any other Concessionaire Default, Contractor may terminate this Agreement upon ten (10) Business Days written notice to Concessionaire. Any right of Contractor to terminate this Agreement shall be subject to all cure rights of the Department under the Comprehensive Agreement and of the Financing Parties. In the event Concessionaire terminates this Agreement by Contractor pursuant to this Section 15.3.2, Concessionaire shall pay the Termination Payment to Contractor in accordance with Section 4.4 hereof as Contractor’s sole and exclusive remedy, but it will not affect Contractor’s right to receive amounts otherwise due but unpaid hereunder prior to termination. If Contractor suspends the DB Work under the first sentence of this Section 15.3.2 but subsequently resumes performance of the DB Work following Concessionaire’s payment of the undisputed portion of the Scheduled Payment, then such suspension shall be treated as a Concessionaire-Caused Delay entitling Contractor to claim a Scope Change Order pursuant to Section 12.8.

15.4 Termination Due to Significant Force Majeure Event. If a Significant Force Majeure Event occurs under the Comprehensive Agreement and the Department or Concessionaire terminates the Comprehensive Agreement as a result thereof pursuant to Section 20.03(a) of the Comprehensive Agreement, then this Agreement shall automatically terminate effective as of the termination date of the Comprehensive Agreement. If this Agreement is terminated pursuant to the preceding sentence prior to Final Acceptance of the entire DB Project (and Concessionaire’s payment therefor), Contractor shall be entitled to receive a termination payment (the “FM Termination Payment”) equal to that portion of the Contract Sum and any other amounts that are then due and payable to Contractor by Concessionaire and applicable to
the DB Work completed up to the date of termination and which have not previously been paid to Contractor, plus all Demobilization Costs but less proceeds of insurance that is required to be carried by Contractor hereunder. Representatives of Concessionaire and Contractor shall determine the Contract Sum amount in accordance with the Payment and Values Schedule. Contractor shall submit an invoice to Concessionaire for the FM Termination Payment, and Concessionaire shall pay such invoice within 30 days after its receipt of same subject to the provisions of this Section 15.4 unless it disputes certain elements thereof, in which event only the undisputed portion of the FM Termination Payment need be made within such 30-day period and the dispute over the remainder of the claimed FM Termination Payment may be submitted to the appropriate dispute resolution process set forth in Article 19; provided, that, subject to Section 2.13.3, Concessionaire’s obligation to pay the FM Termination Payment shall be subject to its receipt of funds therefore as part of the “Significant Force Majeure Termination Amount” paid by the Department under the Comprehensive Agreement. The FM Termination Payment shall be subject to offset for amounts payable by Contractor to Concessionaire. As a condition precedent to receiving the FM Termination Payment, Contractor shall comply, on behalf of Concessionaire, with all the provisions of Section 20.08 of the Comprehensive Agreement with respect to the DB Work. Payment of the FM Termination Payment shall be the sole and exclusive liability of Concessionaire, and the sole and exclusive remedy of the Contractor, with respect to termination of this Agreement pursuant to this Section 15.4 and the events (including the applicable Concessionaire Default) giving rise to such termination, but it will not affect Contractor’s right to receive amounts otherwise due but unpaid hereunder prior to termination. In no event shall Concessionaire have any further liability to Contractor in any such event for actual, incidental, consequential or other damages, notwithstanding the actual amount of damages that Contractor may have sustained in connection with a termination pursuant to this Section 15.4. Calculation of the FM Termination Payment has been agreed upon and fixed hereunder because of the difficulty of ascertaining the exact amount of such damages Contractor will actually sustain in the event of a termination pursuant to this Section 15.4 and Concessionaire and Contractor agree that the calculation of the FM Termination Payment is reasonable.

15.5 Termination for Failure to Achieve Financial Close. If Concessionaire fails to achieve Financial Close by the Financial Close Deadline and the Department or Concessionaire terminates the Comprehensive Agreement, this Agreement will automatically terminate. In the event of such termination, neither Party shall have any liability or obligation to the other, other than amounts payable in respect of the Early Work performed by Contractor or DB Work performed pursuant to an LNTP, in each case, subject to Section 2.13.3, to the extent of the receipt of the corresponding payment by Concessionaire from the Department under the Comprehensive Agreement.

15.6 Requirements Following Termination. Upon termination of this Agreement, Concessionaire shall be immediately released from any and all obligations to Contractor (except for Concessionaire’s obligation to pay the Termination Payment and/or any amount payable under this Agreement by Concessionaire to Contractor that is due but unpaid as of the termination date), Contractor shall immediately discontinue the DB Work and remove its personnel and construction equipment from the Project Right of Way, and Concessionaire shall be entitled to take exclusive possession of the DB Project and all or any part of the equipment and materials delivered or enroute to the DB Project, to the extent that Concessionaire has paid
Contractor all undisputed amounts hereunder then due and payable from Concessionaire to Contractor. If requested by Concessionaire, Contractor will make every reasonable effort to cancel any existing Subcontracts upon terms satisfactory to Concessionaire. Except as otherwise expressly provided in this Agreement or where pursuant to the dispute resolution process under Article 19 it is determined that termination by Concessionaire was wrongful, any payments to be made to a Subcontractor as a result of any such termination shall be at the expense of Contractor. Contractor shall also, upon request by Concessionaire, (i) deliver and assign to Concessionaire (but in no event shall Concessionaire be liable for any action or default of Contractor occurring prior to such delivery and assignment except to the extent such action or default was caused by Concessionaire, and each Subcontract shall so provide) any and all Subcontracts, purchase order, bonds and options made by Contractor in performance of the DB Work, and (ii) deliver to Concessionaire originals of all Construction Documentation and, if the termination occurs at a time when the design of the DB Project is incomplete, originals of all Design Documentation in process (except that Contractor may keep for its records copies, and, if sufficient originals exist, an original set, of the Agreement and other Contract Documents executed by Concessionaire), all other materials relating to the DB Work which belong to Concessionaire, and all papers and documents relating to the Governmental Approvals, orders placed, bills and invoices, lien releases and financial management under this Agreement. All deliveries hereunder shall be made free and clear of any liens, security interests or encumbrances, except such as may be created by Concessionaire. Contractor shall also fulfill Concessionaire’s obligations under Section 20.08(b)-(e) of the Comprehensive Agreement to the extent they relate to the DB Work. Notwithstanding any termination of Contractor’s retention or this Agreement pursuant to this Article 15, Contractor shall for a period not to exceed five (5) days take such steps as are reasonably necessary to preserve and protect DB Work completed and in progress and to protect materials, equipment and supplies at the Project Right of Way, stored off-site, or in transit. Except as provided herein, no action taken by Concessionaire or Contractor after the termination of Contractor’s retention of this Agreement shall prejudice any other rights or remedies of Concessionaire or Contractor provided by law, by the Contract Documents or otherwise upon such termination.

15.7 Surviving Obligations. Termination of this Agreement or the retention of Contractor to perform the DB Work (a) shall not relieve Contractor of its obligations with respect to the confidentiality of Concessionaire information as set forth in Article 18 hereof, (b) shall not relieve Contractor of any obligation hereunder which expressly or by implication survives termination hereof, and (c) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Concessionaire or Contractor of any obligations or liabilities for loss or damage to the other Party arising out of or caused by acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination, and shall not relieve Contractor of its obligations as to portions of the DB Work or other services hereunder already performed or of obligations assumed by Contractor prior to the date of termination.
ARTICLE 16

ASSIGNMENTS

16.1 Assignment. Neither Party shall have the right, power or authority to assign or delegate this Agreement or any portion thereof, either voluntarily or involuntarily, or by operation of law, without the prior written consent of the other Party, which consent may be granted or withheld in the sole discretion of such other Party; provided, that Concessionaire may assign all of its rights and interests in and under this Agreement to the Financing Parties as collateral security for its obligations. Upon request by Concessionaire, on or before the Financial Close Date Contractor shall enter with Concessionaire and the Financing Parties or their agent into a direct agreement substantially in the form of Exhibit BB hereto (the “Direct Agreement”), and the Direct Agreement will provide for Contractor’s consent to Concessionaire’s assignment of all of its right, title and interest in, to and under this Agreement to the Financing Parties as collateral security for Concessionaire’s obligations under the Project financing documents; the Financing Parties may further assign such rights without Contractor’s consent thereto in connection with the exercise of remedies against Concessionaire. Concessionaire also may assign to the Department any or all of its rights under this Agreement and the other Contract Documents without Contractor’s consent. Nothing in this Section 16.1 shall be deemed to preclude Contractor from subcontracting portions of the DB Work in accordance with Article 3 hereof.

16.2 Performance in Favor of the Department and Financing Parties. Contractor agrees that in the event of a default by Concessionaire under the terms and conditions of the Comprehensive Agreement or any agreement between Concessionaire and any Financing Party, then the Department and/or the Financing Parties shall be entitled to use and enforce this Agreement, as the same may be amended or supplemented before or after such default, all without additional cost to the Department or the Financing Parties. In the event any Financing Party notifies Contractor in writing that Concessionaire has defaulted under any agreement between Concessionaire and the Financing Parties and requests Contractor to continue performance under this Agreement, Contractor shall thereafter perform hereunder in accordance with the terms and provisions hereof, so long as Contractor shall be paid in accordance with this Agreement for the DB Work performed hereunder, including payment of any sums due to Contractor for DB Work performed to and including the date of Concessionaire Default. Subject to the provisions of the Direct Agreement, in the event the Department notifies Contractor in writing, pursuant to Section 20.08(f) of the Comprehensive Agreement, within 90 days after the date on which the notice of termination is delivered by the Department to Concessionaire under the Comprehensive Agreement that Concessionaire has defaulted under the Comprehensive Agreement and requests Contractor to continue performance under this Agreement, Contractor shall thereafter perform hereunder in accordance with the terms and provisions hereof, so long as Contractor shall be paid in accordance with this Agreement for the DB Work performed hereunder; provided, that the Department will only be liable to Contractor for such obligations hereunder accruing after the date of assumption by the Department of Concessionaire’s rights under this Agreement. Contractor will consent to such other agreements with respect to the Department’s and/or the Financing Parties’ enforcement of their liens and security interests as the Department and/or the Financing Parties may reasonably request. In addition, if the Department succeeds to Concessionaire’s rights under this Agreement (by assignment or
otherwise), Contractor agrees, in accordance with Section 24.02(f)(vi) of the Comprehensive Agreement, that it will (A) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer and service provider), (B) permit audit thereof by Concessionaire, and provide progress reports to Concessionaire appropriate for the Agreement sufficient to enable Concessionaire to provide the reports it is required to furnish the Department pursuant to the Comprehensive Agreement and (C) allow the Department to assume the benefit of Concessionaire’s contract rights and the DB Work performed hereunder with liability only for those remaining obligations accruing after the date of assumption, but excluding any monetary Claims or obligations that Concessionaire may have against Contractor that existed prior to the Department’s assumption of this Agreement.

16.3 Successors and Assigns. All of the rights, benefits, duties, liabilities and obligations of the Parties hereto shall inure to the benefit of and be binding upon their respective successors and permitted assigns.

ARTICLE 17

DESIGN DOCUMENTATION

17.1 Concessionaire’s Review. All design information and calculations shall be subject to Concessionaire’s Review, but neither (a) the review of such information or calculations by Concessionaire, or (b) Concessionaire’s acceptance of Substantial Completion or Final Acceptance shall constitute a waiver of, or release Contractor from, any liability for errors or omissions contained in any designs or calculations by Contractor or by any Subcontractor, including any errors or omissions contained in the Final As-Built Drawings and Documentation. Notwithstanding anything to the contrary herein contained, Concessionaire shall not be liable for and makes no representation with respect to any designs and specifications prepared by Contractor and reviewed or accepted by Concessionaire, and including any designs and specifications set forth in the Contract Documents. With respect to all aspects of DB Project design, Contractor must create designs and solutions that comply with the Standard of Care, Laws, Applicable Standards, the Technical Requirements, this Agreement and the other Contract Documents. The acceptance of the DB Project by Concessionaire or the Department shall not relieve Contractor of its obligation for such compliance.

17.2 Final As-Built Drawings and Documentation. As a condition to achievement of Final Acceptance, Contractor shall furnish for Concessionaire’s Approval hard copies and electronic files of the Final As-Built Drawings and Documentation meeting the requirements of Section 3.18 of the Technical Requirements (plus one extra hard and electronic copy of each file), including without limitation “as built” surveys illustrating the boundaries of the Project Right of Way, the established building setback lines, if any, and the location of the DB Project on the Project Right of Way and within any established boundaries and setback lines. Together with the Final As-Built Drawings, Contractor shall furnish to Concessionaire a DB Project library in an electronic format that can be searched easily to include, without limitation: all Design Documentation, geological data and observations, surveys and inspection reports, electronic management system and other documents prepared by Contractor and used in the
performance of the DB Work hereunder. Contractor shall incorporate into the Final As-Built Drawings and Documentation all changes or corrections to the DB Work made at the Project Right of Way prior to Final Acceptance so as to accurately represent the completed DB Project and will certify, as required by Section 3.18(B) of the Technical Requirements, that the Final As-Built Drawings and Documentation reflect the actual condition of the DB Project as of Final Acceptance. Contractor shall establish such systems and retain such personnel as are necessary to maintain full quality control and quality assurance with respect to the Final As-Built Drawings and Documentation. If Contractor fails to provide Final As-Built Drawings and Documentation which in all material respects comply with the provisions of this Section 17.2, Concessionaire, without limiting any other right or remedy it may have under the Contract Documents or under Laws, may engage a third party engineer to produce Final As-Built Drawings and Documentation complying herewith, and Contractor shall pay all fees and costs of such engineer.

17.3 Ownership. Contractor agrees that all Design Documentation, the Final As-Built Drawings and Documentation, and other documents prepared or required to be prepared by Contractor as deliverables under this Agreement shall be the sole and exclusive property of the Department and Concessionaire and shall not be used by Contractor in connection with any other project without Concessionaire’s prior written consent. The foregoing does not apply to Contractor’s pre-existing technical experience, expertise, standard formats or the like. Contractor agrees that all such documents, as well as any drawings, tracings, specifications, calculations, memoranda, data, notes and other materials which are supplied by Concessionaire and come into the possession of Contractor, shall be delivered to Concessionaire at the earlier of Final Acceptance or termination of the DB Work hereunder if not previously delivered hereunder, except to the extent Concessionaire shall instruct Contractor not to deliver such materials. Concessionaire may not copy or disseminate such materials in connection with any project other than the Project unless Contractor’s name is deleted from such materials. Concessionaire shall defend, indemnify and hold Contractor harmless from any Claim, demand or liability arising from reuse of Contractor’s documents if such reuse is not in connection with the Project.

17.4 Use of Documents by Contractor. Contractor shall be entitled to retain and use solely and specifically in connection with the DB Work hereunder and for enhancement of its engineering files a reproducible set of all Design Documentation, the Final As-Built Drawings and Documentation, and other documents delivered to Concessionaire by Contractor in accordance with this Article 17.

ARTICLE 18

CONFIDENTIAL INFORMATION

18.1 Confidentiality. Except as set forth in this Section 18.1, each Party shall hold in confidence for a period ending five (5) years after the earlier of (i) Final Acceptance of the entire DB Project or (ii) the earlier termination hereof, any confidential information (marked as such) supplied to it by the other Party or otherwise related to the Contract Documents or the Project. Contractor shall inform its Subcontractors, suppliers, vendors and employees of its obligations under this Section 18.1 and shall require each of its Subcontractors, suppliers, vendors and employees to execute confidentiality arrangements substantially in the form of this Article 18.
Notwithstanding the foregoing, each Party may disclose the following categories of information or any combination thereof:

(i) information which was in the public domain prior to receipt thereof by such Party or which subsequently becomes part of the public domain by publication or otherwise except by a wrongful act of such Party or, in the case of Contractor, any Subcontractor;

(ii) information that such Party can show was lawfully in its possession prior to receipt thereof from the other Party through no breach of any confidentiality obligation;

(iii) information received by such Party from a third party having no obligation of confidentiality with respect thereto;

(iv) information at any time developed independently by such Party provided it is not developed from otherwise confidential information;

(v) information disclosed pursuant to and in conformity with the Law or a judicial order or in connection with any legal proceedings or arbitration procedures; and

(vi) information required to be disclosed under securities laws applicable to publicly traded companies and their subsidiaries or reporting required by a Governmental Authority if such Party informs the other Party of the need for such disclosure and, if reasonably requested by the other Party, seeks, through a protective order or other appropriate mechanism, to maintain the confidentiality of such information.

18.2 Survival. Provisions of this Article 18 shall continue in full force and effect in accordance with their terms, and shall survive any termination of this Agreement.

18.3 Press Releases; Information. Contractor shall not issue any press or similar media release or any advertisement, or publish, release or disclose any photograph or other information concerning this Agreement or the Project, including in accordance with the Public Information and Communications Plan, without the express prior written consent of Concessionaire, which consent shall not be unreasonably withheld. Contractor shall include and enforce this restriction in all Subcontracts and purchase orders. Contractor shall give prior notice to Concessionaire of any information contained in documents filed with public authorities or any other public disclosure which would result in the dissemination of confidential information. Concessionaire when marketing the Project may use Contractor’s name and logo without Contractor’s consent. Concessionaire shall provide Contractor a copy for review and comment where any press release or any paid advertisement containing the name or logo of Contractor, or any of Contractor’s parent entities, may require Contractor to make a responding press release.
ARTICLE 19

DISPUTE RESOLUTION

19.1 Arbitration; Other Actions. Any Claim or controversy between Concessionaire and Contractor not exceeding One Million Dollars ($1,000,000) in value shall be submitted to binding arbitration in accordance with this Section 19.1 upon written notice of either Party delivered to the other of such Party’s intention to arbitrate, the nature of the dispute, the amount claimed and the decision sought, provided that a dispute relating to a Scope Change Order shall be resolved in accordance with Section 12.14. Arbitration under this Section 19.1 shall be conducted by JAMS or its successor in accordance with its Streamlined Arbitration Rules and the Federal Arbitration Act, 9 USC Section 1 et seq. The notice of intent to arbitrate also shall specify the name and address of an arbitrator selected by the Party requesting arbitration. The other Party shall within ten (10) Business Days of receipt of the arbitration notice select its arbitrator; provided, that if it fails to do so, the arbitrator appointed by the Party requesting arbitration shall serve as the sole arbitrator of the dispute. However, if both Parties name an arbitrator, the two arbitrators thus selected shall within ten (10) Business Days of the selection of the second arbitrator select the third arbitrator. All arbitrators shall be qualified, independent and neutral. The decision of any two of the three arbitrators on any issue shall be final. Unless the Parties otherwise agree, all arbitration proceedings shall be held in Washington, D.C. Concessionaire and Contractor shall proceed with any arbitration expeditiously. All conclusions and decisions of the arbitration shall be made consistent with applicable legal principles and the arbitrators’ good faith interpretation of the terms and provisions of this Agreement. The award of the arbitrators will be final and binding on both Parties and may be enforced in any court having jurisdiction over the Party against which enforcement is sought. Each Party shall bear its own expenses, including but not limited to counsel fees and witness fees. If the arbitrators determine that the Claim or defense of either Party was frivolous (i.e., without justifiable merit), they may require that the Party at fault pay or reimburse the other Party for costs of the arbitration in whole or in part, except that all expenses of the arbitration shall be apportioned in the award of the arbitrators based upon the respective merit of the positions of the Parties.

NOTWITHSTANDING THE FOREGOING, EQUITABLE REMEDIES, INCLUDING INJUNCTION AND SPECIFIC PERFORMANCE, SHALL BE AVAILABLE TO THE PARTIES BY JUDICIAL PROCEEDINGS AT ANY TIME AND, FOR THIS PURPOSE AND FOR THE PURPOSE OF ENFORCING ANY ARBITRAL AWARD OR DECISIONS, THE PARTIES HEREBY SUBMIT TO THE EXCLUSIVE JURISDICTION AND VENUE OF THE FEDERAL AND STATE COURTS IN RICHMOND, VIRGINIA. THE PARTIES ALSO SUBMIT TO THE EXCLUSIVE JURISDICTION AND VENUE OF THE FEDERAL AND STATE COURTS IN RICHMOND, VIRGINIA, REGARDING ANY DISPUTE BETWEEN THE PARTIES WHERE THE AMOUNT IN CONTROVERSY EXCEEDS ONE MILLION DOLLARS ($1,000,000). EACH OF THE PARTIES HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES TRIAL BY JURY IN ANY LEGAL ACTION OR PROCEEDING UNDER THIS AGREEMENT AND FOR ANY COUNTERCLAIM IN SUCH AN ACTION OR PROCEEDING. THE PROVISIONS OF THIS SECTION 19.1 SHALL SURVIVE THE TERMINATION OF THIS AGREEMENT.

19.2 Common Issue in Dispute under the Comprehensive Agreement. Notwithstanding any other provision in this Agreement to the contrary, if any issue in dispute
between the Parties to this Agreement is also the subject of a concurrent dispute under the
Comprehensive Agreement, the Parties shall seek to cause the dispute hereunder to be
consolidated with the dispute resolution process occurring under the Comprehensive Agreement.
If such consolidation does not occur, then any ongoing proceeding regarding the dispute
hereunder shall be stayed pending final resolution of the dispute under the Comprehensive
Agreement, which resolution shall be binding on the Parties for all purposes of this Agreement.
Until the expiration of the Warranty Period, Contractor shall be permitted to attend meetings of
the “Steering Committee” established under Section 21.01 of the Comprehensive Agreement
with respect to any dispute under the Comprehensive Agreement. In addition, for so long as
Contractor has any remaining obligations under this Agreement, Contractor shall be permitted to
participate on such Steering Committee with respect to any dispute regarding the DB Work or
relief available to Contractor hereunder that is subject to Concessionaire’s receipt of
corresponding relief under the Comprehensive Agreement.

19.3 **Continuation of DB Work.** Contractor shall continue its performance of the DB
Work on a timely basis in accordance with the Project Schedule during any dispute which may
arise between Concessionaire and Contractor concerning the DB Project, subject to Contractor’s

**ARTICLE 20**

**COST RECORDS**

20.1 **GAAP; Maintenance of Records.** Contractor shall maintain fiscal records, books
and accounts pertaining to the DB Project in accordance with generally accepted American
accounting principles consistently applied. Contractor will maintain or cause to be maintained
such books, records and accounts in accordance with applicable Law, including such Laws
applicable to the Project as a result of the costs of the Project being financed in part with State
funds, federal-aid funds and State bond proceeds.

20.2 **Inspection of Books, Records and Audit Rights.** Contractor covenants and agrees
to keep and maintain full, complete and detailed records of all its costs and allowances pertaining
to Scope Changes. Contractor agrees to make available to Concessionaire, the Department, the
Independent Engineer and FHWA (to the extent required under Section 18.07 of the
Comprehensive Agreement) and independent third parties designated by Concessionaire and
allow to each of them access to, such books, records and documents as they may reasonably
request in connection with the DB Project for any purpose related to the Project, this Agreement,
the Comprehensive Agreement, including but not limited to monitoring compliance with the
terms and conditions of this Agreement. Contractor will fulfill all of Concessionaire’s
obligations under Section 18.07 of the Comprehensive Agreement with respect to any books,
records and documents in connection with the DB Project and will cooperate with the
Department, FHWA and other parties mentioned in this **Section 20.2** in the exercise of their
rights hereunder. Any records, books and documents in connection with the DB Project shall be
preserved by Contractor for a period of three (3) years after Final Acceptance, at no additional
cost to Concessionaire, and subject to Concessionaire inspection and audit during such period.
All expenses of an audit by Concessionaire shall be paid by Concessionaire. No audit rights (or,
in the case of Concessionaire and its designees, inspection rights) shall extend to the make-up of
the lump-sum Contract Sum or to any unit price or rate used under this Agreement after such amount, price or rate has been agreed by the Parties.

ARTICLE 21

INDEPENDENT CONTRACTOR

21.1 Contractor as Independent Contractor. Contractor shall be an independent contractor with respect to the DB Project, each part thereof, and the DB Work hereunder, and neither Contractor, its Subcontractors, nor the employees of any of them shall be deemed to be agents, representatives, employees or servants of Concessionaire in the performance of the DB Work or any other services dealt with herein. Concessionaire shall not have the right to control the methods or means by which Contractor or any agent, representative, Subcontractor, or employee or Contractor conducts its independent business operations. Concessionaire and Contractor covenant and agree that in the performance of the DB Work by Contractor, Contractor shall not perform any act or make any representation to any Person to the effect that Contractor or any of its agents, representatives, Subcontractors is the agent of Concessionaire.

ARTICLE 22

REPRESENTATIVES AND WARRANTIES OF CONTRACTOR

22.1 Representatives and Warranties. Contractor represents and warrants to Concessionaire that:

22.1.1 Organization and Qualification. Contractor is duly organized, validly existing and in good standing under the laws of the State of Delaware, and has the lawful power to engage in the business it presently conducts and contemplates conducting. Contractor is duly licensed or qualified to do business in the Commonwealth of Virginia and in each other jurisdiction wherein the nature of the business transacted by them makes such licensing or qualification necessary. The sole limited liability company members of Contractor are Fluor Enterprises, Inc., a California corporation, and Lane Construction Corporation, a Connecticut corporation, each of which is duly organized, validly existing and in good standing under the laws of the state of its incorporation, and each of which has the lawful power to engage in the business it presently conducts and contemplates conducting, including ownership of Contractor.

22.1.2 Power and Authority. Contractor has the corporate power to make and carry out this Agreement and to perform its obligations hereunder and all such actions have been duly authorized by all necessary proceedings on its part.

22.1.3 No Conflict. The execution, delivery and performance of this Agreement by Contractor (assuming issuance of Governmental Approvals in due course upon application therefor) will not conflict with Contractor’s governing documents, any Laws or any covenant, agreement, understanding, decree or order to which Contractor is a party or by which Contractor is bound or affected.

22.1.4 Validity and Binding Effect. This Agreement has been duly and validly executed and delivered by Contractor. This Agreement constitutes a legal, valid and
binding obligation of Contractor, enforceable in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights of creditors generally or by general principles of equity.

No authorization, approval, exemption or consent by any Governmental Authority (other than the Governmental Approvals) is required in connection with the authorization, execution, delivery and carrying out of the terms of this Agreement.

22.1.5 **Litigation.** There are no actions, suits, proceedings or investigations pending or, to the knowledge of Contractor, threatened against Contractor at law or in equity before any court or before any Governmental Authority, whether or not covered by insurance, which individually or in the aggregate are reasonably likely to have a materially adverse effect on the business, properties or assets or the condition, financial or otherwise, of Contractor or to result in any impairment of Contractor’s ability to perform its obligations under this Agreement. Contractor has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any Governmental Authority which is reasonably likely to have such a materially adverse effect or to result in such impairment.

22.1.6 **Patents; Licenses; Franchises.** Contractor owns or possesses all the patents, trademarks, service marks, trade names, copyrights, licenses, franchises, Governmental Approvals and rights with respect to the foregoing necessary to perform the DB Work and to carry on its business as presently conducted and presently planned to be conducted without conflict with the rights of others.

22.1.7 **Compliance with Laws.** Contractor has complied with all Laws such that Contractor is not subject to any fines, penalties, injunctive relief or criminal liabilities which in the aggregate have materially affected or are reasonably likely to have a materially adverse effect upon the business operations or financial condition of Contractor or Contractor’s ability to perform the DB Work or other services hereunder.

22.1.8 **Prequalification.** As required by Section 24.02(j) of the Comprehensive Agreement, Contractor is prequalified with the Department in accordance with the Department’s Rules Governing Prequalification Privileges, and covenants that it will not subcontract any part of the DB Work to a Subcontractor who is not prequalified with the Department in accordance with the Department’s Rules Governing Prequalification Privileges, unless otherwise indicated in the Comprehensive Agreement; provided, that this restriction does not apply to contract specialty items, consultants, manufacturers, suppliers, haulers or snow removal service providers.

22.1.9 **Disbarment/Suspension.** None of Contractor or any of its affiliates (as “affiliate” is defined in 29 CFR 98.905) is suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any federal or State department or agency.

22.1.10 **No Default.** To the best of Contractor’s knowledge after diligent inquiry, no event which, with the passage of time or the giving of notice, would constitute a Contractor Default has occurred.
22.1.11 No CA Delay Event or CA Compensation Event. To the best of Contractor’s knowledge after diligent inquiry, no event which, with the passage of time or the giving of notice, would constitute a CA Delay Event or a CA Compensation Event under this Agreement has occurred.

22.1.12 Disclosure. No representation or warranty by Contractor contained herein or in any other document furnished by Contractor to Concessionaire contains or will contain any untrue statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading in light of the circumstances under which it was made. All financial and other information furnished by Contractor to Concessionaire is true and correct in all material respects.

22.1.13 Early Work. All Early Work performed by Contractor or by Fluor Enterprises, Inc. prior to the Agreement Date was performed in accordance with (i) Law; (ii) Governmental Approvals; and (iii) prudent industry practices, methods, techniques and standards and using the degree of care that would be expected to be exercised by a prudent, skilled and experienced contractor engaged in the same kinds of undertakings and under the same or similar circumstances, conditions, scope and limitations (including limitations on access to the Project Right of Way and limitations agreed with the Department as to the scope of the work to be undertaken prior to the Agreement Date) as those applying to such work.

Contractor acknowledges that the Department is a third-party beneficiary of all Contractor’s representations and warranties made in this Article 22; provided, that, in accordance with Section 24.02(i) of the Comprehensive Agreement, the Department agreed to exercise its rights under such representations and warranties only so long as Concessionaire or the Financing Parties are not pursuing remedies related thereto.

ARTICLE 23

REPRESENTATIVES AND WARRANTIES OF CONCESSIONAIRE

23.1 Representatives and Warranties. Concessionaire represents and warrants to Contractor that:

23.1.1 Organization and Qualification. Concessionaire is duly organized, validly existing and in good standing under the laws of the State of Delaware, and has the lawful power to engage in the business it presently conducts and contemplates conducting. Concessionaire is duly licensed or qualified to do business in the Commonwealth of Virginia and in each other jurisdiction wherein the nature of the business transacted by them makes such licensing or qualification necessary.

23.1.2 Power and Authority. Concessionaire has the corporate power to make and carry out this Agreement and to perform its obligations hereunder and all such actions have been duly authorized by all necessary proceedings on its part.

23.1.3 No Conflict. The execution, delivery and performance of this Agreement by Concessionaire (assuming issuance of Governmental Approvals in due course upon application therefor) will not conflict with Concessionaire’s governing documents, any
Laws or any covenant, agreement, understanding, decree or order to which Concessionaire is a party or by which Concessionaire is bound or affected.

23.1.4 **Validity and Binding Effect.** This Agreement has been duly and validly executed and delivered by Concessionaire. This Agreement constitutes a legal, valid and binding obligation of Concessionaire, enforceable in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights of creditors generally or by general principles of equity. No authorization, approval, exemption or consent by any Governmental Authority (other than the Governmental Approvals) is required in connection with the authorization, execution, delivery and carrying out of the terms of this Agreement.

23.1.5 **Litigation.** There are no actions, suits, proceedings or investigations pending or, to the knowledge of Concessionaire, threatened against Concessionaire at law or in equity before any court or before any Governmental Authority, whether or not covered by insurance, which individually or in the aggregate are reasonably likely to have a materially adverse effect on the business, properties or assets or the condition, financial or otherwise, of Concessionaire or to result in any impairment of Concessionaire’s ability to perform its obligations under this Agreement. Concessionaire has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any Governmental Authority which is reasonably likely to have such a materially adverse effect or to result in such impairment.

23.1.6 **Compliance with Laws.** Concessionaire has complied with all Laws such that Concessionaire is not subject to any fines, penalties, injunctive relief or criminal liabilities which in the aggregate have materially affected or are reasonably likely to have a materially adverse effect upon the business operations or financial condition of Concessionaire or Contractor’s ability to perform the DB Work or other services hereunder.

23.1.7 **Disclosure.** No representation or warranty by Concessionaire contained herein or in any other document furnished by Concessionaire to Contractor contains or will contain any untrue statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading in light of the circumstances under which it was made. All financial and other information furnished by Concessionaire to Contractor is true and correct in all material respects.

**ARTICLE 24**

**MISCELLANEOUS**

24.1 **Estoppel Certificate.** Contractor shall at any time and from time to time furnish promptly upon request by Concessionaire or any Financing Party a written statement in such form as may be required by the requesting party stating that this Agreement is a valid and binding obligation of Contractor, enforceable against Contractor in accordance with its terms except to the extent that its enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights of creditors generally or by
general principles of equity; that this Agreement has not been released, subordinated or modified; and that there are no offsets or defenses against the enforcement of this Agreement against Contractor; or if any of the foregoing statements are untrue, specifying the reasons therefor.

24.2 Waivers. No failure to exercise, and no delay in exercising, any right, power or remedy under the Contract Documents shall impair any right, power or remedy which any Party hereto may have, nor shall such failure or delay be construed to be a waiver of any such rights, powers or remedies, or an acquiescence in any breach or default under the Contract Documents, nor shall any waiver of any breach or default be deemed a waiver of any default or breach subsequently occurring under the Contract Documents.

24.3 Choice of Law. THIS AGREEMENT AND THE RIGHTS AND DUTIES OF THE PARTIES HEREUNDER AND/OR ARISING FROM OR RELATING IN ANY WAY TO THE TRANSACTIONS EVIDENCED BY THE CONTRACT DOCUMENTS SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE COMMONWEALTH OF VIRGINIA, INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, WITHOUT GIVING EFFECT TO ANY CHOICE OF LAW RULES THEREOF WHICH MAY DIRECT THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION.

24.4 Severability. In the event that any of the provisions, or portions or applications thereof, of any of the Contract Documents are held to be unenforceable or invalid by any court of competent jurisdiction, Concessionaire and Contractor shall negotiate an equitable adjustment in the provisions of the affected Contract Documents with a view toward effecting the purpose of this Agreement, and the validity and enforceability of the remaining provisions, or portions or applications thereof, shall not be affected thereby.

24.5 Notice. Unless otherwise expressly required or permitted by the Contract Documents, any notice required or permitted to be given by Contractor to Concessionaire hereunder shall be in writing and shall be addressed to Concessionaire at:

95 Express Lanes LLC
6440 General Green Way
Room 95
Alexandria, VA 22312
Attention: President
Telephone: 571-419-6100
Fax: 571-419-6101

With a copy to:

Transurban (USA) Inc.
6440 General Green Way
Alexandria, VA 22312
Attention: Vice President-Development
Telephone: 646-278-0870
and any notice required or permitted to be given by Concessionaire to Contractor hereunder shall be in writing and shall be addressed to:

Fluor-Lane 95, LLC  
6621 Electronic Drive, 2nd Floor  
Springfield, VA 22151  
Attention: Project Director

With a copy to:

Fluor-Lane 95, LLC  
c/o Fluor Enterprises, Inc.  
100 Fluor Daniel Drive  
Greenville, SC 29607  
Attention: President of Infrastructure  
Telephone: 803-330-5215  
Fax: 803-560-9381

And a copy to:

Fluor-Lane 95, LLC  
c/o Fluor Enterprises, Inc.  
100 Fluor Daniel Drive  
Greenville, SC 29607  
Attention: Spencer C. Weiss  
Telephone: 864-281-8088  
Fax: 864-281-6868

24.5.1 Delivery. Unless otherwise expressly required or permitted by the Contract Documents, all notices shall be delivered (a) in person to the Party above mentioned, (b) via certified mail with a return receipt requested in a securely sealed envelope, (c) by expedited delivery service with proof of delivery, or (d) by prepaid telegram, telex or telecopy. A notice shall be deemed delivered either at the time of personal delivery or, in the case of delivery service or mail, as the date of first attempted delivery at the address provided herein, or in the case of telegram, telex or telecopy, upon receipt. Concessionaire and Contractor, by like notice in writing, may designate, from time to time, another address or office to which notices may be given pursuant to this Agreement.

24.6 Headings. The Article and Section headings herein have been inserted for convenience of reference only and shall not in any manner affect the construction, meaning or effect of the provisions herein contained nor govern the rights and liabilities of the Parties hereto.

24.7 Entire Agreement. The Contract Documents contain the entire agreement between Concessionaire and Contractor with respect to the DB Project, and supersede any and
all prior and contemporaneous written and oral agreements, proposals, negotiations, understandings and representations pertaining to the DB Project.

24.8 Amendments. No amendments or modifications of the Contract Documents shall be valid unless evidenced by a Scope Change Order or by a written instrument signed by a duly authorized representative of the Party against whom enforcement is sought. The Parties acknowledge that they may not amend or modify this Agreement without the prior written consent of the Department; provided, however, that the Department’s consent shall not be required with respect to Scope Change Orders that neither (i) constitute a change in the scope of the DB Work for purposes of the Comprehensive Agreement or a Technical Requirements Deviation nor (ii) result in an increase in the time to complete the DB Work pursuant to the Comprehensive Agreement (even though such Scope Change Orders may result in an increase in the time permitted to complete the DB Work under this Agreement to the extent so provided in this Agreement) or the imposition or enlargement of any of the Department’s costs, liabilities or obligations under the Comprehensive Agreement.

24.9 Conflicting Provisions. In the event of any inconsistencies between this Agreement and the other Contract Documents, the following order of precedence in the interpretation hereof or resolution of such conflict hereunder shall prevail:

(i) the Comprehensive Agreement and Exhibit A thereto, excluding this Agreement and other exhibits to the Comprehensive Agreement;

(ii) Technical Requirements;

(iii) Exhibits to the Comprehensive Agreement, excluding this Agreement, Exhibit A thereto and the Technical Requirements;

(iv) Duly authorized and executed Scope Change Orders and written amendments to this Agreement executed by both Parties;

(v) This Agreement, excluding Exhibits hereto;

(vi) Scope Document;

(vii) Exhibits hereto (other than the Technical Requirements and the Scope Document); and

(viii) Drawings produced and delivered pursuant hereto (in respect of which, precedence shall be given to drawings of a larger scale over those of smaller, figured dimensions on the drawings shall control over scaled dimensions, and noted materials shall control over undimensioned graphic indications).

Where an irreconcilable conflict exists among Laws, this Agreement, the drawings included in the Design Documentation, and the specifications in the Design Documentation, the earliest item mentioned in this sentence involving a conflict shall control over any later mentioned item or items subject to such conflict, and if a conflict exists within or between parts of the Contract
Documents, or between the Contract Documents and Laws, or among Laws themselves, the more stringent or higher quality requirements shall control. All obligations imposed on Contractor and each Subcontractor under the Contract Documents (other than this Agreement) or under Laws or Applicable Standards and not expressly imposed or addressed in this Agreement shall be in addition to and supplement the obligations imposed on Contractor under this Agreement, and shall not be construed to create an “irreconcilable conflict.” Where a conflict exists among codes and standards applicable to the DB Project or Contractor’s performance of the DB Work, the most stringent provision of such codes and standards shall govern.

24.10 No Third Party Rights. The Contract Documents and all rights thereunder are intended for the benefit of Concessionaire and Contractor, the Financing Parties (to the extent provided in Articles 13 and 16 hereof), the Department (to the extent set out in the Comprehensive Agreement or this Agreement), and the Indemnitees (to the extent provided in Article 13 hereof), and shall not imply or create any rights on the part of, or obligations to, any other Person or any other rights on the part of, or other obligations to, the Financing Parties, the Department and the Indemnitees beyond the rights and obligations expressly set forth herein. The Parties agree to look solely to each other with respect to the obligations and liability arising in connection with this Agreement and the services performed hereunder. No Claims shall be asserted directly between Contractor and the OS&S Contractor (whether arising in contract or tort); rather, such matters, if any, shall be asserted through Concessionaire. Such matters will not be treated as “Third Party Claims” in connection with indemnity obligations; either between Concessionaire and the OS&S Contractor or between Concessionaire and Contractor. This Section 24.10 shall not limit contribution or other Claims for bodily injury, death or third-party property damage.

24.11 Escrowed Pricing Documents. Contractor shall provide to Concessionaire all documents and information required pursuant to Section 18.05(a)-(d) of the Comprehensive Agreement with respect to the DB Work; provided that such documents and information will remain the property of Contractor subject to the Department’s and Concessionaire’s review and will be returned to Contractor upon the earlier to occur of (i) completion of the DB Work and resolution of all Claims or disputes arising hereunder or (ii) termination of this Agreement and resolution of all Claims or disputes arising pursuant to this Agreement. Pursuant to Section 18.05(f)(i) of the Comprehensive Agreement, the Department is to provide advance notice of any examination of the escrowed documents to Contractor, and Contractor will have the right to be present during such examination; provided, however, that such right will not in any way limit the Department’s right to review such documents if Contractor does not attend such examination.

24.12 Source Code Escrow.

24.12.1 The Department, Concessionaire and Contractor acknowledge that Contractor and/or its Software suppliers may not wish to disclose directly to the Department and Concessionaire at the time of installation the Source Code and Source Code Documentation which is Proprietary Intellectual Property of Contractor and/or its Software suppliers, as public disclosure could deprive Contractor and/or its Software suppliers of commercial value, but that the Department and Concessionaire must be ensured access to such Source Code and Source Code Documentation in either of the following circumstances:
(i) if the Comprehensive Agreement is terminated for “Concessionaire Default” thereunder or upon assignment by Concessionaire of its rights pursuant to the Comprehensive Agreement, the Department assumes this Agreement or Subcontract with such Software supplier, and either (A) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Software supplier occurs or (B) the Software supplier fails or ceases to provide services as necessary to permit continued use of the Software by the Department as contemplated by the Comprehensive Agreement; or

(ii) (A) if this Agreement is terminated for Contractor Default, (B) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of Contractor occurs or (C) Contractor fails or ceases to provide services as necessary to permit continued use of the Software by Concessionaire as contemplated by this Agreement.

24.12.2 Under the Comprehensive Agreement, by no later than the Service Commencement Date, the Department and Concessionaire will establish one or more escrows (the “Source Code Escrows”) with the Escrow Agent on terms and conditions reasonably acceptable to the Department and to Concessionaire into which such Source Code and Source Code Documentation will be escrowed, including all relevant commentary, explanations and other documentation, as well as instructions to compile such Source Code and Source Code Documentation and all modifications, additions or substitutions made to such Source Code and Source Code Documentation. Prior to such date, Concessionaire may in its sole discretion establish escrows (for purposes of this Section 24.12.2, “interim escrows”) with the Escrow Agent that will be replaced by the Source Code Escrows once established. Contractor will cooperate with Concessionaire in escrowing the Source Code and Source Code Documentation and will submit to Concessionaire all Source Code and Source Code Documentation in its possession or control that is part of the DB Work.

24.12.3 The escrows provided for herein will survive any termination of this Agreement regardless of the reason. Concessionaire will pay the reasonable costs and expenses of the Escrow Agent related to the Source Code Escrows and interim escrows.

24.13 Recourse Limited to Concessionaire’s Assets. Concessionaire and Contractor acknowledge that Concessionaire has entered into this Agreement entirely on its own behalf, and that, except with regard to Claims of fraud, Contractor shall have no recourse against any parent, subsidiary or Affiliate company of Concessionaire, or against any partners, shareholders, members, owners, joint venturers, officers, directors, employees, agents, successors or assigns of any thereof for any reason.

24.14 Survival of Provisions. All provisions of the Contract Documents which are expressly or by implication to come into or continue in force and effect after the expiration or termination of this Agreement shall remain in effect and be enforceable following such expiration or termination.

24.15 Title to the DB Project. Title to all materials, supplies, equipment and machinery used in connection with the DB Work which become a permanent part of the DB Project shall
vest in the Department upon the earliest of (i) the occurrence of any event by which title passes from the Subcontractor providing such materials, supplies, equipment or machinery, (ii) full payment therefor by Contractor, (iii) full payment therefor by Concessionaire, (iv) incorporation into the DB Project at the Project Right of Way, or (v) delivery of equipment or materials for the DB Project to an approved off-site location. Title to water, soil, rock, gravel, sand, minerals, timber and any other resources developed or obtained in the excavation or the performance by Contractor of the DB Work and the right to use said items or dispose of the same, other than any materials incorporated into the DB Project, is hereby expressly vested in and reserved by Concessionaire. Contractor shall not have any right, title or interest in said resources.

24.16 DBE and SWAM Reporting

24.16.1 DBE

(i) General

(a) The Parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the DBE program, where applicable.

(b) Contractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement and will not permit its Subcontractors to discriminate on the basis of race, color, national origin, or sex in the performance of their respective Subcontracts. Contractor shall carry out applicable requirements of 49 CFR part 26 in the administration of this Agreement and perform in a manner that will not result in a violation of Section 24.03(a)(i)(B) of the Comprehensive Agreement and shall cause its Subcontractors to do the same with respect to their respective Subcontracts. The Parties acknowledge that under the Comprehensive Agreement, failure by Concessionaire and each of its contractors, including Contractor, to carry out the requirements of Section 24.03(a)(i) of the Comprehensive Agreement is a material breach of the Comprehensive Agreement, which may result in the termination of the Comprehensive Agreement or such other remedy as set forth in Section 24.03(a)(v) of the Comprehensive Agreement. As a result, failure by Contractor to carry out the requirements of this Section 24.16.1(i) is a material breach of this Agreement that may result in Concessionaire’s seeking the same remedy sought by the Department against Concessionaire under the Comprehensive Agreement as a result of such breach, including termination.

(ii) DB Work

(a) During performance of the DB Work, in an effort to comply with 49 CFR Part 26, under the Comprehensive Agreement the Department has established a goal of 10% for DBE participation.

(b) Contractor and the Concessionaire agree to manage this goal as follows:
(1) On December 20th of each year, beginning with the first December following the Agreement Date until the Final Acceptance, Contractor will submit an updated DBE/SWaM Plan that defines Contractor’s approach to meeting the DBE participation goals set forth in this Section 24.16.1;

(2) Contractor will have dedicated resources to the DBE inclusion program to ensure compliance with 49 CFR Part 26, the DBE/SWaM Plan, nondiscrimination provisions, technical assistance activities, communication of subcontracting and generate reports specific to DBE utilization;

(3) Contractor will be responsible for either achieving or making Good Faith Efforts to achieve the overall goal of 10% for DBE participation by providing maximum contracting opportunities for DBE businesses;

(4) Contractor will provide to Concessionaire each calendar quarter documentation of all executed Subcontracts and payments to DBE businesses;

(5) Contractor will have the opportunity to establish DBE subcontracting work packages; and

(6) Contractor will provide Good Faith Efforts documentation using form C-49 and other supplemental information as appropriate for Subcontracts that do not include DBE participation. Contractor agrees that if the Department accepts the Good Faith Efforts documentation on a particular bid item group, Contractor will make reasonable efforts to accomplish the overall goal using other bid item groups.

(c) During the performance of the DB Work, the Parties will work cooperatively to accomplish the applicable DBE objectives. Under the Comprehensive Agreement the Department is to assist Concessionaire in meeting the DB Work goals by offering assistance to include the following items:

(1) the Department and Concessionaire will jointly conduct outreach meetings for DBE firms; Contractor shall participate in such meetings;

(2) the Department will identify to Concessionaire DBE firms that are eligible to bid on the specific bid item groups, which information Concessionaire will provide to Contractor; and

(3) the Department will provide access to technical and managerial assistance to eligible DBE firms, including in part, through the VDOT/GEC Civil Rights Team and the Business Opportunity Workforce.
Development Center based upon available funds, which access shall be made available by the Concessionaire to Contractor.

(d) Contractor acknowledges that the Department’s assistance and cooperation will not eliminate or reduce Contractor’s responsibility to achieve the DB Work goals for DBE participation or demonstrate Good Faith Efforts. Contractor is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the DB Work. Contractor is expected to meet the goal or demonstrate that Good Faith Efforts have been made. Contractor will submit quarterly reports of Good Faith Efforts documentation, and, DBE payments on form C-63 to Concessionaire for forwarding to the Department Representative.

(e) When there is a contract goal for the DB Work, Contractor must make Good Faith Efforts to meet the goal either through obtaining enough DBE participation or documenting the Good Faith Efforts it made to do so. 49 CFR Part 26 explicitly provides that the Department must not disregard showings of Good Faith Efforts, and it gives Concessionaire and Contractor the right to have the Department reconsider a decision that their Good Faith Efforts were insufficient. The Department must seriously consider Contractor’s documentation of Good Faith Efforts. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for Concessionaire, which Concessionaire shall provide to Contractor.

(iii) DBE Reporting and Assessment.

(a) Within eleven (11) days after each calendar quarter ends Contractor will submit to Concessionaire (who will submit same to the Chief of Administration in accordance with the Comprehensive Agreement) a quarterly report on Contractor’s efforts to (A) satisfy the DBE goals set forth in this Section 24.16.1 or (B) demonstrate Good Faith Efforts to accomplish the DBE goals set forth in this Section 24.16.1.

(b) An assessment and confirmation as to whether Contractor has (A) satisfied the DBE goals, (B) demonstrated Good Faith Efforts to satisfy such goals or (C) failed to satisfy the requirements of clauses (A) and (B) of this Section 24.16.1(iii)(b) will be made by the Chief of Administration under the Comprehensive Agreement) and communicated to Concessionaire within 30 days after receipt of each quarterly report being submitted by Concessionaire and Concessionaire will notify Contractor thereof.

(iv) Failure to Demonstrate DBE Good Faith Efforts Related to DB Work.

(a) If the Chief of Administration notifies Concessionaire and Concessionaire notifies Contractor pursuant to Section 24.16.1(iii)(b) that Contractor has failed to satisfy the requirements of clause (A) of Section 24.16.1(iii)(b) and has failed to satisfy the requirements of clause (B) of Section 24.16.1(iii)(b) with respect to the DBE
goals for the DB Work for a quarterly period, Contractor will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (A) or (B) of Section 24.16.1(iii)(b) with respect to such DBE goals.

(b) If Contractor has failed to satisfy the requirements of clause (A) of Section 24.16.1(iii)(b) and has failed to satisfy the requirements of clause (B) of Section 24.16.1(iii)(b) with respect to the DBE goals for the DB Work for two consecutive quarters based on the determinations by the Chief of Administration pursuant to the Comprehensive Agreement, Contractor will prepare and submit to Concessionaire, at Contractor’s sole cost and expense, a DBE Performance Improvement Plan for Concessionaire’s review, and Concessionaire will provide comments thereto to Contractor, who will consider them in good faith and make the modifications as appropriate. The DBE Performance Improvement Plan will describe the specific actions and measures that Contractor will undertake to improve its performance with respect to satisfying the requirements of clause (A) and (B) of Section 24.16.1(iii)(b) with respect to the DBE goals for the DB Work. Contractor will submit the DBE Performance Improvement Plan to Concessionaire for review within eleven (11) days after receiving notice from the Chief of Administration forwarded by Concessionaire pursuant to Section 24.16.1(iii) that Contractor has failed to satisfy the requirements of clause (A) of Section 24.16.1(iii)(b) and has failed to satisfy the requirements of clause (B) of Section 24.16.1(iii)(b) and Concessionaire will after its review submit such plan for the Department’s review and approval under Section 24.03(a)(v)(B) of the Comprehensive Agreement. Under Section 24.03(a)(v)(B) of the Comprehensive Agreement, Concessionaire is to pay the Department for its “Allocable Costs” in reviewing, approving and monitoring Concessionaire’s compliance with the DBE Performance Improvement Plan until Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) of the Comprehensive Agreement with respect to the DBE goals for the DB Work. Contractor agrees to pay to Concessionaire any such amounts required for the payment of the Department in reviewing, approving and monitoring Contractor’s compliance with the DBE Performance Improvement Plan until Contractor satisfies the requirements of either clause (A) or (B) of Section 24.16.1(iii)(b) with respect to the DBE goals for the DB Work and Concessionaire will pay the same over to the Department.

(c) If Contractor is debarred or disqualified pursuant to Section 24.03(a) of the Comprehensive Agreement for reasons not attributable to Concessionaire, then Contractor shall not be relieved of any of its obligations under this Agreement and shall be fully liable to Concessionaire for any failure to timely and fully fulfill such obligations in accordance with the terms of this Agreement.

(d) If the Chief of Administration under the Comprehensive Agreement determines at any time that Concessionaire has satisfied the requirements of either clause (1) or (2) of Section 24.03(a)(iv)(B) of the Comprehensive Agreement based on the satisfaction by Contractor of the requirements of either clause (A) or (B) of Section 24.16.1(iii)(b) hereof with respect to the DBE goals for the DB Work performed to date with respect to the applicable calendar quarter, then any prior determinations by the Chief of Administration of Concessionaire’s failure to satisfy the requirements of
clause (1) of Section 24.03(a)(iv)(B) of the Comprehensive Agreement and Concessionaire’s failure to satisfy the requirements of clause (2) of Section 24.03(a)(iv)(B) of the Comprehensive Agreement based on Contractor’s failure hereunder to satisfy the requirements of clause (A) of Section 24.16.1(iii)(b) hereof and Contractor’s failure to satisfy the requirements of clause (B) of Section 24.16.1(iii)(b) hereof with respect to such DBE goals will be disregarded, Contractor will be deemed to be in compliance with this Section 24.16, and any future determinations of a failure to satisfy the requirements of clause (A) of Section 24.16.1(iii)(b) and a failure to satisfy the requirements of clause (B) of Section 24.16.1(iii)(b) hereof with respect to such DBE goals will be pursuant to the provisions set forth in Section 24.16.1(iv)(a) hereof.

(e) Any decision or action taken by the Chief of Administration or the Department pursuant to Section 24.03(a) of the Comprehensive Agreement is subject to the dispute resolution procedures set forth in Article 21 of the Comprehensive Agreement, and Concessionaire will, to the extent permitted by the Department, allow Contractor to participate in any such dispute resolution proceedings which involve the DBE goals for the DB Work. In addition, Contractor may pursue its rights against Concessionaire in accordance with the dispute resolution process set forth in Article 19.

24.16.2 SWaM

(i) General.

(a) The Parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the SWaM program, where applicable.

(b) Contractor shall carry out applicable requirements of Executive Order 33 (2006) in the administration of this Agreement and shall cause its Subcontractors to do the same in the award and administration of the respective Subcontracts.

(c) Failure by Contractor to carry out the requirements in this Section 26.16.2 relating to SWaM participation will subject Contractor to only the remedies set forth in Section 26.16.2(iv) and will not result in Contractor Default.

(d) If debarment occurs as a result of the exercise of such remedies, such debarment shall not constitute a Contractor Default hereunder.

(ii) DB Work.

(a) During performance of the DB Work, in an effort to support Executive Order 33 (2006), under the Comprehensive Agreement the Department has established a goal of 19% for SWaM participation.

(b) Contractor and the Concessionaire agree to manage this goal as follows:
(1) On December 20th of each year, beginning with the first December following the Agreement Date until the Final Acceptance, Contractor will submit an updated DBE/SWaM Plan that defines Contractor’s approach to meeting the SWaM participation goals set forth in this Section 24.16.2;

(2) Contractor will have dedicated resources to the SWaM inclusion program to ensure compliance with Executive Order 33 (2006), the DBE/SWaM Plan, nondiscrimination provisions, technical assistance activities, communication of subcontracting and generate reports specific to SWaM utilization;

(3) Contractor will be responsible for either achieving or making Good Faith Efforts to achieve the overall goal of 19% for SWaM participation by providing maximum contracting opportunities for SWaM businesses;

(4) Contractor will provide to Concessionaire each calendar quarter documentation of all executed Subcontracts and payments to SWaM businesses;

(5) Contractor will have the opportunity to establish SWaM-only statement of work packages; and

(6) Contractor will provide Good Faith Efforts documentation using form C-49 and other supplemental information as appropriate for Subcontracts that do not include SWaM participation. Contractor agrees that if the Department accepts the Good Faith Efforts documentation on a particular bid item group, Contractor will make reasonable efforts to accomplish the overall goal using other bid item groups.

(c) During the performance of the DB Work, the Parties will work cooperatively to accomplish the applicable SWaM objectives. Under the Comprehensive Agreement the Department is to assist Concessionaire in meeting the DB Work goals by offering assistance to include the following items:

(1) the Department and Concessionaire will jointly conduct outreach meetings for SWaM firms; Contractor shall participate in such meetings;

(2) the Department will identify to Concessionaire SWaM firms that are eligible to bid on the specific bid item groups, which information Concessionaire will provide to Contractor; and

(3) the Department will provide access to technical and managerial assistance to eligible SWaM firms, including in part, through the VDOT/GEC Civil Rights Team and the Business Opportunity
Workforce Development Center based upon available funds, which access shall be made available by the Concessionaire to Contractor.

(d) Contractor acknowledges that the Department’s assistance and cooperation will not eliminate or reduce Contractor’s responsibility to achieve the DB Work goals for SWaM participation or demonstrate Good Faith Efforts. Contractor is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the DB Work. Contractor is expected to meet the goal or demonstrate that Good Faith Efforts have been made. Contractor will submit quarterly reports of Good Faith Efforts documentation, and, SWaM payments on form C-63 to Concessionaire for forwarding to the Department Representative.

(e) When there is a contract goal for the DB Work, Contractor must make Good Faith Efforts to meet the goal either through obtaining enough SWaM participation or documenting the Good Faith Efforts it made to do so. The Department must seriously consider Contractor’s documentation of Good Faith Efforts. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for Concessionaire, which Concessionaire shall provide to Contractor.

(iii) SWaM Reporting and Assessment.

(a) Within eleven (11) days after each calendar quarter ends Contractor will submit to Concessionaire (who will submit same to the Chief of Administration in accordance with the Comprehensive Agreement) a quarterly report on Contractor’s efforts to (A) satisfy the SWaM goals set forth in this Section 24.16.2 or (B) demonstrate Good Faith Efforts to accomplish the SWaM goals set forth in this Section 24.16.2.

(b) An assessment and confirmation as to whether Contractor has (A) satisfied the SWaM goals, (B) demonstrated Good Faith Efforts to satisfy such goals or (C) failed to satisfy the requirements of clauses (A) and (B) of this Section 24.16.2 will be made by the Chief of Administration under the Comprehensive Agreement) and communicated to Concessionaire within 30 days after receipt of each quarterly report being submitted by Concessionaire and Concessionaire will notify Contractor thereof.

(iv) Failure to Demonstrate SWaM Good Faith Efforts Related to DB Work.

(a) If the Chief of Administration notifies Concessionaire and Concessionaire notifies Contractor pursuant to Section 24.16.2(iii)(b) that Contractor has failed to satisfy the requirements of clause (A) of Section 24.16.2(iii)(b) and has failed to satisfy the requirements of clause (B) of Section 24.16.2(iii)(b) with respect to the SWaM goals for the DB Work for a quarterly period, Contractor will have until the end of the
next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (A) or (B) of Section 24.16.2(iii)(b) with respect to such SWaM goals.

(b) If Contractor has failed to satisfy the requirements of clause (A) of Section 24.16.2(iii)(b) and has failed to satisfy the requirements of clause (B) of Section 24.16.2(iii)(b) with respect to the SWaM goals for the DB Work for two consecutive quarters based on the determinations by the Chief of Administration pursuant to the Comprehensive Agreement, Contractor will prepare and submit (through Concessionaire), at Contractor’s sole cost and expense, a SWaM Performance Improvement Plan for the Department’s review and approval. The SWaM Performance Improvement Plan will describe the specific actions and measures that Contractor will undertake to improve its performance with respect to satisfying the requirements of clause (A) and (B) of Section 24.16.2(iii)(b) with respect to the SWaM goals for the DB Work. The Contractor will submit the SWaM Performance Improvement Plan to Concessionaire within eleven (11) days after receiving notice from the Chief of Administration forwarded by the Concessionaire pursuant to Section 24.16.2(iii) that Contractor has failed to satisfy the requirements of clause (A) of Section 24.16.2(iii)(b) and has failed to satisfy the requirements of clause (B) of Section 24.16.2(iii)(b). Under Section 24.03(b)(v)(B) of the Comprehensive Agreement, Concessionaire is to pay the Department for its “Allocable Costs” in reviewing, approving and monitoring Concessionaire’s compliance with the DBE Performance Improvement Plan until Concessionaire satisfies the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) of the Comprehensive Agreement with respect to the SWaM goals for the DB Work. Contractor agrees to pay to Concessionaire any such amounts required for the payment of the Department in reviewing, approving and monitoring Contractor’s compliance with the SWaM Performance Improvement Plan until Contractor satisfies the requirements of either clause (A) or (B) of Section 24.16.2(iii)(b) with respect to the SWaM goals for the DB Work and Concessionaire will pay the same over to the Department.

(c) If Contractor is debarred or disqualified pursuant to Section 24.03(b) of the Comprehensive Agreement for reasons not attributable to Concessionaire, then Contractor shall not be relieved of any of its obligations under this Agreement and shall be fully liable to Concessionaire for any failure to timely and fully fulfill such obligations in accordance with the terms of this Agreement.

(d) If the Chief of Administration under the Comprehensive Agreement determines at any time that Concessionaire has satisfied the requirements of either clause (1) or (2) of Section 24.03(b)(iv)(B) of the Comprehensive Agreement based on the satisfaction by Contractor of the requirements of either clause (A) or (B) of Section 24.16.2(iii)(b) hereof with respect to the SWaM goals for the DB Work performed to date with respect to the applicable calendar quarter, then any prior determinations by the Chief of Administration of Concessionaire’s failure to satisfy the requirements of clause (1) of Section 24.03(b)(iv)(B) of the Comprehensive Agreement and Concessionaire’s failure to satisfy the requirements of clause (2) of Section 24.03(b)(iv)(B) of the Comprehensive Agreement based on Contractor’s failure hereunder to satisfy the requirements of clause (A) of Section 24.16.2(iii)(b) hereof and
Contractor’s failure hereunder to satisfy the requirements of clause (B) of Section 24.16.2(iii)(b) hereof with respect to such SWaM goals will be disregarded, Contractor will be deemed to be in compliance with this Section 24.16, and any future determinations of a failure to satisfy the requirements of clause (A) of Section 24.16.2(iii)(b) hereof and a failure to satisfy the requirements of clause (B) of Section 24.16.2(iii)(b) hereof with respect to such SWaM goals will be pursuant to the provisions set forth in Section 24.16.2(iv)(a) hereof.

(e) Any decision or action taken by the Chief of Administration or the Department pursuant to Section 24.03(b) of the Comprehensive Agreement is subject to the dispute resolution procedures set forth in Article 21 of the Comprehensive Agreement, and Concessionaire will, to the extent permitted by the Department, allow Contractor to participate in any such dispute resolution proceedings which involve the SWaM goals for the DB Work. In addition, Contractor may pursue its rights against Concessionaire in accordance with the dispute resolution process set forth in Article 19.

24.17 Contracting Requirements.

24.17.1 Contractor covenants and agrees that it will not discriminate and it will require all Subcontractors not to discriminate against any person, or group of persons, on account of age, sex, marital status, race, creed, color, national origin, religion or the presence of any sensory, mental or physical handicap in the permitting, design, acquisition, construction, maintenance, operation or management of the Project, nor will Contractor establish or permit any such practice or practices of discrimination or segregation with reference to the selection, use, hiring, firing, promotion or termination of employees, Subcontractors, and vendors; provided, that the prohibition against discrimination on the basis of sensory, mental or physical handicap will not apply if the particular disability prevents the proper performance of the particular person involved.

24.17.2 Contractor will comply, and will require all Subcontractors to comply, with all construction safety and health standards established by Law. Neither Contractor nor any Subcontractor will require any worker to work in surroundings or under working conditions that are unsanitary, hazardous or dangerous to his or her health or safety, as determined under construction safety and health standards promulgated by the U.S. Secretary of Labor in accordance with Section 107 of the Contract Work Hours and Safety Standards Act.

24.17.3 Contractor acknowledges that in accordance with Section 24.02(f)(ix) of Comprehensive Agreement no liens or Claims will attach at any time to any interest of the Department in the Project or the Project Right of Way.

24.18 Coordination with the Department and Financing Parties. Contractor acknowledges that each of the Department and the Financing Parties shall have the right to review and approve this Agreement and that they may require as a condition to such approval certain rights for their benefit, including the rights (a) to receive notices of default by Contractor and notices of inspections and tests, (b) to approve payments, (c) to approve Substantial Completion and Final Acceptance, and (d) to have the Independent Engineer inspect the progress
of the DB Project. Contractor agrees to make changes to this Agreement and to otherwise cooperate with each of the Department and the Financing Parties to the extent reasonably required in order for Concessionaire to obtain the Department approval and to obtain financing for the Project on terms satisfactory to Concessionaire.

24.19 Time of the Essence. Without prejudice to any provision of this Agreement relating to liquidated damages, delay or termination for default relating to delay, time is of the essence in the performance of this Agreement.

24.20 Exhibits. All exhibits attached to this Agreement are made a part hereof for all purposes.

[Remainder of this page intentionally left blank. Signature page follows.]
IN WITNESS WHEREOF, Concessionaire and Contractor, intending to be legally bound, have caused this Agreement to be executed by their duly authorized representatives as of the date indicated below and to be effective as of the day and year first above written.

CONCESSIONAIRE

95 Express Lanes LLC

By: _________________________
Name: _______________________
Title: _________________________
Date: _________________________

CONTRACTOR

Fluor-Lane 95, LLC

By: _________________________
Name: _______________________
Title: _________________________
Date: _________________________
EXHIBIT I

FORM OF O&M AGREEMENT

[see attached]
### Requirements Relating to TIFIA Credit Assistance

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<td>Section 22(b)(d)</td>
<td>30 days after the end of each calendar month, a traffic and operating report</td>
</tr>
</tbody>
</table>
EXHIBIT H

TIFIA REQUIREMENTS

[see attached]
## EXHIBIT H - TIFIA Terms and Conditions

<table>
<thead>
<tr>
<th>Item</th>
<th>I-95 Assumption / Proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>TIFIA Term</td>
<td>35 years post Substantial Completion</td>
</tr>
<tr>
<td>TIFIA Scheduled Repayment</td>
<td>Years 1-5 (post SC): interest capitalization</td>
</tr>
<tr>
<td></td>
<td>Years 6-25 (post SC): interest only</td>
</tr>
<tr>
<td></td>
<td>Years 26-35 (post SC): level payments of principal + interest</td>
</tr>
<tr>
<td>Mandatory TIFIA Debt Service</td>
<td>Year 6 (post SC): 10% of scheduled interest</td>
</tr>
<tr>
<td></td>
<td>Year 7 (post SC): 17.5% of scheduled interest</td>
</tr>
<tr>
<td></td>
<td>Year 8-25 (post SC): 25% of scheduled interest</td>
</tr>
<tr>
<td></td>
<td>Year 26-35 (post SC): 100% of scheduled interest</td>
</tr>
<tr>
<td>Restricted Payment Conditions</td>
<td>1. TIFIA debt service is current</td>
</tr>
<tr>
<td></td>
<td>2. TIFIA interest not being capitalized</td>
</tr>
<tr>
<td></td>
<td>3. Trailing and projected Total DSCR must be at least 1.30x</td>
</tr>
</tbody>
</table>

### Debt Service Reserve and Ramp-Up Reserve

|                                        | **PABS DSRA** funded at Financial Close with next 12 months of PABS debt service. Available for Senior Debt Service only but Senior and TIFIA both have lien over the reserve, subject to the Intercreditor Agreement, to the extent funded with funds other than PABS proceeds. |
|                                        | **Ramp-Up Reserve** funded at Substantial Completion with $35 million. Funds shortfalls in opex, capex, senior debt service, mandatory debt service. Released at latter of: |
|                                        | a) End of the CapI period;                                                                |
|                                        | b) Third anniversary of Substantial Completion;                                           |
|                                        | c) Total DSCR > 1.20x                                                                    |
|                                        | [Should this be 1.30x to match the change above?]                                        |
|                                        | Part of released funds must be used to fund O&M Reserve Account                          |
|                                        | Release of funds is subject to the ongoing required balance obligation which is an amount equal to 9 months’ projected TIFIA Mandatory Debt Service; |

### MMRA

|                                        | Funded on an ongoing basis in an amount equal to greater of (i) $1,000,000 and (ii) 100% of scheduled costs in year N, 80% of scheduled costs in year N+1, 60% of scheduled costs in year N+2, 40% of scheduled costs in year N+3 and 20% of scheduled costs in year N+4. |

### Total DSCR

|                                        | Net Cash Flow / debt service, where Net Cash Flow equals revenues minus operating costs plus MMRA and O&M Reserve releases minus payments into MMRA and O&M Reserve. |

### TIFIA Revenue Sharing and Prepayments

<p>|                                        | Revenue Share – Each year after the Debt Service Payment Commencement Date, TIFIA will be prepaid the lesser of (i) amounts distributable to equity and (ii) 50% of the amount by which Toll Revenues deposited in the Revenue |</p>
<table>
<thead>
<tr>
<th>Item</th>
<th>I-95 Assumption / Proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Account during the preceding calendar year exceeds the projected Toll Revenues for such period; provided, that such amount will be reset to $0 following each prepayment.</td>
</tr>
<tr>
<td></td>
<td>Sinking Fund – If the LLCR is less than 1.30x (but all other conditions to equity distribution are satisfied), cash will be deposited into the TIFIA sinking fund to increase the LLCR to at least 1.30x, and cash will continue to be deposited every semi-annual period until the LLCR is 1.30x. If the LLCR is less than 1.30x as of 2 consecutive Calculation Dates, the sinking fund cash will be used to prepay the TIFIA Credit Assistance to increase the LLCR to 1.30x; to the extent funds are available.</td>
</tr>
</tbody>
</table>
| Flow of Funds | 1. Fees and costs related to PABs  
2. Operating costs  
3. Rebate Fund  
4. PABs interest and hedging obligations  
5. Scheduled principal  
6. Hedging termination obligations  
7. TIFIA mandatory interest and principal  
8. Ramp-Up Reserve  
9. PABs DSRA  
10. O&M Reserve  
11. MMRA  
12. TIFIA scheduled interest and principal  
13. Interest on sub-debt (if applicable)  
14. Principal on sub-debt (if applicable)  
15. Optional capital expenditures  
16. Voluntary prepayments/optional redemptions of senior debt  
17. Equity Lock-up  
18. TIFIA Sinking Fund  
19. TIFIA Revenue Share/TIFIA prepayments, if any  
20. Distributions |
<p>| Additional Senior Debt | Additional senior debt can be incurred so long as no event of default under the financing documents has occurred and certain other conditions are met, to (1) complete construction of the Project, (2) refurbish, upgrade, modify, expand, add to Project or perform major maintenance (including funding MMRA), (3) refinance or replace senior obligations and (4) add to, refinance or replace existing senior obligations for any other reason. |</p>
<table>
<thead>
<tr>
<th>Item</th>
<th>I-95 Assumption / Proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1) is limited to 5% of the maximum principal amount of the senior debt,</td>
</tr>
<tr>
<td></td>
<td>(3) is subject to senior debt service after the refinancing to be not more than senior debt service in the base case model,</td>
</tr>
<tr>
<td></td>
<td>(4) requires 50% of the refinancing to be applied to prepayment of TIFIA, and</td>
</tr>
<tr>
<td></td>
<td>(2) and (4) are subject to a minimum Total DSCR test (1.15x and 1.25x, respectively).</td>
</tr>
<tr>
<td>Default interest rate</td>
<td>Default interest accrues on outstanding TIFIA amounts only in a payment default, at 2.00% above the TIFIA interest rate.</td>
</tr>
<tr>
<td>Events of Default</td>
<td>Indefinite cure period for breach of reps or covenants so long as Borrower is diligently pursuing cure.</td>
</tr>
<tr>
<td>Failure to achieve Substantial Completion by a Long Stop Date, if any, is no earlier than the Long Stop Date defined in the Comprehensive Agreement, as may be extended.</td>
<td></td>
</tr>
<tr>
<td>Oversight Covenant</td>
<td>None proposed.</td>
</tr>
<tr>
<td>Debt Service Payment Commence' t Date</td>
<td>First payment date occurring after the 5th anniversary of substantial completion.</td>
</tr>
<tr>
<td>TIFIA Disbursements</td>
<td>Equity to be contributed to fund Project Costs such that the aggregate equity contributions as of any date are equal to no less than [35%] of the aggregate amount of proceeds of the Series 2012 Bonds, TIFIA Credit Assistance and equity drawn. PABs proceeds may be expended prior to drawing on TIFIA Credit Assistance.</td>
</tr>
<tr>
<td>OFAC/Non-Debarment Compliance</td>
<td>None proposed.</td>
</tr>
<tr>
<td>Interest Rate</td>
<td>SLGS + .01%</td>
</tr>
<tr>
<td>Security and Priority</td>
<td>Second lien over project revenues, springing to first priority under Bankruptcy Related Event. Intercreditor terms relating to ranking of claims, default and enforcement, determination of Bankruptcy Related Event, and exercise of remedies, consistent with recent PPP toll road precedent.</td>
</tr>
</tbody>
</table>
| Bankruptcy Related Event | Bankruptcy Related Event means (a) an involuntary proceeding shall be commenced or an involuntary petition shall be filed seeking (i) liquidation, reorganization or other relief in respect of the Borrower or any of its debts, or of a substantial part of the assets of the Borrower, under any Insolvency Law, or (ii) the appointment of a receiver, trustee, liquidator, custodian, sequestrator, conservator or similar official for the Borrower for a substantial part of the assets of the Borrower, and, in any case referred to in the foregoing subclauses (i) and (ii), such proceeding or petition shall continue undisclosed for 60 days or an order or decree approving or ordering any of the foregoing shall be entered; or (b) the Borrower shall (i) apply for or consent to the appointment of a receiver, trustee, liquidator, custodian, sequestrator, conservator or similar official for the Borrower or for a substantial part of the assets of the Borrower, or (ii) generally not be paying its debts as they become due unless such debts are the subject of a bona fide dispute, or become unable to pay its debts generally as they become due, or (iii) make a general assignment for the benefit of creditors, or (iv) consent to the institution of, or fail to contest in a timely and appropriate manner, any proceeding or petition with respect to it described in clause (a) of this definition, or (v) commence a voluntary proceeding under any Insolvency Law, or file a voluntary petition seeking liquidation, reorganization, an arrangement with creditors or an order for relief under any Insolvency Law, or (vi) file an answer admitting the material allegations of a petition filed against it in any proceeding referred to in the foregoing subclauses (i) through (v), inclusive, of this.
I-95 Assumption / Proposal

clause (b), or (vii) take any action for the purpose of effecting any of the foregoing; or (c) (i) all or a substantial part of the Collateral (other than the Equity Interests) shall be sold or otherwise disposed of in a public or private sale or disposition pursuant to a foreclosure of the Liens thereon securing the Senior Obligations, or (ii) all or a substantial part of the Collateral (other than the Equity Interests) shall be transferred pursuant to a sale or disposition of such Collateral in lieu of foreclosure; or (d) (i) all or a substantial part of the Equity Interests shall be sold or otherwise disposed of in a public or private sale or disposition pursuant to a foreclosure of the Liens thereon securing the Senior Obligations, or (ii) all or a substantial part of the Equity Interests shall be transferred pursuant to a sale or disposition of such Collateral in lieu of foreclosure, if in either such case such action or exercise of rights or remedies results in any release or impairment of the Liens of the Collateral Agent in the Collateral (other than the Equity Interests) granted for the benefit of the TIFIA Lender or (e) the Collateral Agent shall transfer, pursuant to directions issued by the Intercreditor Agent, funds or deposit in any of the Project Accounts following the occurrence and during the continuation of an Event of Default under the Senior Financing Documents for application to the prepayment or repayment of any principal amount of the Senior Obligations other than in accordance with the provisions of the Collateral Agency Agreement.

The existence of one or more defaults by the Borrower in the payment of any principal of or interest on the TIFIA Credit Assistance as it becomes due shall not, by itself, be sufficient to establish that the standard set forth in clause (b)(ii) of the definition of Bankruptcy Related Event has been met. Such standard shall be deemed to be met only if: (i) a default in the payment when due of any TIFIA Mandatory Debt Service shall have occurred and shall have continued without cure for a period of twelve months or more, and (ii) thereafter, the TIFIA Lender shall have initiated proceedings for, and obtained, a final judicial determination that a Bankruptcy Related Event has occurred and is continuing.

<table>
<thead>
<tr>
<th>Item</th>
<th>I-95 Assumption / Proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceleration</td>
<td>No acceleration of maturity of TIFIA Credit Assistance unless maturity of senior obligations have been accelerated</td>
</tr>
<tr>
<td>Eligible Project Costs</td>
<td>TIFIA Credit Assistance will be available to finance up to 33% of Eligible Project Costs, which includes prior Project expenditures during the 3-year period before the TIFIA application date.</td>
</tr>
<tr>
<td>Change of Control</td>
<td>Change of Control definition will track the corresponding term in the Comprehensive Agreement.</td>
</tr>
</tbody>
</table>
When the **ee** button is clicked, the image is rejected and the system advances to the next image. Once the violation event is rejected, the non-selected images (non-selected front or rear shots and ROIs) are marked for deletion. The selected image displayed on the screen and the associated violation event information is retained in the system for audit and reporting purposes. Operations and Quality Assurance monitor images processed each day to determine if images are being certified and/or rejected accurately.

### 7.2.4. Exiting Image Review

Any time during the image review process, a user can exit the screen by clicking on the **ance** button. This releases the image record that the user has on the screen and makes the violation available to another user if queried.

### 3. Processing

After an image is certified in the **P a e d e n i c a i o** screen the associated violation event is checked for a possible customer V-toll by license plate. A V-toll is a video toll, or a toll transaction posted with the aid of video or camera captured images.

Each violation saved during image review is checked against the CSC customer license plate list and the IAG license plate list. If the license plate matches an account in good standing then the transaction is converted into a V-toll. The V-tolls are then posted to a customer’s account or included in the IAG transaction files with the corresponding authority’s toll transactions for posting on other E-ZPass agency accounts. These toll transactions are subsequently reconciled according to the IAG schedule and process.

### o n i or ing a e Processing

Part of the process for ensuring timely and accurate image processing involve review reports on a daily basis. Two reports that provide important image related information are the VESC Report and the Violation Transaction Type Report. The operations management and supervisory staff have access to these reports to track daily activity and make decisions accordingly.

Reject reports will be queried to determine violation records rejected for lane/camera related issues. If lane/camera related rejects are prevalent, the violations supervisor will promptly report these findings to the lane maintenance team so that they can proactively address the issues.

Desk reference materials will include samples of violation images to be rejected and the corresponding appropriate reject codes.

The QA Team and violations supervisor monitor rejected and certified violation records to ensure that:
- Clerks are using correct reject reasons when rejecting violation records
- Clerks are not rejecting valid violation records
- Clerks are not certifying invalid violation records

7.4.1. **Accessing Reports**

To access reports, log on to the VPS. For log on instructions see Chapter 6. Select the **e or s** tab from the main menu. See Figure 7.8 below.

![Figure 7.8](image1.png)

After selecting the **e or s** tab, select the report type category from the list on the left margin. See Figure 7.9.

![Figure 7.9](image2.png)

After selecting the report type, you can then select the specific report to generate. The screen also shows the search criteria available for the corresponding report. See Figure 7.10.
Select the search criteria and then click the **Select** button. The report is generated and is shown on the screen. The report can then be printed or be converted into a different format if desired.

### 7.4.2. The VESC Report

The **VESC** report provides information regarding the last reported date and time for each transaction transfer from the VESC to the VPS. Only VES-equipped lanes appear. The staff uses this report to monitor the upload status of the VESC and identify possible lane-level maintenance issues. See Figure 7.11.
## Figure 11: Table of Violation Data

**Table: Violation Status Report**

<table>
<thead>
<tr>
<th>FACILITY</th>
<th>PLAIZ ID</th>
<th>PLAIZ NAME</th>
<th>LANE</th>
<th>LAST REPORTED DATE</th>
<th>LAST REPORTED TIME</th>
</tr>
</thead>
<tbody>
<tr>
<td>CB</td>
<td>02</td>
<td>GLOUCESTER N</td>
<td>1</td>
<td>01/09/2016</td>
<td>13:37:21</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2</td>
<td>01/09/2016</td>
<td>13:37:00</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>3</td>
<td>01/09/2016</td>
<td>13:45:13</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>4</td>
<td>01/09/2016</td>
<td>13:50:45</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>5</td>
<td>01/09/2016</td>
<td>13:55:11</td>
</tr>
<tr>
<td>DTR</td>
<td>01</td>
<td>SULLY RD, SOUTH</td>
<td>1</td>
<td>01/09/2016</td>
<td>13:40:26</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2</td>
<td>01/09/2016</td>
<td>14:25:49</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>3</td>
<td>01/09/2016</td>
<td>13:54:00</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>4</td>
<td>01/09/2016</td>
<td>14:20:43</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>5</td>
<td>01/09/2016</td>
<td>13:54:55</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>6</td>
<td>01/09/2016</td>
<td>14:20:20</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>7</td>
<td>01/09/2016</td>
<td>14:15:57</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>8</td>
<td>01/09/2016</td>
<td>14:10:41</td>
</tr>
</tbody>
</table>
The operations staff can see for each VES-equipped lane the last time the lane reported images. If a lane has not reported for a designated period of time the operations staff can issue a notification for a technician to check the lane. This process helps ensure that images are being processed in a timely manner and lane issues are identified and fixed as needed.

### 7.4.3. The VESC Report

Staff use this report to view specific information involving the total number of violation transactions that have been loaded and processed through each VPS workflow/queues in a given date range. A processed violation increases the count for each queue that it passes through. The activity shown on this report is based upon processing date, meaning the date in which the queuing operation occurred. See Figure 7.12 and Figure 7.13.
<table>
<thead>
<tr>
<th>QUEUE NAME</th>
<th>RELEASE CODE</th>
<th>TRANSACTIONS</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Image Leader</td>
<td>Accepted</td>
<td>350</td>
<td>70.0</td>
</tr>
<tr>
<td>Image Leader</td>
<td>AON Parking</td>
<td>170</td>
<td>34.0</td>
</tr>
<tr>
<td>Image Leader</td>
<td>Image Issuing</td>
<td>31</td>
<td>6.2</td>
</tr>
<tr>
<td>Image Leader</td>
<td>UOS Code Not Available</td>
<td>150</td>
<td>30.0</td>
</tr>
<tr>
<td>Image Leader</td>
<td>Violation Filtering Not Available Release Code</td>
<td>120</td>
<td>24.0</td>
</tr>
<tr>
<td>Image Leader</td>
<td>Zero Toll Amount Due</td>
<td>3</td>
<td>0.6</td>
</tr>
<tr>
<td>Violation Filtering</td>
<td>Accepted</td>
<td>300</td>
<td>60.0</td>
</tr>
<tr>
<td>Violation Filtering</td>
<td>AON Lane Update</td>
<td>20</td>
<td>4.0</td>
</tr>
<tr>
<td>Violation Filtering</td>
<td>AON Over Pay</td>
<td>10</td>
<td>2.0</td>
</tr>
<tr>
<td>Violation Filtering</td>
<td>Dismissed - Prepaid Toll Payment Fund for Violation</td>
<td>5</td>
<td>1.0</td>
</tr>
<tr>
<td>Violation Filtering</td>
<td>Image Issuing</td>
<td>40</td>
<td>8.0</td>
</tr>
<tr>
<td>Violation Filtering</td>
<td>Start Lane Deactivated</td>
<td>10</td>
<td>2.0</td>
</tr>
<tr>
<td>Violation Filtering</td>
<td>Violation is Followed by a Lane Closure</td>
<td>20</td>
<td>4.0</td>
</tr>
<tr>
<td>Violation Filtering</td>
<td>Violation is Followed by an Escrow Violation Condition</td>
<td>150</td>
<td>30.0</td>
</tr>
<tr>
<td>CSC Transponder Check Payment</td>
<td>CSC Account Closed</td>
<td>150</td>
<td>30.0</td>
</tr>
<tr>
<td>CSC Transponder Check Payment</td>
<td>CSC Excessive Maximum Purchase Limit</td>
<td>100</td>
<td>20.0</td>
</tr>
<tr>
<td>CSC Transponder Check Payment</td>
<td>CSC Inactive Tag</td>
<td>5</td>
<td>1.0</td>
</tr>
<tr>
<td>CSC Transponder Check Payment</td>
<td>CSC Insufficient Funds</td>
<td>50</td>
<td>10.0</td>
</tr>
<tr>
<td>CSC Transponder Check Payment</td>
<td>CSC No Transponder Match</td>
<td>10</td>
<td>2.0</td>
</tr>
<tr>
<td>CSC Transponder Check Payment</td>
<td>CSC Permit No Good Standing</td>
<td>10</td>
<td>2.0</td>
</tr>
<tr>
<td>Filter 1</td>
<td>Accepted</td>
<td>500</td>
<td>100.0</td>
</tr>
</tbody>
</table>

**Total Transactions:** 3,382

**Total Violation Filtering Subtotal:** 970

**Total CSC Transponder Check Payment Subtotal:** 1,564

**Total Filter 1 Subtotal:** 665
### Table 1: Queue Processing Report

<table>
<thead>
<tr>
<th>Queue Name</th>
<th>Release Code</th>
<th>Transactions</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Image Loader</td>
<td>Accepted</td>
<td>401</td>
<td>61.3</td>
</tr>
<tr>
<td>Image Loader</td>
<td>Image loading, wrapper success</td>
<td>585</td>
<td>85.7</td>
</tr>
<tr>
<td>Image Loader</td>
<td>UOCode not identifiable</td>
<td>329</td>
<td>47.1</td>
</tr>
<tr>
<td><strong>Subtotal: Image Loader</strong></td>
<td></td>
<td><strong>722</strong></td>
<td></td>
</tr>
<tr>
<td>CSC Temporal Check Pending</td>
<td>CSC database match</td>
<td>4</td>
<td>0.6</td>
</tr>
<tr>
<td>CSC Temporal Check Pending</td>
<td>CSC no temporal match</td>
<td><strong>368</strong></td>
<td><strong>97.6</strong></td>
</tr>
<tr>
<td><strong>Subtotal: CSC Temporal Check Pending</strong></td>
<td></td>
<td><strong>368</strong></td>
<td><strong>97.6</strong></td>
</tr>
<tr>
<td>Filter 1</td>
<td>Accepted</td>
<td>632</td>
<td>100.0</td>
</tr>
<tr>
<td><strong>Subtotal: Filter 1</strong></td>
<td></td>
<td><strong>632</strong></td>
<td><strong>100.0</strong></td>
</tr>
<tr>
<td>Confidence Check</td>
<td>Below Lower Confidence Threshold</td>
<td>632</td>
<td>100.0</td>
</tr>
<tr>
<td><strong>Subtotal: Confidence Check</strong></td>
<td></td>
<td><strong>632</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

---

### Figure 1.3: Image Transmission Example

![Image Example]

---

### Table 2: VI Report

<table>
<thead>
<tr>
<th>Queue Name</th>
<th>Release Code</th>
<th>Transactions</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Final Image Review</td>
<td>Accepted</td>
<td>301</td>
<td>19.2</td>
</tr>
<tr>
<td>Final Image Review</td>
<td>No Plate and Vehicle Match</td>
<td>5</td>
<td>0.3</td>
</tr>
<tr>
<td>Final Image Review</td>
<td>Plate Unreadable/Obstructed</td>
<td>593</td>
<td>38.9</td>
</tr>
<tr>
<td>Final Image Review</td>
<td>Redacted</td>
<td>1,114</td>
<td>54.2</td>
</tr>
<tr>
<td>Final Image Review</td>
<td>Unauthorized Plate Jurisdiction</td>
<td>165</td>
<td>7.5</td>
</tr>
</tbody>
</table>

**Total Image Review** **SUBTOTAL**: 2,066

<table>
<thead>
<tr>
<th>Queue Name</th>
<th>Release Code</th>
<th>Transactions</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issue Document</td>
<td>Accepted</td>
<td>362</td>
<td>100.0</td>
</tr>
</tbody>
</table>

**Issue Document** **SUBTOTAL**: 362

**TOTAL**: 2,428

---

**END OF REPORT**
This report is important in the review and tracking of image related violation queues. The operations staff can use this report for the following functions:

- To see how violations are moving through each of the system queues
- To view the percentage of images that end in each status
- To see a total number of transactions for a given search period
- To compare to month to date or year to date historical information

### Sampler Queue

The sampler queue is a tool in the system designed to allow supervisors to set up and view plate identification work done by plate identification staff. The supervisor first sets up the user with a sample percentage and then can view results as violation records are processed in Plate Identification. The sampler queue will send (the percentage selected by user) violation records back thru Plate Identification for a second blind review. It will then report the results showing records that were updated by the second user. It will calculate a percentage based upon those records which were updated by the second user of the sampled records.
7.5.1. Setting up a User for Sampler Queue

In order for a supervisor to be able to set up users in sampler queue or view results it will be necessary to first set up their user role for Sampler queue. From the Admin Tab in the main menu the system administrator or manager will set up a user role by checking the Sampler Summary, Sampler Detail and Sampler User check boxes (see below).

![Image of Sampler User role setup]

7.5.2. Setting up a CSR for Sampling

From the Admin tab in the main menu select Sampler User. Select the CSR from the pick list presented. The list will contain user names of all active users in the VPS. Then select a sample rate from the pick list. Select Save. Un-checking the “Active” box will stop sampling for that user. The screen will display all users and will show active on non active status (N=non active, Y=active). Please refer to the following figure.
Now the user is set up to be sampled. As violation records are processed in the Plate ID Queue by the user. The sampler percentage will be passed back to the beginning of the queue. The records will be processed by the next person processing the queue. When the second user processes the sampled records the system will save the first and second users’ data entry information including:

- License Plate Characters Entered
- Jurisdiction Selected
- Plate Type Selected
- Accept or Reject

### 7.5.3. Sampled Results

#### 7.5.3.1. Sampler Summary

By selecting the “Sampler Summary” link, a supervisor can retrieve and view sampler summary results for a particular user over a specified time period (see below). The supervisor first selects the user’s name and then the date range. Results will be returned showing:

- Total Violations Reviewed
- Total Violations Sampled
- Total Changed
- Percent of records changed by the second reviewer
7.5.4. Sampler Detail

By selecting the “Sampler Detail” Link, a supervisor can retrieve and view sampler detailed results for a particular user and by a date range, as shown in the following figure.

The supervisor enters the user’s name and date range then selects Search. The system will return detailed information for both the first and second reviews of each violation record sampled. The information returned includes:

- Changed? Y or N
- Violation ID
- Plate characters entered by first and second user
- Jurisdiction entered by first and second user
- Plate type entered by first and second user
8. DMV PROCESSING

Following the V-toll check by license plate, the VPS system prepares the violation records to send to the respective Department of Motor Vehicles (DMV). The file is sent to each DMV in accordance with that particular DMV’s process requirements. The sending and receiving schedule of each DMV file runs overnight to let the operations staff work on returned records the next business day. Violation records are also sent to Law Enforcement Systems, Inc. (LES) to obtain Registered Owner of Vehicle information (ROV) for use in toll violations processing.

.1. Response

After each DMV has processed the records sent from the CSC, they return the records to the VPS. The majority of returned records has license plate information matches and provides the corresponding registered owner’s vehicle (ROV) information. The DMV returns several types of information related to the registered owner. Examples of this appear in Table 8.1. In the table, the “Field” column contains the description of the information type received; the “Length” column contains the maximum number of characters accepted, based on the information type; and the “Description” column contains the type of characters within the file.

<table>
<thead>
<tr>
<th>Field</th>
<th>S</th>
<th>P</th>
</tr>
</thead>
<tbody>
<tr>
<td>License P a e</td>
<td>10</td>
<td>Alphanumeric license plate number</td>
</tr>
<tr>
<td>License P a e S a e</td>
<td>2</td>
<td>State/province abbreviation, alphanumeric</td>
</tr>
<tr>
<td>License P a e e</td>
<td>10</td>
<td>Alphanumeric (Note: some states don’t support plate type, so this could be blank)</td>
</tr>
<tr>
<td>Address 1</td>
<td>100</td>
<td>Alphanumeric</td>
</tr>
<tr>
<td>Address</td>
<td>100</td>
<td>Alphanumeric</td>
</tr>
<tr>
<td>Address i</td>
<td>100</td>
<td>Alphanumeric</td>
</tr>
<tr>
<td>Field</td>
<td>Value</td>
<td>Description</td>
</tr>
<tr>
<td>---------------------------</td>
<td>-------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>Address State/Province</td>
<td>2</td>
<td>State/province abbreviation, alphanumeric</td>
</tr>
<tr>
<td>Address I</td>
<td>10</td>
<td>Alphanumeric zip code</td>
</tr>
<tr>
<td>Address Zip Code</td>
<td>30</td>
<td>Alphanumeric</td>
</tr>
<tr>
<td>Address Owner</td>
<td>100</td>
<td>Alphanumeric (individual or corporate)</td>
</tr>
<tr>
<td>Ease Ena Age</td>
<td>10</td>
<td>Alphanumeric</td>
</tr>
<tr>
<td>Ease Age</td>
<td>30</td>
<td>Alphanumeric</td>
</tr>
<tr>
<td>Ease Code</td>
<td>30</td>
<td>Alphanumeric</td>
</tr>
<tr>
<td>Ease Year</td>
<td>4</td>
<td>4-digit year</td>
</tr>
<tr>
<td>Ease Year or</td>
<td>30</td>
<td>Alphanumeric</td>
</tr>
<tr>
<td>Ease Registration User</td>
<td>30</td>
<td>Alphanumeric</td>
</tr>
<tr>
<td>Registration Agency</td>
<td>10</td>
<td>Alphanumeric</td>
</tr>
<tr>
<td>Registration Agency Code</td>
<td>30</td>
<td>Alphanumeric vehicle identification number</td>
</tr>
</tbody>
</table>

*Not all DMVs return all the information shown above.

When returned, this information appears in the appropriate fields in the VPS as shown in the following sections in this chapter.

### 8.1.1. Types of DMV Responses

When the DMV reviews the license plate information sent by the VPS, there is a possibility of several types of results returned. These include the following:

- Match the license plate information with a registered owner
- Provide multiple matches for the license plate type
- Have no match for the license plate owner

Table 8.2 shows the response type and the VPS process to address each response.
Table 8.2 sent from the DMV are the same. When the VPS system receives this information it makes a differentiation; Section **error reference source not found.** explains this.

To understand when each action occurs, a flow chart of the activity appears in Figure 8.1. This illustrates the image process starting from receiving the violation from the lane through the process of printing of the notice. The details in green boxes refer to manual procedures that are the responsibility of the operations staff. These include plate identification in Section **error reference source not found.**, plate type selection in Section **error reference source not found.**, plate confirmation in Section **error reference source not found.**, new violators in Section **error reference source not found.**, supervisor review in Section **error reference source not found.**, and final image review in Section **error reference source not found.**
... Previous Violators

When the DMV has returned the ROV information to the VPS, the ROV information and the violating license plate are checked against the exiting information in the DMV cache. The DMV cache lists all previous violators in the system.

If the VPS determines that the license plate is in the DMV cache but the ROV information does not match it exactly, it puts the violation event into the new violator queue for manual review. The new violator review determines if the violation should be associated with an existing party within the VPS, or whether a new party should be created using the new DMV information.

If the VPS evaluated the record and sees that it is a previous violator by finding it in the DMV cache, then the record advances to the next step and is ready for final image review. For more on final image review, refer to Section Error Reference Source number.

The same process occurs if the VPS recognizes a completely new violator; the information is added to the DMV cache and the violation goes to the final image review queue.

When a violator is identified as a new violator and placed in the new violator queue, these violation events appear in the e io a or screen. The e io a or screen (Figure 8.2) provides the user with the ROV information obtained from the DMV lookup, as well as a list of the existing VPS parties with the same plate information. The user reviews this information to determine if there are differences in the spelling of the names, or if the new name is a different person.
8.2.1. **Processing Violators**

1. Log on to the VPS (see Chapter 6).
2. Select the **Violations** tab from the main menu. See Figure 8.3.

3. Select **New Violator** from the list on the left margin. See Figure 8.4. The screen populates the first record for review. The system provides the license plate, jurisdiction, and type. It shows the list of current violators on the left and the new violator on the right. See Figure 8.5.
4. Click on the **Save Violator** button if the name listed under the current violator name and address is similar to the name that appears in new violator name and address.
5. The name and address information are updated in the DMV cache.
6. Click on the **ieren io a or** button to create a new VPS party if the information is completely different; it usually indicates the sale of a vehicle. The DMV cache stores the new violator information for subsequent lookups on that plate.

7. After selecting either the **Sae io a or** or **ieren io a or** button, the record advances and the next new violator to review appears. Processed violations go through the next automated steps to go through final image review.

8. If the name or address is changed when processing Same Violator, it is updated in all existing violation records in the system with the same address. Examples include the following:

   - **Sae io a or**
     - First name, middle initial, last name match originally but the middle name is updated by spelling it out.
     - First name, middle name and address match originally, but last name may be different due to marriage or other name change.

   - **ieren io a or**
     - If in doubt, use different violator
     - One is a company and another is a personal name, select different party

**3. ina age e ie**

The majority of the violation records from the DMV flow directly to the final image review queue. Statistically, there are more license plates that match the initial query to their respective DMV. The exceptions to this include multiple responses to a single violation record and those returned as unknown. For this reason these scenarios are covered later in this document.

The final image review conducts a quality review of violation images and information before a Violation Notice is issued. The **ina age e ie** screen (Figure 8.6) allows the plate number, jurisdiction and plate type information to be edited; ROV information is read only. The lower section of the page contains violation information. The image(s) displayed at final image review were previously certified during the initial plate identification or plate confirmation review processes.
8.3.1. Final Review Processing

To process images for final review:

1. Log on to the VPS. (See Chapter 6).
2. Select the **io a ions** tab from the main menu. See Figure 8.7.

3. Select Final Image Review from the list on the left margin. See Figure 8.8.
4. The screen populates the first record for review. The system provides the ROV information in read only fields on the left side. On the right, the first picture of the initial saved pictures is shown.

5. Scroll through the other pictures by using the scroll bar on top or use the Pre and e buttons. See Figure 8.9.

6. You review several areas of the screen to ensure that the information is correct before making a decision. You must:
   - Check the vehicle make and model (if possible) against the picture
   - Check that the license plate information is entered correctly
   - Check that the jurisdiction is correct
   - Check the quality of the image
   - Check the content of the image
   - Check the Lane Status information

Note: All violations associated with the toll violation notice to be certified, are grouped for Final Review.
7. You must edit, certify, or reject each violation record in the group to move on to the next record. When the last record in the group is certified, the **Certified** window appears to confirm your choice. See Figure 8.10.

![Certified Screen](image)

8. In the **Certified** window, you can view the number of violations certified, rejected or edited.
   - If you click **Ice** then a print preview version of the notice appears in PDF format. The notice shows all certified violations for this party in final image review for this notice. The notice does not have a document number at this time.
   - If you click the **ance** button, the screen returns to the same violation event in the **age e ie** screen.

![Certified Notice](image)
If you click the **Supervisor Review** button, the violation record goes to the supervisor review queue. See Section 6.1 with more information on supervisor review.

9. Click the **Edit** button on the **Final Image Review** window to complete the final image review and create a notice. The violation notice goes to the printing queue and the screen advances to the next violation record.

### 8.3.2. Editing the Plate Information

While processing the final image review queue, sometimes it is necessary to edit the license plate because it was identified incorrectly during an earlier part of the process either from the OCR or from another user during the first image review stage.

To edit the plate information:

1. Open the **Image Review** screen (see Section 1.2).
2. Click on the appropriate field for editing, such as the license plate field, if the license plate or jurisdiction needs to be changed. See Figure 8.11.

3. Highlight and type over the characters in the field and enter the correct license plate information.

4. After making the corrections, click the **Edit** button. The **Final Image Review** window appears. See Figure 8.12.
5. To save the corrections made, click on the **Save changes** button. Clicking the **Save changes** button disassociates the violation record with the violation notice and routes the violation record to the license plate V-toll check to try to match it to either a CSC customer or other E-ZPass customer.

6. To return to the **Image entry** screen, click the **ance** button.

### 8.3.3. Rejecting the Image

While processing the final image review queue, sometimes it is necessary to reject the image because it is of poor quality or because of a particular business rule.

**Business uses or ion ofces**

- Reject all violation records with Canadian or government license plates using the **n enorced a e us id on reject reason**
- Reject emergency vehicle records using the **er ge nc e ic e reject reason**
- Reject VDOT vehicle records using the **n en orced a e us id on reject reason**
### Reject Reasons

<table>
<thead>
<tr>
<th>S</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>P aerreada e s ruced</td>
<td>Plate is dirty or is in poor condition, or a trailer hitch or other object obstructs the image.</td>
</tr>
<tr>
<td>O P aer oorar P aer</td>
<td>No plate is visible or there is a temporary plate on the vehicle.</td>
</tr>
<tr>
<td>Orru age</td>
<td>Image is corrupted in some manner or merged with another image.</td>
</tr>
<tr>
<td>ad a era i</td>
<td>Camera aim prevents plate recognition.</td>
</tr>
<tr>
<td>oo rig are</td>
<td>The image is washed out, preventing plate recognition.</td>
</tr>
<tr>
<td>oo ar</td>
<td>The image is too dark or shadowed, preventing plate recognition.</td>
</tr>
<tr>
<td>o e ice</td>
<td>There is no vehicle displayed.</td>
</tr>
<tr>
<td>ruc rai er</td>
<td>There is a truck using the lane where only back camera is located</td>
</tr>
<tr>
<td>nen orcea e P a e urisdic ion</td>
<td>US federal plate, non US or Canadian plate, VDOT vehicles</td>
</tr>
<tr>
<td>ergenc e ic es</td>
<td>Any vehicle with a light bar, i.e. Police, Fire, Ambulance</td>
</tr>
<tr>
<td>ad ane ea</td>
<td>Lane status indicators are yellow or red</td>
</tr>
<tr>
<td>ad a era ocus</td>
<td>The image is not legible, unable to review.</td>
</tr>
</tbody>
</table>

To reject the image:

1. Open the ina age e ie screen (see Section rror e erence source no ound.).
2. Click on the drop-down list for the reject reasons if the image needs to be rejected. See Figure 8.13.
After selecting the appropriate reason, the **ee** button is enabled.

3. Click on the **ee** button; the **ina Su ar e ec ed** window appears. See Figure 8.14.

4. To finalize the rejection, click on the **ee** button in the **ina Su ar e ec ed** window.

5. To return to the **ina age e ie** screen, click the **ance** button.

Clicking the **ee** button rejects the violation event. The violation event information and the selected image are retained for audit and reporting purposes. The screen then advances to the next record.
8.3.4. Sending the image for Supervisor Review

While processing the final image review queue, sometimes it is necessary to forward images to a supervisor for review. This may occur because a staff member is unsure of certain license plate characteristics or the DMV information provided shows a discrepancy with the associated violation image. Prior to sending a record to supervisor review, the clerk must make a note of the plate number, plate type, jurisdiction, and the issue related to the violation record. This note must be given to the violation supervisor so that feedback to the clerk can be provided as to the disposition of the record sent. This is a manual process.

- **Send an image to supervisor**
  1. Open the image entry screen (see Section Error! Reference source not found.).
  2. Click on the Supervisory Review button if the image needs to be sent to the Supervisor. See Figure 8.15.

![Figure 8.15 Supervisory Review](image)

Clicking the Supervisory Review button routes the record to the supervisor review queue. If the license plate or jurisdiction had been changed prior to clicking the Supervisory Review button, the record is sent with the original information.
8.3.5. Sending Violation Records for Supervisor Sampling

The VPS has a configurable parameter that allows a set percentage of final review records to be automatically forwarded to the supervisor review queue. The percentage will be adjusted by the violations supervisor to monitor VPS staff data entry. The information obtained through this sampling exercise will be used as a training and performance monitoring tool.

Supervisor Review

The supervisor review queue enables a quality check of the violation data, images, and ROV information pertaining to a violation event. The Supervisor Review screen (Figure 8.16) allows the plate number, jurisdiction and plate type information to be edited; ROV information is read-only. The lower section of the page contains violation information. If there is more than one violation per document, this page only shows related violations for the facility associated with the triggering violation.

Figure 8.1 Supervisor Review Screen
8.4.1. Processing Supervisor Review Images

1. Log on to the VPS. (For the Log on process see Chapter 6).
2. Select the **io a ions** tab from the main menu. See Figure 8.17.

3. Select **Su er isor e ie** from the list on the left margin.

4. Scroll through the other pictures by using the scroll bar on top or use the Pre and **e** buttons. See Figure 8.19.

It is assumed that because a supervisor primarily reviews this screen, he is well versed in the image review process. The user reviews several areas of the screen to ensure that the information is correct before making a decision. The user may:

- Check the vehicle make and model (if possible) against the picture
- Check that the license plate information is entered correctly
- Check that the jurisdiction is correct
- Check the quality of the image
- Check the content of the image

The screen populates the first record for review. The system provides the ROV information in read-only fields on the left side. On the right, the first image of the initial saved pictures appears.
• Check the Lane Status information

5. If all the criteria in Step 6 above are met, click the **Certify** button; the **Su er isor e i e** window appears to confirm the user’s choice. See Figure 8.20.

6. If the review criteria are not met, edit the image or reject the image. The process for editing or rejecting an image from the **Su er isor e i e** screen is the same as that from the **ina age e i e** screen. These options are explained in **rror**
ence source not found, and error source not found. respectively. The only exception is that in the ina Su ar screens, there is not an option to route violations to the supervisor review queue.

The ina Su ar er i ed window appears as in Figure 8.20.

a. If the user clicks ie o ice a print preview version of the notice appears in PDF format. The notice does not have a number at this time.

b. If the user clicks the ance button, the screen returns to the same violation event in the Su er isor e ie screen.

7. To complete the supervisor review and create a notice, click the er i o ice button on the ina Su ar er i ed window. The violation goes to the printing queue and the screen advances to the next violation event for supervisor review.

.5. u i e a c es e urned

There are two scenarios that occur where the DMV may return multiple records for a violation event. These are

- If multiple ROV records are identified with the same license plate and type information
- Or, if multiple ROV records are identified with the same license plate but a different type

In these cases the violation event is passed to the P a e e Se ec ion queue. The purpose of the P a e e Se ec ion review is to determine which of the ROV information returned from the DMV corresponds to the violating vehicle.

The P a e e Se ec ion e ie screen (Figure 8.21) contains the violation images, as well as a list of the ROV information obtained by the DMV lookup.
8.5.1. Multiple Matches Returned

To process multiple ROV returns:

1. Log on to the VPS. (For the Log on process see Chapter 6).

2. Select the **io a ions** tab from the main menu. See Figure 8.22.

3. Select **P a e e Se ec io n** from the list on the left margin. See Figure 8.23.
The screen populates the first record in queue for review. The user can review the images associated with the violations that were certified during the image review stage (by staff or from the OCR). The system provides the multiple ROV information returned window below the **Selected Image** pane. See Figure 8.24.
4. The user reviews the selected image with regard to the type of vehicle, make, model and year of the vehicle.

5. The user selects the corresponding ROV data from the registered list at the bottom of the screen and clicks the button.

6. If none of the ROV information corresponds to the image, the user rejects the violation by selecting appropriate reject reason from the drop-down list and then clicking on the button.

By selecting the button in step 5, the violation record advances to the section. For more information on this, see .

By selecting to reject the violation in step 6, the violation is then rejected. The selected image is retained on the VPS image server and the violation event information is retained for audit and reporting purposes.

. non license Pases

If the initial DMV look up does not return any ROV information for a violation record, these events are routed to the plate confirmation queue. The purpose of the plate confirmation review is to confirm that the plate number, jurisdiction, and plate type were correctly identified during the OCR or plate identification phases of the VPS workflow.

The screen (Figure 8.25) provides the user an opportunity to review and/or correct the plate information, as well as to view the last certified operator who processed the violation event and last certified queue if the event bypassed the license plate identification step due to the OCR confidence level settings.
8.6.1. Processing Plate Confirmation Records

To process plate confirmation records:

1. Log on to the VPS. (For the Log on process see Section 6).
2. Select the **Plate** tab from the main menu. See Figure 8.26.
3. Select **Plate Confirmation** from the list on the left margin. See Figure 8.27.
The screen populates the first record for review.

4. Check the quality of the vehicle image; if desired, choose another image from the recent ages or ear ages as the second age. See Figure 8.28.

Figure . Panorama Screen
5. Verify that the data, including plate number, jurisdiction, and plate type, are correct. If needed, highlight the **Plate** field and type the correcting characters into it to edit the license plate information.

6. To save the changes to the record, click the **Edit** button.
   
   If the plate, jurisdiction, or plate type information is edited and you click the **Edit** button, the violation event is sent to the E-ZPass Virginia and E-ZPass database as a plate lookup where each violation is evaluated and processed according to the V-toll process. If no match is found, the violation is routed to the DMV lookup to obtain ROV information.

7. If the image appears correct, click **Edit** without making any edits. If no edits are applied, the violation is rerouted to the registration pending queue for another potential DMV lookup.

8. If the image is unacceptable, select a rejection reason from the drop-down list and click the **Reject** button.

### 8.6.2. Registration Pending Queue

The registration pending queue is a status for violation records waiting on ROV information. The difference between this and the DMV pending status is that those records in the registration pending have already been sent once and no ROV match was made.

If no match is found on the first attempt, the violation is routed to the plate confirmation queue, as discussed in Section 8.6.1. If no match is found on subsequent lookup attempts, the violation is routed to the registration pending queue where it is automatically retried a specified number of times, the number of which is configurable through system parameters. Once the maximum number of lookups has been made on the plate and no match obtained, the violation is routed to the reject queue and the reason is indicated as “No DMV Match” or equivalent.

#### io ath o ices

Every day, the operations staff in the Production department is responsible for monitoring the creation and distribution of the violation notices. This is done through oversight of the VPS Print Distribution system.

The VPS Print Distribution system (Figure 8.29) facilitates creating documents (violation notices, summons, dispute acceptance/rejection letters, or general correspondence), associating one or more violations to a document, adding fines/fees to a document, batching, PDF generation, distributing for in-house printing, or electronically transmitting to a print outsourcer vendor.
All violation notices will be printed and mailed by the third party vendor, Questmark. This company receives the violation notice information on a daily basis in PDF format. They print and mail each notice. While processing these, they scan the barcode of each to ensure that all are mailed. After scanning these documents, the information is sent back to the VPS in an acknowledgement file and the status of the violation events is changed to mailed. In cooperation with the Production department staff, the system administrator ensures that this process is completed and any unusual occurrences are addressed.

Figure 8.30 illustrates the types of violation notices and the actions that precipitate the notices being generated. The first processed toll violation is forgiven but the license plate number is kept on file for the next year. A second toll violation within 365 days of the first violation generates a toll violation notice. Failure to pay the violation within a configurable number of days causes a second notice to generate and, if left unresolved, can ultimately result in a court summons for the violator. Figure 8.30 also describes business rules related to various notice levels.
9. MAIL PROCESSING

Mail processing includes receiving and sorting incoming correspondence and distributing violations to be printed.

9.1. Incoming Correspondence

Mailroom staff picks up violation mail daily. When necessary, production staff signs for any certified or express mail deliveries.

In addition to dealing with the mail delivery, the production staff receives faxes. A fax number is provided on the violation notice for violators to use. The fax machine is located in the E-ZPass Virginia Customer Service Center (CSC) close to the Mail Department to let the production staff retrieve faxed correspondence easily and in a timely manner.

9.1.1. Sorting Incoming Mail

The production staff sorts and logs all correspondence that arrives at the CSC from the United States Postal Service (USPS). The production staff logs information for the violation-related correspondence on the Daily Incoming Mail Log that is also used for
customer service-related mail. This procedure captures the total volume of mail processed on a daily basis. Mailroom staff will date-stamp all correspondence with the date it was delivered to the CSC or picked up at the Post Office by mail room staff. The production manager monitors the volume by reviewing the forms and uses the data for tracking and reporting purposes to the operations manager.

To sort and log violations-related correspondence:

1. Sort violation correspondence by type.

   A person who was issued a violation may return various types of correspondence. These include the following:
   - Single or multiple violation disputes
   - Dispute and a payment of the same violation
   - Violation payment for one or more violations
   - Complaint letters

2. Sort all violation disputes received in the mail into two categories. These categories include the following:
   - Category A: Appeals
   - Category B: Returned mail

   These are then counted and logged. This process is explained in detail in Section 9.1.2.

3. All received payments are sorted, counted, and forwarded to the Accounting Department. This process is further explained in Section 9.1.2.

### 9.1.2. Processing Returned Mail

The VPC staff processes violation mail returned to the CSC usually after all other mail has been accounted for and forwarded to the appropriate department. There are typically two kinds of returned mail—those with a forwarding address and those without one.

Processing mail returned without a forwarding address is covered in Section 9.1.2.

Per VDOT’s defined business rules, the production staff can change the addressee information on a violation and re-send the violation to the new address.

The violation processing center (VPC) staff will scan and link to the violation record, all return mail envelopes with forwarding addresses. For a full description of the scanning process, refer to section 10.3.

To change the address information:

1. Log on to the VPS. See Chapter 6.
2. Select the Customers tab from the main menu. See Figure 9.1.
3. Then the user selects **Document Returns** from the list on the left margin. See Figure 9.2.

**Figure 9. Document Returns window**

4. The **Document I** window opens. See Figure 9.3. Enter the document ID into the field. The document ID can be found on the violation notice.

**Figure 9.3 Document I**
If the document has been paid in full, partially paid, or dismissed, the document return feature is disabled and an appropriate message appears. If the message in Figure 9.4 occurs, forward this record to the violation supervisor for further processing.

**Figure 9. Document Return Not Allowed**

![Document Return Not Allowed](image1)

5. Click the **Continue** button. The system searches for that document record and the results appear. See Figure 9.5.

**Figure 9. Document Record Art 1**

![Document Record Art 1](image2)

The document mailing address is the address to which the notice was initially mailed. The current violator address is the current address associated with the violator. These are typically the same, but may be different if the violator’s address was updated at the DMV after a notice was sent. The last update date of each address is recorded in the system.

6. Click the **New Address** checkbox to change the address; the system advances to the **Document Record Art** screen. See Figure 9.6.
7. Enter the new address information into the appropriate fields.
   a. If you click on **a e ddress wit no eissue**, the new address information is stored and no new document is created.
   b. If you click the **Cancel** button, no updates are saved and the system returns to the previous screen.

8. Click on the **eissue to New address** button to create a new notice with the changed address information. This closes the current document. The system also starts a new escalation calendar based on the issue date of the new document.

9.1.3. **Entering a Violation Note**

To create a violation note or document returns

1. Log in to the VPS (see Chapter 6).

2. Select the **Customers** tab from the main menu as in Figure 9.7.

Figure 9. Customers a
3. Select **Violator earc** from the list on the left. See Figure 9.8. The **Violator Criteria** screen (Figure 9.9) appears.

![Figure 9.8 Violator earc Criteria](image)

4. Enter the document information and click the **earc** button. The system returns the violation record based upon the search criteria. See Figure 9.10.
5. Click on the name of the violator and the violation record appears Figure 9.11.
6. Click the **Notes** button.

7. Click the **dd** button on the **Notes** screen (Figure 9.12).

8. Select the **annotation** **pe** from the drop-down list.

9. Enter a comment about the violation being returned in the mail with no forwarding address. See Figure 9.13.
9.1.3.1. Voiding the Violation with No Forwarding Address

To process the violation notice that is not being pursued because a valid forwarding address is not available:

1. Log on to the VPS (see Chapter 6).
2. Select the Customers tab from the main menu. See Figure 9.14.
3. Select Document Returns from the list on the left margin. See Figure 9.15.
4. The **Document** window opens. See Figure 9.16. Enter the document ID into the field. The document ID can be found on the violation notice.

5. Click the **Continue** button. The system searches for that document record and the results appear. See Figure 9.17.
6. Click on the returned No Forwarding address button. The document status changes to Closed/Unenforced. The initial document return screen then appears to the user.

9.1.4. Entering a Violation Note

This section describes the types and procedures for processing violation dispute mail. With the exception of disputes made by E-ZPass Virginia customers via phone or Web, all dispute mail must be scanned and linked to the appropriate violation record.

9.1.4.1. Single Violation Disputes

The production staff reviews incoming disputes to determine if the violator is contesting one or more violations, as indicated on the violation dispute form. If the violator is only disputing a single violation notice, the staff places it into one of the following major categories based on the type of the dispute. The list below helps the production staff select the correct category.

Category A—E-ZPass customer in good standing:
- CSC account holder
- Other E-ZPass agency account holder

Category B—identified driver:
- Rental or leased vehicle
· Sold vehicle
· Stolen vehicle
· Claim of incorrect plate/vehicle type

Category C—Ad hoc disputes (must be accompanied with a toll authority directive)
· Medical emergency
· Collision avoidance
· Death, divorce, bankruptcy
· Claim of inadvertent violation
· VDOT directive

9.1.4.2. SINGLE VIOLATION NOTICE, MULTIPLE DISPUTES

Occasionally, a violator may have multiple violations for the same vehicle. The violator may also want to dispute all the violations associated with his license plate at the same time. In this case, the production staff receives correspondence with more than one violation number written on the dispute form.

To process single violation notice with multiple disputes:

1. Review the dispute form to determine how many violations the violator is attempting to dispute. Write the number on the top right corner of the dispute form and circle the number. This helps ensure that the proper number of copies is made.

2. If the violator has enclosed a copy of his account statement or other documentation along with the dispute form, this is also copied for each dispute number documented.

   a. After the corresponding statements have been copied, the disputes are listed for the single violation disputes in Section 9.1.4.3.

9.1.4.3. PAYMENT AND DISPUTE OF THE SAME VIOLATION

The production staff may also receive a violation response that includes a dispute request and payment.

Although a payment has been submitted, the dispute is also processed.

To process a dispute with an accompanying payment:

1. Check the payment carefully and ensure that it is for the violation notice and not for customer account replenishment.

2. If the payment is for the violation, copy the violation dispute and the payment. If the payment is for an account, skip to Step 5.
3. The copy of the violation dispute and the payment will be sorted and counted with the other disputes. Black out any credit card information, if applicable. This copy is then sorted as a single violation dispute as in Section [error reference source not found].

4. Attach the payment to the dispute form and secure all of the documents together. The payment is then recorded on the Daily Incoming Control Log and forwarded with the other payments to the Finance Department.

5. If the payment is for the replenishment of a CSC account, record the payment on the Payment Control Log with the customer service-related correspondence and forwarded to the Accounting Department for processing.

9.1.5. Violation Payment Mail

This section describes recording violation payments received through the mail.

To process each type of incoming mail payments:

1. If there is one payment in an envelope received without additional documents, then date stamp the payment and place the payment back in the envelope in which it arrived. For the appropriate payment type see below:
   - Check payments: Paperclip the check and contents from the envelope and date stamp. (The envelope is discarded.)
   - Credit card payments: Paperclip the contents in envelope and date stamp. (The envelope is discarded.)
   - Cash payments: All cash payments are entered on the Daily Incoming Mail Log, including the name of the sender and the dollar amount.
   - Money orders: When money orders are received, they are treated the same as checks; paperclip the money order and the contents and date stamp. (The envelope is discarded.)

2. If there are multiple payments without additional documentation, date-stamp each payment, place them back in the envelope, and forward to the Finance Department.

3. If payments arrive with additional documents, and if the documentation is not related to a violation dispute, no additional action is necessary. Place the documents back in the envelope and record the payment information on the front. Send the documents to the Finance Department where they will determine the necessity of retaining these documents.

4. If payments arrive with violation appeals, follow the instructions in Section [error reference source not found].

5. After opening, date stamping, and sorting the payments by type, the production staff then counts and logs all of the payment information on the Daily Incoming Mail Log.

6. Record the payment quantities by type on the Daily Incoming Mail Log.

7. The production staff retains the log for research and audit purposes.
9.1.6. Complaint Mail

Occasionally, the public sends a complaint letter to the CSC to comment on an experience with getting a violation. When this occurs, forward the letters to the appropriate supervisor who will evaluate the level of the complaint and then determine the necessary action based on the information provided in the complaint. The CSC manager is made aware of any complaint letters with which the supervisor needs assistance in finding a resolution.

9.1.7. Processing Incoming Faxes

Faxes can be received at the CSC 24 hours a day. Therefore, the production staff pays special attention to the date and time stamp provided by the fax machine when the document arrives.

To process faxes:

1. Retrieve the faxed documents from the fax machine at the beginning of the workday. Faxes are also retrieved throughout the day.
2. Record the faxed information on the Incoming Fax Log immediately upon receipt.
3. Sort the papers into the following categories:
   - Disputes
   - Payments
   - Administration

   **Note:** Administration is considered a fax addressed to a specific staff member.
4. Date stamp the disputes with the current date, unless it is apparent that the fax was received overnight, in which case write the appropriate date and initial it.
5. For faxed disputes, follow the procedure used for single and multiple mailed disputes as described in Sections **error reference source not found.**
6. Date stamp the payments (only credit card) with the current date, unless it is apparent that the fax was received overnight in which case write the appropriate date and initial it.
7. For faxed payments, follow the same procedure used for mailed payments in Section **error reference source not found.** These payments are also counted on the Payment Control Log and signed off on when received by the Accounting Department.
8. When all of the faxed correspondence is stamped and sorted, the quantities of each category are recorded on the Daily Incoming Mail Log.

9.1.8. Processing Incoming Faxes

After all of the incoming mail and faxes have been sorted into the dispute categories (A, B, and C), payments, and returned mail, the production staff counts the correspondence
for each group by the quantity in each category. This information is then entered into the Daily Incoming Mail Log.

9. Processing outgoing mail

There are several types of outgoing mail that the operation handles. These include:

- Violation notices
- Dispute resolution letters
- Violation payment correspondence
- Administrative mail
- Transponders and their contents

The operation plans to use a third party vendor to print, post, and mail the violation notices and the dispute resolution letters. It is the production staff member’s responsibility to monitor the sending of the daily file and receipt of the daily confirmation. The VPS print distribution process is described in Section 8.8. If the vendor has a problem and cannot print the documents, the operation is prepared to support this function for a limited time until the problem is resolved.

For the other two groups of mailings—violation payment correspondence and administrative mail—these are accounted for and mailed with the use of the postage machine.

9.2.1. Processing Outgoing Mail

When using the postage machine, select the correct category to identify the type of mailing. If the operation currently has a postage machine, additional categories will be added to accommodate mailing violation related correspondence.

At the start of each month, a report is run to show the amount of the funds by category used for that month. After the report is run, the machine is cleared. The production department monitors the balance on the machine and makes a formal request for replenishment with the Accounting Department in advance of when it is needed so that the deposit it not fully depleted.

9.2.2. Logging Outgoing Mail

Each type of correspondence sent by the production staff in the outgoing mail is logged in the Daily Outgoing Mail Log. This tracking sheet helps identify, in more detail, the information that is available through the postage machine report.
10. DISPUTE PROCESSING

When responses are received from violators, many are disputing their violation. The VPS application supports the processing of disputes for both acceptance and rejection reasons. The proper selection of these reasons is based upon any supporting documentation provided and the definition of the business rules. This chapter covers the procedures for processing disputes.

In addition, this chapter explains how the operations staff ensures that any documentation that accompanies a dispute is handled properly and scanned into the system for reference during the decision process and available for research purposes or evidence packages later if needed.

10.1. Dispute Methods

To provide accessibility for the resolution of a violation, the CSC gives the violator several ways to submit a dispute. Table 10.1 shows the methods of contact.

<table>
<thead>
<tr>
<th>Method</th>
<th>Contact Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mail</td>
<td>P.O. Box 1234, Clifton Forge, VA 24422</td>
</tr>
<tr>
<td>Website</td>
<td><a href="http://www.ezpassva.com">www.ezpassva.com</a></td>
</tr>
<tr>
<td>Phone</td>
<td>877-762-7824</td>
</tr>
<tr>
<td>In person</td>
<td>Northern Virginia, Richmond, and Coleman service centers</td>
</tr>
</tbody>
</table>

10.1.1. Mailed and Faxed Disputes

The process for handling mailed or faxed violation disputes is described in detail in Section 9.1.3. After the disputes have been sorted into the A, B, and C categories, the dispute processing production staff (DP production staff) sorts the groups into specific dispute reason groups. This process is further described in Section 9.1.3.

10.1.2. Disputes via the Web and by Phone

The Website will allow an E-ZPass Virginia customer in good standing to enter a dispute. If the account is in good standing at the time of the dispute, the dispute will be processed and a V-toll will be posted to the account. Only E-ZPass Virginia customers can dispute by Web or phone. All other disputes must be submitted by mail or fax with appropriate documentation. E-ZPass Virginia customers may also call the CSC and a customer service representative (CSR) will enter a dispute for the customer, creating a V-toll and dismissing the violation record.
10.1.3. Disputes Made in Person

A violator can go to a CSC location to drop off a violation dispute. Dispute submission in-person is not advertised as an option on the violation notices or other CSC violation correspondence. Because in-person submissions are expected to occur anyway, the procedures for the walk in CSC locations are included here.

When a CSC employee at a walk-in location receives a violation dispute, the staff member briefly reviews the form to ensure that it is complete. If it is not, such as a missing copy of a police report for a stolen vehicle dispute, the staff member advises the violator of the missing documentation. If the dispute is complete, the staff member takes the form and places it with the other incoming mail disputes. The staff person does not provide any indication about the possible outcome of the dispute.

To process disputes prior to sending the disputes from the walk in locations:

1. The walk in locations send violation disputes to the Clifton Forge location for processing via one of two methods:
   - Documents are scanned to email and forwarded to the Violations Supervisor
   - Documents are faxed to the Violations Department.
   
   **Note:** If a violation dispute is faxed, an email is sent to the Violations Supervisor to confirm receipt of the fax.

2. The violation disputes are scanned as outlined in Chapter 13 and placed in the appropriate folder to be processed.

3. Any disputes remaining to be processed at the end of the business day are resolved first on the subsequent business day. All disputes must be processed within three (3) business days of receipt.

10. Processing Disputes

The violation production staff goes through several phases to resolve violation disputes. This includes preparing, resolving the dispute by accepting or rejecting it, and producing and mailing a resolution letter.

Scanning the dispute to store a copy of it electronically follows this process.

10.2.1. Preparation

The first preparation step is to divide the disputes into groups by the reasons for submission. When the disputes come from the mailroom, they are in three groups—A, B, and C.

- Group A is customer disputes
- Group B is identified drivers
- Group C is other violators or those for administrative review
10.2.1.1.  CUSTOMER DISPUTES – GROUP A

The staff takes the customer disputes and further divides them into two groups:
- E-ZPass Virginia customer disputes
- IAG (E-ZPass) customer disputes

10.2.1.2.  IDENTIFIED DRIVER DISPUTES – GROUP B

Identified driver disputes occur when the original violation party claims that there is another party responsible for the violation event. An example of this is a violation from the use of a rental car where the rental company sends proof of the rental agreement at the time of the violation.

The staff divides this group into the following subcategories:
- Rental vehicle disputes
- Leased vehicle disputes
- Sold vehicle disputes
- Stolen vehicle disputes
  - Claim of incorrect vehicle plate/type

The disputes are sorted by dispute type and placed into separate folders. A note is placed on the front of each folder designating the number of disputes in each folder.

10.2.1.3.  AD HOC DISPUTES – GROUP C

This group is a catchall for all other types of violation disputes. This group should not contain any customer or identified driver disputes. An example of this type of dispute is a non-customer claim that the violation was inadvertent because of the traffic at the time of the event. This group also contains violations that need toll facility review and direction. This can also happen when there is a directive from VDOT for violations during a certain time or location with tolls waived. An example of this may be a funeral procession or an emergency situation.

Examples of this type of dispute are:
- Medical emergency
- Collision avoidance
- Death or bankruptcy
- Claim of inadvertent violation
- VDOT directive
These disputes are placed in the Miscellaneous folder with a note placed on the front designating the number of disputes within the folder.

10.2.2. Processing an E-ZPass Virginia Customer Dispute

Note: Violation department personnel follow the process below to process manual v-tolls (Customer V-Tolls) for E-ZPass Virginia patrons. Telephone and Retail CSRs use the process outlined in Section 12.3.

10.2.2.1. PRELIMINARY WORK

Before completing any Customer V-Toll for an E-ZPass Virginia patron, the CSR needs to check the following three things:

- Check the account to make certain there are enough funds to cover the sum of all events that will be v-tolled. If there are not enough funds available, a payment must be processed prior to v-tolling.

- Check to see if the vehicle listed on the violation notice is listed on the patron’s account. If the vehicle is not on the account, investigate with the customer as to the reason the vehicle is not on the account and resolve.

- Check the count cti it in the CSC application to see if transactions occurred that match the violation events on the violation notice (duplicate transactions).

10.2.2.2. PROCEDURE

1. Search the VPS application by either Document ID or Plate Number. The following screen will appear:
2. Click the Disputes button at the bottom to process a Customer V-Toll for the patron (see above). The following screen will appear:

Figure 10.19  Dispute Reason Selection

3. Select Customer V-Toll from the “Select Dispute Reason” drop-down-menu. The dd button will now become active; press the dd button (see above). The following screen will appear:
Enter the applicable selection for **ispute source**.

Enter the patron’s E-ZPass Virginia account number in the **atront ccount** field.

Choose “010 – Smart Tag Virginia” from the **ransponder genc** drop-down menu

***CRITICAL*** Do **NOT** enter any information into the **ranoner N umber** field, even if the patron offers it.

4. Enter the applicable toll facility abbreviation (DTR, PW, CB, RMA), patron’s E-ZPass account number, any applicable note about the account status that may have led to the violation notice, the date, and the CSR’s initials in the **Notes** field

5. Click the **a e** button at the bottom of the screen. The following screen will appear:
6. Click on the **accept** hyperlink on the right side of the screen (see above). The following screen will appear:

The information on the left is verification of the data entered previously.
7. The V-Toll Application Method section on the right must also be verified prior to selecting the **Continue** button at the bottom (see above).

- **V-Toll Entire toll balance** – select this option if the desired result is to v-toll all violation events associated to this party.
- **V-Toll by document** – **do not use this option**
- **V-Toll by violation** – select this option for the flexibility to specifically select the violation events to v-toll.

8. Click the **Continue** button at the bottom.

- If “V-Toll Entire toll balance” was selected on the previous screen, the screen below will appear. Click **a e** at the bottom to process the v-toll.

![Figure 10.3 Click a.e to process V-Toll](image)

- If “V-Toll by violation” was selected on the previous screen, the screen below will appear.
9. Place a check mark in the applicable boxes under the “V-Toll” column to designate which violations are to be v-tolled. Once the selections are made, press the **Continue** button at the bottom to process the v-toll.

10. After the v-toll has been processed, go back into the **Notes** section and add the same notes placed in the dispute (this can be copied and pasted)
11. Click the **dd** button.

12. Then complete the next screen by selecting “Dispute” as the **notation pe**, typing (or pasting) the notes into the **Note** field, and choosing the applicable Document ID from the **Violation ocument** drop-down menu (see below).

13. Click a e.
10.2.3. Resolving IAG Customer Disputes

IAG customer disputes must be submitted by mail or fax. The customer must provide a copy of his account statement to be considered for an IAG customer dispute. The submitted document must be current, showing him/her as a valid customer with a good account balance.

To enter an IAG Customer Dispute:

To process an IAG customer dispute, the user must use the isputes screen. Section error reference source not found. describes how to get to this screen. The steps described in the following sections assume that the user is starting from this point.

1. Select Customer Toll from the dispute reason drop-down list in the isputes screen. The dispute Information window opens.

2. Select the dispute source from the drop-down list and enter the customer’s account number. The user can also add comments associated with the violation in the Notes box. Select the applicable E-ZPass agency from the Transponder Agency drop-down menu – the selections will contain a leading zero (0) before the two-digit Agency ID number. Do NOT enter any information into the Transponder Number field. See Figure 10.27.

3. Click the a e button to return to the isputes screen. The accept and eect links are available as shown in Figure 10.28. If the Cancel button is selected, the system returns to the previous screen without saving any changes.

Figure 10. Dispute—Voll Information Indow
10.2.3.1. ACCEPTING AN E-ZPASS IAG CUSTOMER VIOLATION DISPUTE (AND CREATING A V-TOLL)

1. Click on the **accept** link in the **isputes** screen. The **accept** link on the **Voll ispute** screen opens the V-Toll Wizard to help throughout the V-Toll process. Figure 10.29 illustrates the wizard’s workflow.

The V-Toll wizard choice selected on the first V-Toll Entry screen determines subsequent screen(s) that appear. The choices are:

- Allow system to apply v-tolls automatically
- Allow the operator to apply v-tolls by document
- Allow operator to apply v-tolls by violation

All options result in the user viewing the details on a final verification screen. The user sees the v-toll screen and is prompted to fill in the fields. This screen is shown in Figure 10.30.
2. User can make changes to the information entered when originally creating the dispute—it has been pre-populated into the **source**, **atran account**, and **Notes** fields.

3. The user also must review the selections on the **V toll application et od** list. The **ismiss all ees and ines or selected ilations** checkbox is checked by default. All violations selected for v-toll have any additional fines dismissed. By completing the V-Toll Wizard process, fees and fines dismissal occurs automatically. Deselecting the **ismiss all ees and ines or selected ilations** checkbox results in dismissing the tolls only and leaving the violation balance open for any administrative fees. In this case, open administrative fees cause the document to remain open and subject it to escalation and additional fees.

4. Select from the following options:
   - **V toll all olls**: This selection, when saved, opens the last screen in the wizard (Step 7) where the user has the option of v-tolling all tolls that the violator has incurred with violations.
   - **V toll oculent**: This selection, when saved, opens the wizard screen 2—** oculent** (Step 5).
   - **V toll Violations**: This selection, when saved, opens the wizard screen 2—**Violation** (Step 5).

5. Click on the **Continue** button. The screen advances based on the choice in Step 4.
   - When **V toll oculent** is selected, the next screen is Figure 10.14.
A list of all the documents in dispute appears and the user can select one or more by clicking in the **V toll** checkbox to the right of the document information. When these selections are made, the dismissal amount is calculated. The dismissal amount is the amount of tolls, fines, and fees dismissed if the selected violations are v-tolled to an account.

The user makes the selection and clicks the **Continue** button. The **Dismissal Summary** screen (Step 7) opens.

b. **When V toll Violation** is selected, the next screen the user sees is shown in Figure 10.15.

A list of all the violations in dispute appears and the user can select one or more by clicking in the **V toll** checkbox to the right of the violation information.

6. The user makes the selection and clicks the **Continue** button. The **Dismissal Summary** screen (Step 7) opens.
7. The **dismissal summary** screen (Figure 10.33) opens.

**Figure 10.33 dismissal summary screen**

- The screen shows all the violations or documents selected for processing. The user has two options at this point. Clicking the **Cancel** button opens the prior screen.
- Clicking **Apply** sends the v-tolls to post to a CSC account.

Follow the same steps for processing V-toll disputes by document and by violation.

When posting a v-toll to a CSC account, the system provides feedback. When **Apply** is selected in Step 7, the VPS sends the patron account and violation information to the CSC for verification. If the verification succeeds, the tolls post to the patron account and any associated admin fees are dismissed. If the verification fails, the **V Toll Failed** screen appears and shows the patron account number and a description of the failure. See.
If the verification failed when the CSR attempted a v-toll dispute, the **Voll Failed** screen allows the CSR to either reject the dispute or cancel the transaction and return to the previous screen, leaving the dispute open.

If the Customer V-toll dispute for an IAG patron fails on the first attempt, clerks are instructed to begin the process again, starting with Step #2 under section 10.2.3. This time, however, the IAG E-ZPass transponder number is to be entered in the Transponder Number field. The application will process the V-Toll under this condition.

### 10.2.3.2. REJECTING A CUSTOMER VIOLATION DISPUTE

To reject a customer violation dispute:

1. Click on the **e ect** link in the **ispute** screen. If **e ect** is selected, the user is prompted to confirm the rejection on the **ispute eect eason** screen. See Figure 10.18.
2. Click on the **Continue** button. The dispute is processed and the violator is responsible for the open balances, which may include escalation fees added when the related documents were removed from administrative hold. The dispute status is updated to **elected**, and the CSR is returned to the **isputes** screen. The reject process also generates a dispute rejected letter, viewable from the **etters** button on the **Violator** **etails** screen.

### 10.2.4. **Identified Driver Disputes**

#### 10.2.4.1. **Processing a Rental Dispute**

When a person renting a vehicle violates, the violation is sent to the rental company. If the rental company disputes the notice and provides written evidence of the renter’s name and address from the rental agreement, violations staff can close the initial notice of violation and reissue the notice to the renter.

To process a rental dispute:

1. Select **ental Ve icle** from the dispute reason drop-down list in the **isputes** screen. The **ental ispute** screen opens.

2. Enter the information into each of the fields based on the rental agreement sent with the dispute form. The user also has the option to enter comments in the **Notes** box. See Figure 110.19.

![Figure 110.19 ental ispute creen—Notes o](image-url)
3. Click the accept button. The dispute is recorded in the system and new violator information is stored to the database. Clicking the Cancel button returns to the previous screen without saving changes. The disputes screen opens. The accept and reject links are available as in Figure 110.20.

Figure 110.0 accept and reject in disputes

4. Selecting the Cancel button opens the previous screen without saving any changes.

10.2.4.1.1. Accepting a Rental Dispute

To accept a rental dispute:

1. Click on the accept link in the disputes screen. Accepting the dispute results in the following:
   - The system determines if any of the open violations fall within the rental period.
   - If there are no violations within the rental period, the dispute is denied and the unable to accept dispute screen (Figure 10.21) appears.
2. Click on the Cancel button if this occurs and the previous screen appears. The user can re-verify the rental period, edit the dispute, retry the accept process, or reject the dispute if no violations apply to the rental period.

Figure 10.1 unable to accept dispute screen
If the open violation check succeeds, the dispute process dismisses the rental company’s open violations and associated documents within the rental period and re-issues new violations to the renter. A dispute acceptance letter for the rental company is also generated.

10.2.4.1.2. Rejecting a Rental Dispute

To reject a rental dispute:

1. Click on the **eect** link in the **isputes** screen. Rejecting the dispute results in the following:
   - The documents on administrative hold are returned to their state before the dispute.
   - The original violator is responsible for the open balances, which may include escalation fees added when the related documents were removed from administrative hold.

   The reject process also prompts the user to select a dispute reject reason, which determines the type of Dispute Rejected letter generated as in Figure 10.22.

   ![Figure 10. Ispute eect eason screen](image)

2. Click on the **Continue** button. The dispute status updates to **eected**, and the **isputes** screen reopens. The reject process also generates a Dispute Rejected letter, viewable from the **etters** button on the **Violator etails** screen.

10.2.4.2. PROCESSING A LEASED VEHICLE DISPUTE

In the case of leased vehicles, the DMV may return information showing the leasing company’s information or the lessee’s information. If only the leasing company’s information is returned from the DMV lookup, the initial violation document is addressed to the leasing company. If the leasing company disputes the notice and provides written evidence of the lessee’s name and address from
the lease agreement or other lease document, the staff can close the initial notice of violation and reissue the notice to the lessee.

To process a leased vehicle dispute:

1. Select **leased Vehicle** from the dispute reason drop-down list in the **Disputes** screen. The **leased Dispute** screen appears.

2. Enter the information in each of the fields based on the lease agreement or lease information provided by the leasing company. The user also has the option to enter comments in the **Notes** box. See Figure 10.23.

   ![Figure 10.3 leased Dispute screen—Notes](image)

3. Click the **Save** button. The dispute is recorded in the system and new violator information is stored to the database. If the user clicks the **Cancel** button, the system returns to the previous screen without saving any changes. The **Disputes** screen reappears. The **Accept** and **Edit** links are enabled as shown in Figure 10.24.

4. Selecting the **Cancel** button opens the previous screen without saving any changes.
10.2.4.2.1. Accepting a Leased Vehicle Dispute

To accept a leased vehicle dispute, click on the **accept** link in the **disputes** screen. The leasing company’s violation is dismissed.

The system creates a Dispute Acceptance Letter for the leasing company and reissues the violation to the lessee.

10.2.4.2.2. Rejecting a Leased Vehicle Dispute

To reject a leased vehicle dispute:

1. Click on the **reject** link in the **disputes** screen. Rejecting the dispute results in the following:
   - The documents on administrative hold are returned to their state before the dispute.
   - The original violator is responsible for the open balances, which may include escalation fees added when the related document(s) were removed from administrative hold.

The reject process also prompts the user to select a dispute reject reason, which determines the type of Dispute Rejected letter generated as in Figure 10.25.
2. Click on Continue. The dispute status updates to **e ected** and the **isputes** screen appears. The reject process also generates a Dispute Rejected letter, viewable from the **etters** button on the Violator **etails** screen.

### 10.2.4.3. Processing a Sold Vehicle Dispute

To process a sold vehicle dispute:

1. Select **old Ve icle** from the dispute reason drop-down list in the **isputes** screen. The **old ispute** screen appears.

2. Enter the information in each of the fields based on the receipt of sale or signed vehicle title l information provided that was sent in with the dispute form. The user also has the option to enter comments in the **Notes** box. See Figure 10.26.
3. Click the **Accept** button. The dispute is recorded in the system and new violator information is stored to the database.

Clicking the **Cancel** button opens the previous screen without saving any changes.

The **Disputes** screen reopens. The **Accept** and **Reject** links are enabled as in Figure 10.27.

4. Select the **Cancel** button to return to the previous screen without saving any changes.

![Disputes screen — Accept and Reject in Figure 10.]

**10.2.4.3.1. Processing a Sold Vehicle Dispute**

Click on the **Accept** link in the **Disputes** screen. If the dispute is accepted, all violations after the sale date and time are reissued to the new owner and dismissed for the original owner. The original owner remains responsible for violations before the date and time of the sale.

By accepting the dispute, the system creates a Dispute Acceptance Letter for the seller for the violation after the sale date. The system also creates a new violation for the buyer.

**10.2.4.3.2. Processing a Sold Vehicle Dispute**

To reject a sold vehicle dispute:

1. Click on the **Reject** link in the **Disputes** screen. The documents on administrative hold return to their state before the dispute. The original violator is responsible for the open balances, which may include escalation fees added when the related documents were removed from administrative hold.
The reject process also prompts you to select a dispute reject reason as in Figure 10.28, which determines the type of Dispute Rejected letter generated.

Figure 10.8 Dispute eect reason rop own ist

2. Click Continue. The dispute status updates to e ected and the disputes screen opens. The reject process also generates a Dispute Rejected letter, viewable from the letters button on the Violator etails screen.

x o re ect a sold e icle dispute

1. Click on the e ect link in the disputes screen. The documents on administrative hold will be removed from administrative hold. The original violator remains responsible for the open balances, which may include escalation fees added when the related documents were removed from administrative hold. The reject process also prompts the user to select a dispute reject reason as in Figure 10.29, which determines the type of Dispute Rejected letter generated.

Figure 10.9 Dispute eect reason rop own ist

2. Click Continue. The dispute status updates to e ected, and the disputes screen opens. The reject process also generates a Dispute Rejected letter, viewable from the letters button on the Violator etails screen.
10.2.4.4. Processing a Stolen Vehicle Dispute

To process a stolen vehicle dispute:

1. Select **Vehicle Theft** from the dispute reason drop-down list in the **Disputes** screen. See Figure 10.30. The **Vehicle Theft** reason screen appears.

   ![Figure 10.30 Vehicle Theft Reason Screen](image)

   **Figure 10.30 Vehicle Theft Reason Screen**

2. Enter the information in each of the fields based on the police report or other official information provided that was sent in with the dispute form. The user also has the option to enter comments in the **Notes** box. See Figure 10.31.

   ![Figure 10.31 Vehicle Theft Information Screen](image)

   **Figure 10.31 Vehicle Theft Information Screen**

3. Click the **Save** button. The dispute is recorded in the system and the **Disputes** screen opens where they may process the dispute using the **Accept** or **Reject** links as shown in Figure 10.32.

4. Select the **Cancel** button; the previous screen opens without saving any changes.
10.2.4.4.1. Accepting a Stolen Vehicle Dispute

To accept a stolen vehicle dispute, click on the accept link in the disputes screen. Accepting the dispute results in the following:

- The system determines if any of the open violations occurred after the theft period.
- If there are no violations after the theft period, the dispute is denied and the \textit{na le to accept ispute} screen (Figure 10.33) appears. If this occurs, click on the Cancel button and the previous screen appears. The user can re-verify the theft date, edit the dispute, retry the accept process, or reject the dispute if no violations apply.

If the check succeeds, the dispute process dismisses the open violations. A Dispute Acceptance letter is then generated.

10.2.4.4.2. Rejecting a Stolen Vehicle Dispute

To reject a stolen vehicle dispute:
1. Click on the **e ect** link in the **isputes** screen. The documents on administrative hold are removed to admin hold. The original violator is responsible for the open balances, which may include escalation fees added when the related documents were removed from administrative hold. The reject process also prompts the user to select a dispute reject reason, which determines the type of Dispute Rejected letter generated as in Figure 10.34.

   **Figure 10.3** ispute e ect eason rop own ist

2. Click on the **Continue** button. The dispute status updates to **e ected**, and the **isputes** screen appears. The reject process also generates a Dispute Rejected letter, viewable from the **etters** button on the **Violator etails** screen.

   **10.2.4.5. Processing a Wrong Vehicle Dispute (Plate Correction)**

   A violator may claim that the violation that he was sent is wrong because either the license plate number is incorrect or the plate type is incorrect. This can occur with OCR passing a violation event automatically through the process.

   To process a wrong vehicle dispute:

   1. Select **late Correction** from the dispute reason drop-down list in the **ispute** screen. See Figure 10.35. The **late Correction** screen appears.

   **Figure 10.3** ispute eason rop own ist

   2. Select a dispute source, document ID, plate number, and jurisdiction. The user also has the option to enter comments in the **Notes** box. See Figure 10.36.
3. Click on the **Accept** button. The dispute is recorded in the system. If the user clicks the **Cancel** button, the previous screen opens without saving any changes. The **Disputes** screen opens. The **Accept** and **Reject** links are enabled as in Figure 10.3.

4. Select the **Cancel** button; the previous screen opens without saving any changes.

### 10.2.4.5.1. Accepting a Plate Correction Dispute

To accept a plate correction dispute, click on the **Accept** link in the **Disputes** screen. If the dispute is accepted, the selected document is dismissed for all open balances and a new queue entry is added to the CSC/E-ZPass plate check for a possible v-toll queue for each new violation created.
A Dispute Acceptance letter is also created for the appellant.

10.2.4.6.  Ad Hoc Disputes

Disputes that do not fit into the customer or identified driver categories are placed in a catchall group. This includes all the violations that were sorted by the violations production staff into Category C. In the VPS, processing these types of dismissals is defined as “Ad hoc” processing.

10.2.4.6.1.  Processing Ad Hoc Violation Disputes

All ad hoc disputes must be approved by a toll facility operator. Toll facility operators will provide the service center with an ad hoc dismissal form when making a request for processing an ad hoc dismissal. The form will be scanned and linked along with any backup evidence and linked to the violation record.

To process ad hoc violation disputes:

1. Select **document dispute** from the dispute reason drop-down list in the disputes screen.
2. Click **dd**. The **dd dispute** box will appear.
3. Enter dispute information.

**Figure 10.38 disputes screen**

![Dispute screen](image)

4. Click **a e**.

**Figure 10.39 a e button**

![Button](image)
5. The dispute is recorded in the system and the disputes screen opens to process the dispute using the accept or eect hyperlinks.

6. Select the Cancel button to return to the previous screen without saving any changes.

Figure 10.0 accept and eect in s

10.2.4.6.2. Accepting Ad Hoc Violation Disputes

To accept ad hoc disputes:

1. Click on the accept link in the disputes screen.
2. Select doc ismissal from the disputes screen to access the doc ismissal screen (Figure 10.41).
3. Select a dispute source and a dispute reason. If the dispute reason of voter is selected, then comments are required in the Notes box.

4. Click the accept button and, depending on the radio button selected, the violation tolls, fines, or fees are dismissed.
A Dispute Acceptance letter is also created for the appellant.

10.2.4.6.3. Rejecting Ad Hoc Disputes

To reject ad hoc disputes:

1. Click the correct link in the disputes screen. The documents on administrative hold are removed from admin hold status. The violator is responsible for the open balances, which may include escalation fees added when the related documents were removed from administrative hold.
The reject process also prompts the user to select a dispute reject reason, which determines the type of Dispute Rejected letter generated as in Figure 10.42.
2. Click **Continue**. The dispute status updates to **e ected** and the **isputes** screen returns. The reject process also generates a Dispute Rejected letter, viewable from the **etters** button on the **Violator etails** screen.

### 10.2.5.  **Sinner to Saint**

An option made available to all violators who are not E-ZPass Virginia customers at the time they choose to resolve their violation notice is referred to as the “sinner to saint” rule. If a violator contacts the Service Center and chooses to open an E-ZPass account, the associate has the authority to provide amnesty for the violations that have occurred as follows:

- **1st Notice** – The violator is advised to open an account with sufficient funds to cover cumulative tolls on the violation notice(s) and the $25.00 administrative fee is waived.

- **Final Notice** – The violator is advised to open an account with sufficient funds to cover cumulative tolls. A second payment is processed in the VPD application to cover 50% of the administrative fees on the violation notice(s). After the new account is created and the payment for 50% of the administrative fees is processed, the remaining 50% of the administrative fees is waived.

After the account has been opened, a customer dispute is processed causing the notice to be closed. V-tolls and administrative fees, if applicable, post to the newly opened customer account.

#### 10.2.5.1.  **Resolving Notices Via the Sinner to Saint Rule**

Resolving notices via the “Sinner to Saint” rule requires activity in both the CSCWinClient application and the Forte application.

a. An E-ZPass account is opened in the CSCWinClient application using the procedures outlined in section 3.2.1.4 or section 3.2.1.6, depending on
EXHIBIT J

PERMIT FEE

1. Concessionaire Responsibilities and Department Rights

1.1 On or before 120 days following the end of each Agreement Year following the Service Commencement Date and continuing until 120 days following the end of the year in which the end of the Term, or the termination of the Agreement, occurs the Concessionaire shall provide to the Department:

(i) a calculation of the Actual Equity IRR as at the end of such Agreement Year;

(ii) a reconciliation of Permit Fees paid, if any, during the Agreement Year and the required Permit Fees payable, if any, based upon the Actual Equity IRR throughout the Agreement Year; and

(iii) the Concessionaire’s audited calculation of the Permit Fee, together with all other data relevant to the calculation of the Permit Fee.

1.2 Prior to achieving the First Level Rate of Return as defined in Section 2.1 of this Exhibit, the Concessionaire’s responsibilities in this section still apply. In periods where no Permit Fee is payable, the Concessionaire shall explicitly note this as part of 1.1(ii).

1.3 The Permit Fee will be payable by the Concessionaire to the Department, pari passu with other Operating Costs pursuant to Section 5.06(a).

1.4 The Department shall have the right to dispute the Concessionaire’s calculation of the Permit Fee or to request additional information, clarification or amendment of such calculation, at any time for a period of one year following the submission of the audit and other data referenced above. The Concessionaire shall deliver to the Department such information, clarification or amendment within 30 Days following the delivery of the Department’s request. If the Department does not agree with the calculation of the Permit Fee, the dispute shall be resolved according to the Dispute Resolution Procedures of Article 21 of the Agreement.

1.5 “Semi-Annual Period” means the six month period ending December 31 and June 30 of each Agreement Year.

2. Rate of Return Levels

2.1 "First Level Rate of Return" means the Initial Equity IRR. "Second Level Rate of Return" means the Initial Equity IRR plus 2%. "Third Level Rate of Return" means the Initial Equity IRR plus 4%. "Fourth Level Rate of Return" means the Initial Equity IRR plus 6%.
2.2 First Level Rate of Return shall be treated as having been achieved if during an Agreement Year the nominal Actual Equity IRR equals or exceeds the First Level Rate of Return;

2.3 Second Level Rate of Return shall be treated as having been achieved if during an Agreement Year the nominal Actual Equity IRR equals or exceeds the Second Level Rate of Return;

2.4 Third Level Rate of Return shall be treated as having been achieved if during an Agreement Year the nominal Actual Equity IRR equals or exceeds the Third Level Rate of Return; and

2.5 Fourth Level Rate of Return shall be treated as having been achieved if during an Agreement Year the nominal Actual Equity IRR equals or exceeds the Fourth Level Rate of Return.

3. Calculation of Permit Fees

3.1 If, as of the end of any Agreement Year, the Project shall have achieved the First Level Rate of Return as of such date, the Concessionaire shall pay to the Department, as a Permit Fee, an amount equal to 5% of the aggregate Gross Revenues received by or on behalf of the Concessionaire during such Agreement Year in excess of such portion of such Gross Revenues that resulted in the Concessionaire achieving the First Level Rate of Return (but excluding any such Gross Revenues that may have resulted in the Concessionaire achieving a return in excess of the Second Level Rate of Return).

3.2 If, as of the end of any Agreement Year, the Project shall have achieved the Second Level Rate of Return as of such date, the Concessionaire shall pay to the Department, as a Permit Fee, an amount equal to 15% of the aggregate Gross Revenues received by or on behalf of the Concessionaire during such Agreement Year in excess of such portion of such Gross Revenues that resulted in the Concessionaire achieving the Second Level Rate of Return (but excluding any such Gross Revenues that may have resulted in the Concessionaire achieving a return in excess of the Third Level Rate of Return).

3.3 If, as of the end of any Agreement Year, the Project shall have achieved the Third Level Rate of Return as of such date, the Concessionaire shall pay to the Department, as a Permit Fee, an amount equal to 30% of the aggregate Gross Revenues received by or on behalf of the Concessionaire during such Agreement Year in excess of such portion of such Gross Revenues that resulted in the Concessionaire achieving the Third Level Rate of Return (but excluding any such Gross Revenues that may have resulted in the Concessionaire achieving a return in excess of the Fourth Level Rate of Return).

3.4 If, as of the end of any Agreement Year, the Project shall have achieved the Fourth Level Rate of Return as of such date, the Concessionaire shall pay to the Department, as a Permit Fee, an amount equal to 40% of the aggregate Gross
Revenues received by or on behalf of the Concessionaire during such Agreement Year in excess of such portion of such Gross Revenues that resulted in the Concessionaire achieving the Fourth Level Rate of Return.

3.5 If, as of June 30 of the 50th Agreement Year of the Term and each Agreement Year thereafter, the Project shall have achieved the First Level Rate of Return as of such date, the Concessionaire shall pay to the Department, as a Permit Fee, an amount equal to 40% of the aggregate Gross Revenues received by or on behalf of the Concessionaire during such Agreement Year in excess of such portion of such Gross Revenues that resulted in the Concessionaire achieving the First Level Rate of Return.

3.6 At the request of either party from time to time (but not more than once per year), the Concessionaire and the Department will discuss in good faith possible adjustments to the Operating Costs, using the federal Contract Cost Principles and Procedures, 48 C.F.R. 31.205, as non-binding guidance to ensure that only reasonable and customary costs are included as Operating Costs.

4. Example of the Permit Fee calculations

4.1 Calculation of the first Permit Fee payable

The amounts payable on or before October 31 following the end of the first Agreement Year in which the First Level Rate of Return is achieved are shown as follows:

First Year Permit Fee payable = \[\left\{\left[\frac{A - B}{1 + \frac{C}{365}}\right] \times 5\%\right\} \times \left\{\left[1 + \frac{C}{365}\right]^{\frac{D}{365}}\right\}\]

Where:

A = total Gross Revenue for the full Agreement Year

B = total Gross Revenue accumulated during each Semi-Annual Period in such Agreement Year during which the First Level Rate of Return was achieved

C = calculated average annual earnings rate on the State’s Transportation Trust Fund or any successor.

D = the number of days after June 30 of the Agreement Year prior to the Agreement Year in which payment is made, understanding that payment is required by October 31 of the immediately following Agreement Year.

4.2 Subsequent Permit Fee Payments

(a) Concessionaire requirements

Within 30 days following each Quarterly Period (i.e., the quarterly periods ending September 30, December 31, March 31 and June 30) within any Agreement Year following the Agreement Year in which the First Level Rate of
Return was achieved, the Concessionaire shall remit to the Department an amount equal to the Permit Fee for such Quarterly Period based on the sharing percentage as calculated in the most recent audited Permit Fee calculation submitted by Concessionaire and agreed by the Department.

(b) Quarterly Permit Fees

The amounts payable shall be calculated based on the following formula:

Quarterly Permit Fee payable = A x B

Where:

A = total Gross Revenues for the preceding Quarterly Period.

B = the Permit Fee sharing percentage as determined in the most recent audited Permit Fee calculation provided by the Concessionaire and agreed by the Department.

(c) Second Level Rate of Return Permit Fee Calculation

If the Actual Equity IRR calculation as submitted to the Department by the Concessionaire shows that during the preceding Agreement Year, the Actual Equity IRR achieved the Second Level Rate of Return, then the Concessionaire shall identify the amounts payable to the Department within a reconciliation of the amounts payable and amounts paid as required in Section 1 of this Exhibit J.

The calculation of such amount is shown as below:

\[ TRPF = \left\{ [A - B] \times 15\% \right\} + \{B \times 5\% \} \]

\[ TPPF = A \times 5\% \]

Amounts due = \( TRPF - TPPF \) x \( \left\{ [1 + C/365] \right\}^{D/365} \)

Where:

TRPF = Total Required Permit Fee

TPPF = Total Paid Permit Fee

A = total Gross Revenue for the full Agreement Year

B = total Gross Revenue accumulated from the beginning of the Agreement Year to the end of the Semi-Annual Period during which the Second Level Rate of Return was achieved

C = calculated average annual earnings rate on the State’s Transportation Trust Fund or any successor.
D = the number of days after June 30 of the Agreement Year prior to the Agreement Year in which payment is made, understanding that payment is required by October 31 of the immediately following Agreement Year.

(d) Third Level Rate of Return Permit Fee calculation

If the Actual Equity IRR calculation as submitted to the Department by the Concessionaire shows that during the preceding Agreement Year, the Actual Equity IRR achieved the Third Level Rate of Return, then the Concessionaire shall identify the amounts payable to the Department within a reconciliation of the amounts payable and amounts paid as required in Section 1 of this Exhibit J.

The calculation of such amount is shown as below:

\[
\begin{align*}
\text{TRPF} &= \{[A - B] \times 30\% \} + \{B \times 15\% \} \\
\text{TPPF} &= A \times 15\% \\
\text{Amounts due} &= \{\text{TRPF} - \text{TPPF}\} \times \{[1 + C\%]^{D/365} \}
\end{align*}
\]

Where:

\[
\begin{align*}
\text{TRPF} &= \text{Total Required Permit Fee} \\
\text{TPPF} &= \text{Total Paid Permit Fee} \\
A &= \text{total Gross Revenue for the full Agreement Year} \\
B &= \text{total Gross Revenue accumulated from the beginning of the Agreement Year to the end of the Semi-Annual Period during which the Third Level Rate of Return was reached} \\
C &= \text{calculated average annual earnings rate on the State’s Transportation Trust Fund or any successor.} \\
D &= \text{the number of days after June 30 of the Agreement Year prior to the Agreement Year in which payment is made, understanding that payment is required by October 31 of the immediately following Agreement Year.}
\end{align*}
\]

(e) Fourth Level Rate of Return Permit Fee calculation

If the Actual Equity IRR calculation as submitted to the Department by the Concessionaire shows that during the preceding Agreement Year, the Actual Equity IRR achieved the Fourth Level Rate of Return, then the Concessionaire shall identify the amounts payable to the Department within a reconciliation of the amounts payable and amounts paid as required in Section 1 of this Exhibit J.

The calculation of such amount is shown as below:

\[
\begin{align*}
\text{TRPF} &= \{[A - B] \times 40\% \} + \{B \times 30\% \}
\end{align*}
\]
TPPF = A x 30%

Amounts due = \{TRPF – TPPF\} \times \{[1 + C\%]^{D/365}\}

Where:

TRPF = Total Required Permit Fee

TPPF = Total Paid Permit Fee

A = total Gross Revenue for the full Agreement Year

B = total Gross Revenue accumulated from the beginning of the Agreement Year to the end of the Semi-Annual Period during which the Fourth Level Rate of Return was reached

C = calculated average annual earnings rate on the State’s Transportation Trust Fund or any successor.

D = the number of days after June 30 of the Agreement Year prior to the Agreement Year in which payment is made, understanding that payment is required by October 31 of the immediately following Agreement Year.

(f) Permit Fee calculation after the 50th Agreement Year of the Term

On or after the 50th Agreement Year after the Service Commencement occurs, so long as the First Level Rate of Return was achieved, then the Concessionaire shall identify the amounts payable to the Department within a reconciliation of the amounts payable and amounts paid as required in Section 1 of this Exhibit J.

The calculation of such amount is shown as below:

TRPF = \{A x 40\%\}

Amounts due = \{TRPF – TPPF\} \times \{[1 + C\%]^{D/365}\}

Where:

TRPF = Total Required Permit Fee

TPPF = Total Paid Permit Fee

A = total Gross Revenue for the full Agreement Year

B = total Gross Revenue accumulated during each Semi-Annual Period.

C = calculated average annual earnings rate on the State’s Transportation Trust Fund or any successor.
D = the number of days after June 30 of the Agreement Year prior to the Agreement Year in which payment is made, understanding that payment is required by October 31 of the immediately following Agreement Year.

(g) Additional Committed Investment

If the Concessionaire invests additional Committed Investment over and above that included in the Base Case Financial Model, subject to adjustment pursuant to Section 7.07, the additional Committed Investment shall not be included in the calculation of the Actual Equity IRR, except to the extent that the additional Committed Investment was made in connection with a Department Change, a Department Project Enhancement or a Directive Letter.

5. Payment of Permit Fees

Payment of the First Permit Fee

5.1 In the first Agreement Year in which a Permit Fee becomes payable, as a result of the First Level Rate of Return being achieved, the Concessionaire shall submit to the Department within 150 days following the end of such Agreement Year, the Permit Fee payable by Concessionaire to the Department together with interest, from the first day of the month following the month in which the First Level Rate of Return is achieved to the payment date, with interest during such period to be calculated at the average daily earnings rate on the State’s Transportation Trust Fund or any successor rate. Any amount not paid within such 150 day period, will bear interest as specified in Section 25.22 of the Agreement.

Payment of Subsequent Permit Fees

5.2 In each Agreement Year following the Agreement Year in which the Concessionaire first achieves the First Level Rate of Return, the Concessionaire shall remit to the Department within 30 days after the end of each Quarterly Period ending September 30, December 31, March 31 and June 30 an amount equal to the estimated Permit Fee for such immediately preceding quarter.

5.3 The Permit Fee for each Quarterly Period shall be based upon the total Gross Revenues for such Quarterly Period and a sharing percentage as calculated and audited at the end of the most recent Agreement Year.

5.4 Within 150 days of the end of each Agreement Year, the Concessionaire shall pay to the Department any unpaid portion of the Permit Fee together with interest from the end date of any Quarterly Period in relation to which it was determined that an insufficient amount was paid to the date of payment, with interest during such period to be calculated at the average daily earnings rate on the State’s Transportation Trust Fund or any successor rate. Any amount not paid within such 150 day period, will bear interest as specified in Section 25.22 of the Agreement.
EXHIBIT K

FORM OF ELECTRONIC TOLL COLLECTION AGREEMENT

This ELECTRONIC TOLL COLLECTION AGREEMENT (this “Agreement”) is made and entered into this 31st day of July 2012, by and between the VIRGINIA DEPARTMENT OF TRANSPORTATION (“VDOT”) and 95 EXPRESS LANES LLC, a Delaware limited liability company (the “Participant”).

RECITALS

WHEREAS, VDOT is the owner and operator of the Virginia E-ZPass Toll Collection System;

WHEREAS, the Participant will operate the I-95 HOV/HOT Lanes Project (the “Facility”);

WHEREAS, the Facility will operate and be compatible with the E-ZPass ETC System;

WHEREAS, pursuant to the E-ZPass Reciprocity Agreement attached hereto as Exhibit A, VDOT has joined the E-ZPass Interagency Group on behalf of itself and the Other Participants; and

WHEREAS, VDOT and the Participant desire to enter into this Agreement which will permit Participant to purchase the necessary equipment to operate the Facility to be compatible with the E-ZPass ETC System and to provide for, among other things, the provision by VDOT of ETC Services for the Participant for the Facility.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, VDOT and the Participant, intending to be legally bound, hereby agree as follows:

ARTICLE 1 – DEFINITIONS

Section 1.1 The terms set forth below will have the meanings set forth adjacent to them.

Agreement means this Electronic Toll Collection Agreement.

Agreement Date means the date hereof.

Authorized VDOT Representative means the person duly authorized to act on behalf of VDOT.

Authorized Participant Representative means the person duly authorized to act on behalf of the Participant.
**Comprehensive Agreement** means a comprehensive agreement, if any, relating to the Facility between VDOT and Participant pursuant to the Virginia Public-Private Transportation Act.

**CSC** means a customer service center that will issue and provide services relating to the ETC System administration, prepaid account maintenance, and distribution of transponders.

**ETC** means electronic toll collection.

**ETC Prepaid Account** means an account for purposes of collecting prepaid tolls, membership fees and transponder fees.

**ETC Servicer** means a third party with whom VDOT has contracted to provide the ETC Services to the Participant.

**ETC Servicer Agreement** means the agreement between VDOT and the ETC Servicer for the provision of the ETC Services to the Participant.

**ETC Services** means all of those services necessary for the administration and operation of an electronic toll collection system, including customer services, distribution of transponders and the collection of tolls and the operation of E-ZPass CSCs.

**ETC System** means a system of electronic toll collection.

**E-ZPass** means the trademark for the regional ETC system operated by an Interagency Group (IAG) of participants.

**E-ZPass ETC System** means the overall system of hardware, software and networks that are used for processing E-ZPass transactions and managing E-ZPass accounts.

**E-ZPass Reciprocity Agreement** means the agreement requiring reciprocity among Other Participants in the E-ZPass ETC System attached to the Agreement as Exhibit A.

**Facility** means the I-95 HOT/HOV Lanes Project in Northern Virginia, with a northern terminus approximately 1 mile north of Route 648 (Edsall Road) and a southern terminus at the ramp for the Route 610 interchange (Garrisonville Road) on Interstate 95 in Stafford County.

**Facility Transactions** means the aggregate of the tolled transactions for the Facility.

**Fiscal Year** means any 12 month period beginning July 1st one year and ending June 30th the following year.

**Other Participant** or **Other Participants** means those persons operating other ETC Systems in Virginia and who are members of the Virginia Toll Facilities Group.

**Participant** means 95 Express Lanes LLC, a Delaware limited liability company.
Statewide Transactions means the aggregate of electronic tolled transactions in the Commonwealth of Virginia.

VDOT means the Virginia Department of Transportation.

VDOT E-ZPass Fees means the fees paid by the Participant to VDOT in an amount as calculated in accordance with Article 4.

VDOT Standard Operating Procedures means the VDOT Standard Operating Procedures for ETC Services set forth in Exhibit E.

Virginia Toll Facilities Group means a group comprised of the Other Participants.

ARTICLE 2 – ETC SERVICES

Section 2.1 Provision of ETC Services. VDOT agrees to provide the ETC Services to the Participant for the Facility. All Participant policies and procedures that affect VDOT’s E-ZPass CSC operations are subject to review and approval by VDOT (such approval not to be unreasonably withheld or delayed); provided, however that such approval shall not be subject to any deemed approval provisions of a Comprehensive Agreement. To the extent that any of Participant’s policies and procedures materially and adversely affect VDOT’s E-ZPass CSC operations, VDOT and Participant will engage in good faith discussions regarding the implementation of such policies and procedures, including the cure by Participant of any adverse financial effect on VDOT or the E-ZPass CSC operations.

Section 2.2 – E-ZPass Customer Service Centers. VDOT will establish, administer, and operate one or more CSCs either directly or through a contract with an ETC Servicer to establish, administer, and operate one or more CSCs. Unless otherwise provided herein, VDOT will provide the necessary data and communication lines, office supplies and equipment to support a CSC. VDOT will provide a minimum of seven (7) days advance notice to the Participant of any planned changes to any CSC, toll operations and service requirements that materially affect Participant and will, with good faith cooperation, seek the Participant’s comments on any such changes and incorporate any mutually agreeable proposals.

Section 2.3 – ETC Prepaid Account.

(a) Notwithstanding anything contained in this Agreement, VDOT and the Participant acknowledge and agree that:

(i) VDOT has established an ETC Prepaid Account;

(ii) VDOT is the sole owner of the ETC Prepaid Account and has the exclusive right, power and authority, at the exclusion of the Participant and all other persons, to exercise sole dominion and control of the ETC Prepaid Account; and

(iii) the Participant will have no right, title or interest in and to the ETC Prepaid Account.
(b) VDOT agrees to initiate payment by wire transfer to the Participant on or before the close of business of the next VDOT business day, an amount equal to the aggregate tolls and any applicable membership fees posted to patron accounts the previous day, less payment of the VDOT E-ZPass Fees; provided, however that VDOT shall not be obligated to initiate payment pursuant to this Section 2.3(b) in cases of system failure that prevents Participant from sending E-ZPass transactions or VDOT from processing E-ZPass transactions for Participant. Payments which were not made in accordance with this Section 2.3(b) due to system failure will be made by VDOT to the Participant the next day following the correction of the system failure.

(c) In the event outstanding bond or financial covenants located in the Project Financing Agreements (as defined in the Comprehensive Agreement) prohibit netting of the VDOT E-ZPass Fees from the electronic toll receipts, the VDOT E-ZPass Fees must be paid upon receipt of an invoice for services pursuant to Section 2.4.

(d) VDOT agrees to provide the Participant with read-only access to the Virginia E-ZPass Customer database via the customer service client application.

Section 2.4 – Invoices for Services. Any fees for any services including, but not limited to, ETC Services provided by VDOT to the Participant upon request or with the agreement of the other party that are not otherwise paid as provided herein, will be invoiced to the other party and paid in compliance with the laws of the Commonwealth of Virginia.

Section 2.5 – Disputed Invoices. If either VDOT or the Participant disputes any invoice or payment transaction reported by the ETC Servicer, they will give prompt notice to the ETC Servicer and each other and resolve the dispute pursuant to Article 11. Participant will only reimburse questioned amounts to VDOT upon final resolution for any amounts in dispute.

Section 2.6 – Payments by the ETC Servicer. In the event that pursuant to an ETC Servicer Agreement, the ETC Servicer is obligated to pay VDOT lost revenues or any other sum resulting from the default of the ETC Servicer or the non-performance of the ETC Servicer’s duties and obligations under the ETC Servicer Agreement, VDOT will promptly remit to the Participant its pro rata portion of such sums. Such payment will be based on the product of (i) the historical ratio of the Facility Transactions to Statewide Transactions over the applicable time period in question for the immediately preceding year (taking into account holiday and weekend travel days), multiplied by (ii) the average percentage traffic increase at the Facility during the immediately preceding twelve month period; provided that if by reason of an event during the time periods in either or both of the preceding items (i) and (ii), the foregoing calculation is not a fair approximation of the traffic flow for the Facility for the period in question, then VDOT will remit such other amount as Participant can establish to VDOT’s reasonable satisfaction. Payment to the Participant by VDOT will be limited to revenues lost by Participant or other sums that Participant can show as a direct loss from any such non-performance.
ARTICLE 3 – ETC SYSTEMS

Section 3.1 – Independent Systems.

(a) The Participant operates or will operate an ETC System which is independent of but compatible with the VDOT E-ZPass ETC System and reads the same or E-ZPass-approved compatible type of transponder, and the Participant agrees that its ETC System will provide ETC transaction data in the format required by VDOT. The Participant agrees to purchase readers, antennas and other tolling hardware necessary to comply with the E-ZPass Reciprocity Agreement from vendors approved by VDOT.

(b) VDOT will provide data formats, documentation, interface requirements and any other necessary design information to the Participant in a timely manner and at no additional cost to the Participant. This information is subject to change with reasonable advance written notice from VDOT. Participant will be required to conform to the new interface requirements at no cost to VDOT or Participant may elect to not install new interface requirements and withdraw from this Agreement. Transaction processing problems which arise from the Participant not meeting these requirements will be resolved at the direction of VDOT on a time plus materials basis payment by the Participant to VDOT.

(c) VDOT and the Participant will each continue to be responsible for the maintenance, repair, and operation of all necessary lane and computer equipment for their respective ETC Systems. Specifically, the Participant will be responsible for the maintenance, repair and operation of all necessary lane and computer equipment for its ETC System through and including its host computer. VDOT will be responsible for the maintenance, repair and operation of its ETC System commencing from the Participant’s host router and extending through and including telephone lines, routers, black boxes and the CSC.

(d) In no event will VDOT have any liability to the Participant for any losses, including but not limited to lost toll revenue, suffered due to equipment failure or error in the Participant’s ETC System; provided, however, that should VDOT’s failure to properly maintain, repair and operate its ETC System and the CSC cause a loss of revenue to the Participant, VDOT will pay the Participant the lost revenue and the Participant’s direct costs associated therewith within 14 days after the Participant provides VDOT written notice. Such written notice will include adequate and detailed documentation of such lost revenues and costs. Neither party will have any liability to the other party for consequential damages.

Section 3.2 – Testing Procedures and Results. Participant will provide VDOT the opportunity to participate in the installation of upgrades or other modifications to the Participant’s ETC System, as requested by VDOT. The Participant may participate in the installation of upgrades or other modifications to VDOT’s CSC system. In any such event, each party will provide proposed test schedules and scripts for such upgrades or other modifications to the other party and the CSC at least 60 days in advance of testing. In the case of upgrades or modifications to Participant’s ETC System, upon mutual agreement, VDOT may require additional tests to be undertaken at the Participant’s expense in order to confirm the accuracy and reliability in all aspects of processing relating to ETC transactions. Copies of test results will be
made available to the other party and the relevant CSC promptly. VDOT will participate in acceptance testing and must approve testing prior to processing of live traffic through the CSC.

Section 3.3 – Modifications to Systems.

(a) As equipment changes, modifications or upgrades occur to the ETC Systems, the Participant will use reasonable efforts to cause its ETC equipment used on the Facility to be compatible with that used by VDOT on its other ETC facilities and VDOT’s ETC operations. The Participant will be responsible for any and all system maintenance, changes, modifications or upgrades to its ETC equipment or operations. If any changes, modifications or upgrades to any of the Participant’s ETC equipment or other system modifications will adversely impact VDOT’s ETC operations in any material respect, the parties agree to make good faith efforts to resolve such impact to each party’s satisfaction; provided, however, that any such changes, modifications or upgrades will be ultimately compatible with the VDOT ETC operations. Either party will notify the other in writing at least 90 days in advance of any changes or modification to such party’s ETC System equipment that may affect the other’s ETC System equipment or operations in any material respect.

(b) VDOT will exercise due care and diligence in planning and implementing modifications, upgrades and associated testing of its ETC System at levels which are reasonable given the schedule, scope and budget for the ETC System and will not exceed what is considered customary and reasonable for hardware and software processing systems. However, there is no guarantee against adverse impacts to the performance of the hardware or software in Participant’s or others’ systems. While precautions will be taken by VDOT to help mitigate the risk of occurrence of such adverse impacts, VDOT will not, unless it is in breach of its duty of due care and diligence, be financially responsible for the occurrence of adverse impact to the Participant or other third parties affected during such modifications, upgrades and associated testing.

Section 3.4 – System Performance.

(a) Both the Participant and VDOT will report as promptly as possible and no later than 72 hours from when the parties received notice therefore, of any system failure or degradation that may affect ETC operations. In the event that the Participant is unable to send E-ZPass transactions for the Facility for periods in excess of 24 hours, the Participant must notify the Authorized VDOT Representative prior to sending any backlogged E-ZPass transactions for the Facility. If VDOT is unable to process E-ZPass transactions for the Facility for the Participant for any period in excess of 24 hours, VDOT will notify the Participant within as promptly as possible and no later than 72 hours of such fact.

(b) Any E-ZPass transactions for the Facility not sent within 60 business days of occurrence are subject to deletion from the patron’s account and related revenue may not be recorded or transferred unless the delay is due to failure by VDOT, in which case the related revenue will promptly be transferred to the Participant.
Section 3.5 – Disputed Transactions.

(a) Each business day, the Participant will forward by telecopy or e-mail to VDOT through a CSC, a report listing E-ZPass transactions by lane number from the previous day or weekend, as applicable. Each business day VDOT will cause a CSC to send the Participant via telecopy or e-mail a disbursement report reflecting E-ZPass transaction revenue credited to Participant by transaction number.

(b) If at any time the Participant’s E-ZPass revenue reflected in the disbursement report is out of balance with Participant’s reported E-ZPass transactions by $50 or more for any 3 consecutive days, the Participant will notify VDOT. VDOT will provide a detailed disbursement file within 5 business days of Participant’s notification. The Participant will compare the detailed disbursement report to its detailed audit and provide details regarding the disputed transactions sufficient to update the patron accounts. If the Participant cannot provide detail sufficient to update the patron accounts within 20 business days of the occurrence of the transactions, those transactions will not be charged to patron accounts and will not result in revenue to the Facility. The Participant will send the detailed data to VDOT with comparisons of transactions to include the transaction sequence number(s) and the acknowledgement verification by the ETC System.

(c) E-ZPass transaction/revenue disputes will be resolved on a monthly basis. The CSC will resolve disputes that are recognized and/or identified as valid by adjusting or offsetting the funds that are owed to the Participant in a subsequent transfer. Any Participant’s E-ZPass transactions rejected by their respective home agency will be identified in a report, which will be communicated to the Participant. Rejected transactions will be handled according to documented or generally accepted E-ZPass reconciliation procedures.

ARTICLE 4 - PAYMENT TERMS

Section 4.1 – VDOT E-ZPass Fees.

(a) Participant agrees to pay the VDOT E-ZPass Fees. The VDOT E-ZPass Fees will be due and payable as provided in Section 2.3. VDOT or the ETC Servicer will manage all responsibilities associated with collection and transmission of revenue back to the Participant.

(b) Subject to bond covenants and the affirmative agreement of Participant to right of offset, VDOT reserves the right to offset against amounts to be transferred from the ETC Prepaid Account to the Participant, any amount due to VDOT from the Participant. VDOT and the Participant agree that the agreement to transfer Participant’s tolls from the ETC Prepaid Account and the remittance by VDOT to the Participant of amounts from the ETC Prepaid Account in accordance with this Agreement is irrevocable unless amended, modified or waived by written agreement of both parties.

(c) The cost for any additional services provided by VDOT or the ETC Servicer for the Participant that have been agreed to by VDOT and the Participant in advance will be in addition to the VDOT E-ZPass Fees. Examples of additional services may include mailhouse services to customers and emails to customers. Pricing for the performance of such additional
services shall be as agreed between the Participant and VDOT, with pricing for such services to be limited to a pass through of reasonably incurred costs to perform such services.

**Section 4.2 – Basis for VDOT E-ZPass Fees.**

(a) The VDOT E-ZPass Fees are intended to cover the Participant’s share of VDOT’s total annual ETC expenses, and shall be full compensation for VDOT to cover the normal and customary expenses requested to process tolls electronically and service the Participant’s ETC accounts, based on transactions transmitted electronically to the ETC Servicer. The VDOT E-ZPass Fees for each fiscal year will be determined by VDOT and will be deemed correct absent manifest error. The VDOT E-ZPass Fees consist of the following two amounts: the operating costs component and the processing fee component.

(b) The operating costs component of the VDOT E-ZPass Fees will be assessed by transaction and calculated as follows:

   (i) VDOT will determine the estimated operating costs component of the VDOT E-ZPass Fees for each fiscal year based on a five-year look ahead based upon:

       (A) VDOT’s estimated costs for operating the statewide ETC system, including, but not limited to, the amortized capital costs allocated to the statewide ETC system, the annual E-ZPass membership dues paid by VDOT to the E-ZPass Group, and additional transponder acquisition and distribution costs of VDOT’s ETC operations;

       (B) VDOT’s estimated revenue collected from customer maintenance fees assessed per transponder and other miscellaneous customer charges (e.g., statement fees, lost/stolen transponder fees); and

       (C) VDOT’s estimated transactions for all participants in the statewide ETC System.

       (D) The estimated baseline operating costs component of the VDOT E-ZPass Fees is an amount equal to the difference in the estimated amounts set forth in clause (A) above and clause (B) above, plus the amount set forth below in Section 4.2 (b)(ii)(Z) for the most recently available fiscal year divided by the number of estimated transactions set forth in clause (C) above. 

          \[ \frac{(A - B + Z)}{C} \]

   (ii) Following the end of each fiscal year, an adjustment to the estimated baseline operating costs component of the VDOT E-ZPass Fees calculated in Section 4.2(b)(i) will be made as follows:

       (W) VDOT will calculate the difference between the estimated costs for operating the statewide ETC system set forth in Section 4.2(b)(i)(A) and the actual costs for operating the statewide ETC system for such fiscal year;

       (X) VDOT will calculate the difference between the estimated revenue collected set forth in Section 4.2(b)(i)(B) and the actual revenues collected during such fiscal year; and
(Y) VDOT will calculate the difference between (1) the estimated number of transactions for all participants in the statewide ETC system, multiplied by the result in Section 4.2(b)(1)(D) above and (2) the actual number of transactions for such fiscal year, multiplied by the fee set forth in Section 4.2(b)(1)(D).

(Z) The baseline operating costs adjustment for a fiscal year is an amount equal to the sum of the amounts set forth in clause (W) above, clause (X) above and clause (Y) above. \([W + X + Y]\).

(c) The processing fee component of the VDOT E-ZPass Fees will consist of the sum of an amount equal to the average credit card processing fee (expressed in a percentage and calculated as set forth in the next sentence) multiplied by total revenue processed for the Participant each day. For the purposes of this calculation, the “average credit card processing fee” will equal the sum of the actual credit card processing fees and other related bank fees divided by credit card revenue multiplied by the percentage of total E-ZPass revenue processed by credit card. In the event that the processing fee component of the VDOT E-ZPass Fees collected for the twelve month period immediately preceding the date of calculation are either less than or in excess of the actual costs for such period, the deficiency or excess will then be applied to the calculation of the processing fee component of the VDOT E-ZPass Fees for the next twelve month period.

(d) Annually, but not later than April 1st, VDOT will provide to Participant written notice of the VDOT E-ZPass Fees to be charged the next fiscal year including the adjustment to the estimated baseline operating costs component for the preceding fiscal year.

(e) A calculation of the estimated baseline operating costs component of the VDOT E-ZPass Fees and the adjustment thereto is set forth in Exhibit B. A calculation of the processing fee component of the VDOT Processing Fee for the current fiscal year is also set forth in Exhibit B.

**Section 4.3. – Account Information.** Unless otherwise directed by the Participant upon 10 business days prior written notice, the Department shall deposit or cause to be deposited all revenues derived from E-ZPass transactions into the account set forth in Exhibit C, in accordance with the terms of this Agreement.

**ARTICLE 5 – TERM**

**Section 5.1 – Term.** The term of this Agreement will commence upon the Agreement Date and will terminate on that date which is the earlier to occur of the following:

(a) June 30, 2013, subject to extension by VDOT pursuant to the Annual Extension of the Electronic Toll Collection Agreement, the form of which is attached hereto as Exhibit D, for successive one year extensions of the term;

(b) the date on which this Agreement is terminated by either party, having given 90 days prior written notice; or
(c) the date this Agreement is terminated in accordance with Article 12.

Section 5.2. – Continuity of ETC Services. In order to insure continuity of ETC Services to the Participant, VDOT agrees that if the ETC Services Agreement will for any reason be terminated, or is materially changed or renegotiated, VDOT will (i) make a good faith attempt to give the Participant the opportunity to obtain ETC Services from the current ETC Servicer or a substitute Servicer engaged by VDOT, as appropriate, under terms substantially the same as those set forth in the ETC Services Agreement and this Agreement pursuant to an amendment to this Agreement or a separate agreement, and (ii) in the case where VDOT is performing the ETC Services, make ETC Services available to the Participant under terms substantially the same as those set forth in the ETC Services Agreement and this Agreement.

ARTICLE 6 – OPERATIONS

Section 6.1 – Standard Operational Procedures. VDOT Standard Operating Procedures for ETC Services are attached hereto as Exhibit E (the “Standard Operating Procedures”). The Participant may establish and operate a CSC independently of VDOT and in such a case the Participant agrees to operate such an independent CSC in compliance with the VDOT Standard Operating Procedures.

Section 6.2 – Changes in Operational Procedures. Any anticipated changes that materially affect operating procedures will be presented and discussed at liaison meetings. VDOT will, in good faith cooperation, try to accommodate changes proposed by the Participant. However, VDOT has sole approval authority to amend operational procedures.

ARTICLE 7 – RESPONSIBILITIES OF VDOT

Section 7.1 – Generally. VDOT will use commercially reasonable efforts to cause the ETC Servicer to perform its duties and obligations in accordance with the ETC Servicer Agreement and the VDOT Standard Operating Procedures. If the Participant gives VDOT a written notice stating that the ETC Servicer is not performing its duties and obligations in accordance with the ETC Servicer Agreement or the VDOT Standard Operating Procedures, and specifying the reasons therefore, VDOT will promptly remedy the deficiency (including taking any remedial action available pursuant to the ETC Servicer Agreement) or give the ETC Servicer notice to such effect and request appropriate action. VDOT will include the Participant in all decisions relating to any such situation. The parties acknowledge that it is not necessary for Participant to be a party to the ETC Servicer Agreement, provided that VDOT will be obligated to provide all ETC Services pursuant to this Agreement.

Section 7.2 – Notices. VDOT will promptly notify the Participant of all changes in ETC Services that are anticipated to materially affect Participant’s operations, including with respect to E-ZPass and the E-ZPass Reciprocity Agreement.
ARTICLE 8 – RESPONSIBILITIES OF PARTICIPANT

Section 8.1 – Generally. The Participant will use commercially reasonable efforts to maintain its ETC System to perform in accordance with the VDOT Standard Operating Procedures. If VDOT gives the Participant a written notice stating that its ETC System is not operating in accordance with approved operating procedures, and specifying the reasons, the Participant will promptly initiate appropriate corrective action. The Participant will include VDOT in all decisions relating to any such situation. The Participant will take no actions that violate or affect any of the terms of the E-ZPass Reciprocity Agreement that is attached and incorporated as part of this Agreement.

Section 8.2 – Toll Rate Changes. The Participant is exclusively authorized to make and be responsible for any toll rate changes at the Facility in accordance with applicable law and a Comprehensive Agreement, if any. The Participant will communicate any toll rate changes to VDOT and the ETC Servicer in accordance with a Comprehensive Agreement, if any, or if the Participant has not entered into a Comprehensive Agreement, at least fifteen (15) business days prior to implementation to allow for modifications to the ETC systems and related charges and modifications.

Section 8.3 – Notices. The Participant will notify VDOT of all changes in its ETC Systems that are anticipated to materially affect VDOT and/or ETC operations.

ARTICLE 9 – MARKETING

Section 9.1 – Marketing. VDOT and the Participant will coordinate marketing for the ETC System of toll collections. VDOT and the Participant will mutually determine a marketing plan. VDOT will, in good faith cooperation, include the Participant in its marketing efforts. However, either party may implement, at its own cost, supplemental marketing efforts for the Facility which are in addition to those provided by the mutually agreed upon marketing plan. The Participant will be provided usage of, and is hereby granted, subject to the provisions of a Comprehensive Agreement, a license to use, the term “E-ZPass” and the “E-ZPass” logos at no charge for operational and marketing purposes and VDOT represents and covenants that it has lawful authority to grant such license; provided that VDOT will retain the right of prior approval of any such use, such approval not to be unreasonably withheld, conditioned or delayed.

ARTICLE 10 – VIRGINIA TOLL FACILITIES GROUP; LIAISON; MEETINGS

Section 10.1 - Virginia Toll Facilities Group.

(a) Each of VDOT and the Participant will designate a person and the Participant will also designate an alternate whose responsibility will be to meet periodically with the Virginia Toll Facilities Group in order to coordinate areas of mutual concern and interest to the ETC Systems for both the Participant and VDOT, including the CSCs.

(b) The primary purpose of Virginia Toll Facilities Group meetings will be to discuss issues related to the provision of ETC Services, other issues of mutual interest to the Virginia
Toll Facilities Group and VDOT’s ETC budget and, if applicable, the selection and performance of the ETC Servicer. VDOT will be responsible for coordinating the meetings, which will be held not less than quarterly.

(c) The Virginia Toll Facilities Group will oversee the implementation and performance of ETC Systems and will have the responsibility for advising VDOT and the Other Participants with respect to ETC Systems and their performance but will be an advisory body only that may not bind or commit either VDOT, the Participant or any Other Participant except by duly authorized express delegation by either VDOT, the Participant or any Other Participant for such purpose. VDOT is not obligated to implement any recommendation of the Virginia Toll Facilities Group.

ARTICLE 11 - DISPUTE RESOLUTION

Section 11.1 – Dispute Resolution Generally. VDOT and the Participant will each exercise their best efforts to mutually resolve any dispute that may arise between them through good faith negotiations between the Authorized VDOT Representative and Authorized Participant Representative.

Section 11.2 – Dispute Resolution Pursuant to a Comprehensive Agreement. If VDOT and the Participant have entered into a Comprehensive Agreement pursuant to the Virginia Public-Private Transportation Act which requires their respective entry into this Agreement, then the provisions of Section 11.1 shall not apply and the parties agree to resolve any disputes which arise between them under this Agreement pursuant to the dispute resolution provisions of such Comprehensive Agreement.

ARTICLE 12 - DEFAULT

Section 12.1 – Events of Default; Cure; Termination.

(a) A failure by either VDOT or Participant to fulfill their respective material responsibilities and obligations set forth herein will give rise to an event of default, respectively. Following the provision of notice of default by the non-defaulting party to the defaulting party, and the failure to cure the event of default within the period agreed upon pursuant to Section 12.1(b), the Agreement may be terminated in accordance with Section 12.1(c).

(b) If an event of default occurs pursuant to Section 12.1(a), the defaulting party shall have 60 days to cure such default; provided, however, that the 60-day cure period may be extended by mutual agreement.

(c) Following expiration of the cure period, unless such cure period is extended by mutual agreement, the non-defaulting party will have the right to terminate this Agreement by notice thereof to the defaulting party.

ARTICLE 13 - MISCELLANEOUS

Section 13.1 – Waivers, Modifications and Amendments. No waiver, modification, or amendment of any term, condition or provision of this Agreement will be valid or of any force
or effect unless made in writing and signed by both VDOT and the Participant. The effect of any such change will be limited to the extent specified and agreed to by VDOT and the Participant, as evidenced by signatures of duly appointed officers of each of the parties.

**Section 13.2 – Captions.** Captions, headings, cover pages and tables of contents contained in this Agreement are inserted for convenience of reference only and in no way define, limit or prescribe the scope, intent or meaning of any provisions of this Agreement. All appendices, exhibits, or schedules attached hereto are hereby incorporated herein and made a part of this Agreement.

**Section 13.3 – Notices.** All notices will be in writing and will be delivered personally, by telecopy, or by registered or certified mail, return receipt requested, addressed as follows:

<table>
<thead>
<tr>
<th>Participant Mailing Address</th>
<th>VDOT Mailing Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>95 Express Lanes LLC</td>
<td>Virginia Department of Transportation</td>
</tr>
<tr>
<td>6440 General Green Way</td>
<td>1401 East Broad Street</td>
</tr>
<tr>
<td>Alexandria, Virginia 22312</td>
<td>Richmond, Virginia 23219</td>
</tr>
<tr>
<td>Attention: President</td>
<td>Attention: Commissioner of Highways</td>
</tr>
<tr>
<td>Telecopier: 571-419-6101</td>
<td>Telecopier: 804-780-6250</td>
</tr>
</tbody>
</table>

**Section 13.4 - Entire Agreement.** This Agreement constitutes the entire agreement between VDOT and the Participant concerning the subject matter hereof and supersedes all prior negotiations, representations, and agreements about them, either oral or written; provided, however that the provisions of a Comprehensive Agreement, if any, shall prevail in the event such provisions conflict with the terms of this Agreement.

**Section 13.5 - Force Majeure/Emergency.** In case by reason of force majeure, either party will be rendered unable wholly or in part to carry out its obligations under this Agreement, then, provided such party will give notice and full particulars of such force majeure in writing to the other within a reasonable time after occurrence of the event or cause relied on, the obligations of such party so far as they are affected by such force majeure, will be suspended during the continuance of the inability then claimed, which will include a reasonable time for the removal of the effect thereof, and such party will endeavor to remove or overcome such inability with all reasonable dispatch. Any time period specified herein for the performance by such party of an obligation will be appropriately adjusted and extended without the necessity for any amendment to this Agreement if a force majeure event occurs.

**Section 13.6 – Assignment.** Participant may not assign its rights and obligations under this Agreement except with the prior written consent of VDOT.

**Section 13.7 – Governing Law and Venue.** This Agreement shall be governed and construed in accordance with the laws of the Commonwealth of Virginia. All litigation between the parties arising out of or pertaining to this Agreement or its breach will be filed, heard and
decided in the Circuit Court for the City of Richmond, Virginia, Division I, which will have exclusive jurisdiction and venue.

Section 13.8 - Counterparts. This Agreement may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

[Signature Page Follows]
IN WITNESS THEREOF, this Agreement has been entered into as of the first date set forth above, by the duly authorized officers of the parties hereto.

PARTICIPANT

By: __________________________________
Name: ________________________________
Title: ________________________________

VIRGINIA DEPARTMENT OF TRANSPORTATION

By: __________________________________
Name: Laura Farmer
Title: Director of Financial Planning

[Signature Page to Electronic Toll Collection Agreement]
Exhibit A

E-ZPass Reciprocity Agreement
Exhibit B

VDOT E-ZPass Fees

For Fiscal Year 2013, the processing fee component of the VDOT E-ZPass Fees will be 1.808% of the revenue processed for each individual facility.

A calculation of the estimated baseline operating costs component of the VDOT E-ZPass Fees and the adjustment thereto is attached hereto as follows:
### Exhibit B - VDOT E-Zpass Fees and Adjustments

#### Operating Cost Component

<table>
<thead>
<tr>
<th></th>
<th>Fiscal Year 2013</th>
<th>Fiscal Year 2014</th>
<th>Fiscal Year 2015</th>
<th>Fiscal Year 2016</th>
<th>Fiscal Year 2017</th>
<th>Total</th>
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<tbody>
<tr>
<td>Total Estimated Costs for Operating the statewide ETC System (A)</td>
<td>$11,395,593</td>
<td>$11,399,164</td>
<td>$12,023,028</td>
<td>$12,887,487</td>
<td>$13,033,116</td>
<td>$61,659,288</td>
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<tr>
<td>Total Estimated Revenue collected from customer maintenance fees and other miscellaneous fees (B)</td>
<td>$1,537,871</td>
<td>$4,467,536</td>
<td>$6,396,343</td>
<td>$7,844,728</td>
<td>$9,108,540</td>
<td>$32,364,370 (A-B)</td>
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<tr>
<td>Costs Remaining</td>
<td>$9,857,722</td>
<td>$6,931,628</td>
<td>$5,889,682</td>
<td>$5,982,199</td>
<td>$4,874,587</td>
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<tr>
<td>Estimated ETC Transactions for all participants (C)</td>
<td>153,403,000</td>
<td>182,107,000</td>
<td>205,916,000</td>
<td>211,912,000</td>
<td>211,410,000</td>
<td>965,808,000 (C)</td>
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<td>Baseline Operating Cost Adjustment (Z)</td>
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**Operating Cost Component of E-Zpass Fee $0.0335 \((A-B)/(A-B+C)\)**

#### Revenue Summary

<table>
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<tr>
<th>Revenue anticipated from other revenues/fees</th>
<th>Fiscal Year 2013</th>
<th>Fiscal Year 2014</th>
<th>Fiscal Year 2015</th>
<th>Fiscal Year 2016</th>
<th>Fiscal Year 2017</th>
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<tr>
<td>Transaction Fee</td>
<td>$1,537,871</td>
<td>$4,467,536</td>
<td>$6,396,343</td>
<td>$7,844,728</td>
<td>$9,108,540</td>
<td>$32,364,370 (A-B)</td>
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<td><strong>TOTAL</strong></td>
<td>$6,078,428</td>
<td>$10,509,949</td>
<td>$13,169,599</td>
<td>$14,945,931</td>
<td>$16,925,462</td>
<td>$61,659,385 (C)</td>
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#### Adjustment to the estimated baseline operating costs component (Sample only)

| Fiscal Year 1 completed                      |                  |                  |                  |                  |                  |           |
| Actual Costs (Sample only)                  | $15,000,000      |                  |                  |                  |                  |           |
| **Total Estimated Costs for Operating the statewide ETC System (A)** | $11,395,593      |                  |                  |                  |                  |           |

### Revenue

<table>
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<tr>
<th>Estimated ETC Transactions for all participants (C)</th>
<th>Fiscal Year 2013</th>
<th>Fiscal Year 2014</th>
<th>Fiscal Year 2015</th>
<th>Fiscal Year 2016</th>
<th>Fiscal Year 2017</th>
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<tr>
<td>Operating Cost Component Revenue</td>
<td>$5,140,557</td>
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<tr>
<td>Transactions</td>
<td>153,403,000</td>
<td>182,107,000</td>
<td>205,916,000</td>
<td>211,912,000</td>
<td>211,410,000</td>
<td>965,808,000</td>
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<td>Operating Cost Component Revenue</td>
<td>$5,140,557</td>
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<td>Baseline operating costs adjustment (Z)</td>
<td>$450,252</td>
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DMEAST #14040298 v12

K-18
Exhibit C

Account Information

Bank:

Account Name:

Account No.

Re:

* If the Facility is not in operation, the Participant agrees to provide to the Department the account information in this Exhibit C within 30 days prior to the planned commencement of tolling on the Facility.
This ANNUAL EXTENSION OF THE ELECTRONIC TOLL COLLECTION AGREEMENT (this “FY 20[• ] Extension Agreement”) is made and entered into this [ • ] day of [ • ] 20[ • ], by and between the VIRGINIA DEPARTMENT OF TRANSPORTATION (“VDOT”) and 95 EXPRESS LANES LLC (the “Participant”). Terms used in this FY 20[ • ] Extension Agreement and not defined herein shall have the meaning given them in the ETC Agreement.

Recitals

WHEREAS, VDOT and Participant entered into an Electronic Toll Collection Agreement (the “ETC Agreement”) on July 31, 2012;

WHEREAS, the [ • ] Extension of the ETC Agreement was entered into on [ • ] and ends on [ • ]; and

WHEREAS, Article 5 of the ETC Agreement provides that it may be renewed for successive one year extensions.

Agreement

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, VDOT and the Participant hereby agree as follows:

Section 1.01 Extension Period. The term of the ETC Agreement shall be extended for an additional one-year period commencing July 1, 20[ • ] (the “Effective Date”) and ending June 30, 20[ • ] (the “Extension Period”), subject to extension or earlier termination as provided in the ETC Agreement.

Section 2.01 VDOT E-ZPass Fees.

(a) The VDOT E-ZPass Fees for the Extension Period are calculated and set forth in Exhibit A hereto and shall replace the VDOT E-ZPass Fees prior to the Effective Date.

Section 3.01 Ratification of ETC Agreement. Except as expressly modified by a prior extension and this FY 20[ • ] Extension Agreement, all of the terms and provisions of the ETC Agreement and subsequent extension agreements are hereby ratified and confirmed and shall remain in full force and effect.

Section 4.01 Counterparts. This FY 20[ • ] Extension Agreement may be executed in any number of counterparts, each of which shall be an original and all of which together shall constitute but one and the same instrument.

[Signature Page Follows]
IN WITNESS THEREOF, this FY 20[ • ] Extension Agreement has been entered into as of the first date set forth above, by the duly authorized officers of the parties hereto.

PARTICIPANT

By: __________________________________
Name: ________________________________
Title: ________________________________

VIRGINIA DEPARTMENT OF TRANSPORTATION

By: __________________________________
Name: ________________________________
Title: ________________________________
Exhibit A to FY2012 Extension Agreement

VDOT E-ZPass Fees for the Extension Period will be ____% of the revenue processed from each individual facility.
Exhibit E

VDOT Standard Operating Procedures for ETC Services
Statewide Toll Customer Service Center
RFP# WLP-100
CSC Detailed Operations Manual

Version 1

Faneuil, Inc.
2 Eaton Street, Suite 1002
Hampton, Virginia 23669

May 2010

Document No. WLP-100-002
# Approvals

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<th>Organization Responsibility</th>
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<td>IBI Project Manager</td>
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<td>Program Director, VDOT EZPass</td>
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1. INTRODUCTION

The Virginia Department of Transportation has a contractual relationship with Faneuil Inc. to provide electronic toll collection (ETC) services and to operate the E-ZPass Virginia Customer Service Center (CSC) locations in Clifton Forge, Richmond, Gloucester Point, and Northern Virginia. This document provides a detailed overview of the operational procedures and instructions for all routine and non-routine day-to-day tasks handled by the CSC staff including:

- Background information concerning toll facilities, IAG agreements and interoperability, and the violation program
- Administrative policies regarding system access and personnel staffing
- CSC operational procedures
- Financial department procedures
- Inventory and mail room procedures
- Violations processing

The policies and procedures presented in this manual are a compilation of VDOT preferences and requirements along with Faneuil’s experience. The CSC management staff is responsible for ensuring the procedures in this document are followed according to the policies given by VDOT. As necessary, CSC staff provides updates and descriptions of processes to add to this document.

**E-ZPass Virginia Program Overview**

The E-ZPass Virginia system allows customers to pay tolls electronically via a vehicle-mounted radio frequency identification, or RFID, device called a transponder or tag. The tag interacts with equipment in E-ZPass Virginia lanes. The radio signal-initiated transaction starts the process by automatically deducting the toll amount from the customer’s E-ZPass Virginia account. See Table 1 for account types.

<table>
<thead>
<tr>
<th>ACCOUNT TYPE</th>
<th>DESCRIPTION</th>
<th>REPLENISHMENT OPTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>Individual accounts are always pre-paid and typically have an individual (not a company or corporation) on record as financially responsible for the account. If the customer prefers, an individual may open an individual account with a company name (in the last name field) for tax purposes, roadway discounts, or other customer-preference reasons. Corporate credit cards are acceptable. The account is automatically replenished (credit card or ACH). This is required for any account with 5 or more transponders.</td>
<td>Manual replenishment (cash, check, money order, travelers check, credit card)</td>
</tr>
<tr>
<td>ACCOUNT TYPE</td>
<td>DESCRIPTION</td>
<td>REPLENISHMENT OPTIONS</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>Individual</td>
<td>account holder receives a quarterly statement at no additional charge. Individual customers include daily commuters, business travelers, or recreational and other occasional drivers. Vehicles are typically motorcycles or cars, SUVs, vans, and trucks with two axles, not exceeding 7,000 pounds. Account is typically in a person’s name.</td>
<td>Automatic replenishment (credit card and ACH). This is required for any account with 5 or more transponders. Manual replenishment (cash, check, money order, travelers check, credit card)</td>
</tr>
<tr>
<td>Commercial</td>
<td>Commercial accounts are always pre-paid and typically have a company or corporation on record as financially responsible for the account. In certain instances, the CSC may open a commercial account in an individual’s name, typically because the individual opening the account is registering a commercial vehicle. The account holder receives a quarterly statement at no charge. Commercial customers include trucking companies, private transit companies, express delivery companies, taxicab and livery services, and other small businesses with a fleet of vehicles using toll roadways. Includes all classes of vehicles—two-axle as well as vehicles that exceed 7,000 pounds and have more than two axles. Account is typically in a business’ name.</td>
<td></td>
</tr>
</tbody>
</table>

## A Relations ip

The E-ZPass Virginia system is a member of the Interagency Group (IAG), a collaboration of ETC agencies and their roadways. Reciprocity agreements among the members enable E-ZPass customers to use their home agency transponders to travel on other agencies’ roadways.

*Home agency* refers to the agency where a customer established his E-ZPass account. For example, VDOT is the home agency for customers who established their E-ZPass Virginia account through the main or remote VDOT CSC locations. *Away agency* refers to any other agency that honors E-ZPass Virginia as a toll collection option; currently, this includes Delaware, Illinois, Indiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and West Virginia. Figure 1.1 shows the away agency locations.

All agencies have the opportunity to participate in meetings about E-ZPass policies on a regular basis. If an issue arises that VDOT needs to address Faneuil will assist in presenting this to the IAG.
Ohio is the newest member of the E-ZPass Interagency Group, joining in October of 2009.

ass Virginia facilities

Table 1.2 lists the VDOT E-ZPass Virginia CSC facilities and their locations.

<table>
<thead>
<tr>
<th>A</th>
<th>O</th>
<th>A</th>
<th>O</th>
<th>S</th>
</tr>
</thead>
<tbody>
<tr>
<td>ort ern Virginia</td>
<td>610 Herndon Parkway, Suite 900 Herndon, VA 20170</td>
<td>Walk-in services, including transponder distribution and account management. Call center overflow.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ric mon</td>
<td>Midlothian Market Shopping Center 175 Wadsworth Dr. Richmond, VA 23236</td>
<td>Walk-in services, including transponder distribution and account management. Call center overflow.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>oleman</td>
<td>1811 George Washington Memorial Hwy Gloucester Point, VA 23062</td>
<td>Walk-in services, including transponder distribution and account management. Call</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The hours of operation for each facility are listed below:

- **Northern Virginia**: 8:00 a.m. to 7:00 p.m. Monday through Friday, closed Saturdays
- **Richmond**: 8:00 a.m. to 6:00 p.m. Monday through Friday, closed Saturdays
- **Coleman**: 8:00 a.m. to 6:00 p.m. Mondays, 9:00 a.m. to 6:00 p.m. Tuesdays and Wednesdays, 8:00 a.m. to 5:00 p.m. Thursdays and Fridays, closed Saturdays
- **Clifton Forge**: 7:00 a.m. to 7:00 p.m. Monday through Friday, closed Saturdays

*Any potential changes to the hours of operation are approved by VDOT before implementation.*

The table below lists the VDOT CSC holidays and dates.

<table>
<thead>
<tr>
<th>Holiday</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Year’s Day</td>
<td>January 1</td>
</tr>
<tr>
<td>Memorial Day</td>
<td>Last Monday in May</td>
</tr>
<tr>
<td>Independence Day</td>
<td>July 4</td>
</tr>
<tr>
<td>Labor Day</td>
<td>First Monday in September</td>
</tr>
<tr>
<td>Thanksgiving Day</td>
<td>Fourth Thursday in November</td>
</tr>
<tr>
<td>Christmas Day</td>
<td>December 25</td>
</tr>
</tbody>
</table>

### 2. ADMINISTRATION AND PERSONNEL POLICIES

**Administrative Policies**

This section describes administrative and personnel policies, including system and facility access.
2.1.1. User Identification and Access on the Network

This section is intended for E-ZPass Virginia operations staff for control of user identification (ID) on, and access to, the ST_local network.

2.1.2. Usage and Access

The information technology staff monitors the central host computer system for the Customer Service Center (CSC) application and Violation Processing System (VPS) and has access to the functions described here. The system administrator must revise and re-release information for this section for other employees to access the functions.

User IDs are issued at the domain controller console which, for the ST_local domain, is the STPRINT domain controller. This system is located in the server room in the Clifton Forge service center.

Note: To perform this procedure the user must log in to the console with an account in the domain administrators access group.

- To issue a user ID
  1. Login or break screen lock using any domain administrator account.
  2. Go to Start/All Programs/Administrative Tools/Active Directory Users and Computers to open the Active Directory Users and Computers applications
  3. Expand the Sites organizational unit and select the relevant site (Clifton Forge, Richmond, Northern Virginia, and Coleman Bridge).
  4. Expand the site and click on the Users organizational unit.
  5. Right click in the Users organizational unit and select New/User. Type a character string in the User Logon Name field. This is the user ID that the employee uses at each login. Use the person’s first initial, last name.
  6. Type a name in the Full Name field. This is the user’s full legal name.
  7. Type a character string in the Password field. This is the password the employee uses to log in to his first user session. The initial password must contain at least seven characters preferably with random letters, numbers, and optional punctuation as specified in the Password Policy. Retype the same string into the Confirm Password field. Remember or record this string to give to the new user.
  8. Ensure that the checkbox User Must Change Password ... is checked.
  9. In familiarizing a new staff member, give him his user ID and initial password and assist him in logging in and choosing and new password
Note: To reset the password for an existing user, contact the IT (Information Technology) staff.

2.1.3. Password Security Policy

This policy provides information about access to the CSC system domain and data as required for E-ZPass Virginia purposes, and to limit access to authorized users.

This policy applies to users of CSC and systems connected to the network at all of the E-ZPass Virginia facilities.

Users of the E-ZPass Virginia system are issued user IDs as applicable for access to the Windows ST Domain, the CSCWinClient Application and the Forté® VPS Application.

Passwords expire as follows and must conform to the standard set forth in this policy:

- Windows ST Domain: 30 days
- CSCWinClient Application: 45 days
- Forte VPS Application: 45 days

Passwords for the Windows ST Domain must contain at least seven characters. Passwords are a combination of lower-case letters, at least one capital letter, and one numeral. Punctuation characters—such as an option and are encouraged, but the first and last characters must not be punctuation, and the characters / and are not allowed. The user is locked out of the system after three failed login attempts.

Password requirements and restrictions for the CSC and VPS applications are detailed in Chapter 3 and Chapter 6 respectively.

Operations managers watch for evidence of mishandled passwords and change any password found to be vulnerable. All personnel are responsible for reporting violations of this policy to any member of CSC management. Personnel who place systems security at risk by violating this policy are subject to disciplinary action, up to and including dismissal.

System utages and elp Des

In the event a system outage occurs, authorized management and/or supervisory personnel notify the Information Technology department of the issue in detail. Once reported, Figure 2.1 diagrams the communication flow until the issue(s) is/are resolved:
2.2.1. On-Call I.T. Support

The on-call time schedule consists of the time between 4pm and 7am Monday through Friday. On-call staff members rotate and a documented schedule will be available to display who is on-call for each day. The staff member identified as “on-call” will also be available during weekends for system/network monitoring.

2.2.1.1. Examples of Issues in Which On-Call I.T. Support Would be Needed

- CSR cannot access necessary applications, i.e., Echopass, CSCWinClient, or Forte VPS
- Customer Service or Violation applications are not responding
- Call center is not receiving inbound phone calls
- Internet is down
- E-ZPass Virginia website is reported as being down
- Electricity in any of the centers goes out for an extended period

2.2.1.2. RESOLUTION AND COMMUNICATION

Once any issue has been reported and verified by a supervisor, a help-desk ticket is placed at the following website: [http://172.16.200.151/helpdesk](http://172.16.200.151/helpdesk). Responsible I.T. staff will be accountable for contacting the Supervisor back within 15 minutes via phone,
email or the issues page above. Detailed information is required to ascertain what the issue is. A cell phone or office phone number is also required. In the event that the internet is down or there are network issues preventing access to the system issue page, the on-call number is to be used explicitly. On-call staff are responsible for keeping Supervisors apprised of the situation all issues has been resolved. The on-call number is 540-862-8646

2.2.2. Help Desk

Help Desk support is designed to support minor, common technical issues that affect one person or a small segment of the workforce. Examples of these types of issues include:

- Password resets
- Desktop issues
- Phone or application issues (that are only affecting one or few)

Help desk issues are entered and tracked on the following website: http://172.16.200.151/helpdesk. This web application allows the user to enter, edit, and update the ticket information.

Each ticket is assigned to helpdesk personnel and all changes in the ticket status trigger automatic emails to the assigned IT personnel and the user who entered the ticket

Building Security and Access Controls

The security for the CSC facilities has several components. These components link to a central access control system located in the main CSC located in Clifton Forge. The access control system controls the following components:

- Video surveillance system
- Keycard access and card reader points
- Intrusion detection system
- Emergency services contact
2.3.1. Video Surveillance

The video surveillance system are housed locally at each center can only be accessed from that location. The points of surveillance are strategically placed to capture activity at access points to the facility, money handling areas, and other significant processing areas.

Remote image viewing is available. In addition, for 30 days, the system retains recorded activities. A record of the video information is archived.

2.3.2. Access Control

Each facility, except for the Richmond Retail Center, has an access control system managed from the Clifton Forge location. This system serves two purposes—providing facility access for authorized personnel and providing alarms for intrusions, fire, or other emergencies.

To facilitate the management of proper access to all the CSC facilities, each facility uses a keycard access system that connects to a central monitoring system. The system administrator or other authorized manager sets up the keycards. Each keycard is assigned to a specific employee. The employee information is entered and a detail record of the employee is created for access privileges. For example, the staff member may access the general building but not the system room.

The system administrator will manage the database of all authorized personnel for each person and level of access. This information is also archived for future reference.

2.3.2.1. ACCESS CONTROL – RICHMOND RETAIL CENTER

Authorized personnel are assigned a key to the front door of the retail center and the code to disarm the ADT alarm system. Currently, the authorized staff exclusively includes the Retail Center Supervisor, the Retail Center CSR Lead, and the Retail Center Senior CSR. The rear door to the Richmond Retail Center can only be opened from the inside.

2.3.3. Intrusion Detection

Intrusion detection is provided as part of the access control system. In the event of an access point breach, the system automatically contacts the security vendor and the facility point of contact to advise that there was an incident. In addition to
contacting the security vendor, the system also contacts the appropriate law enforcement agency.

2.3.4. **Emergency Services Contact**

In the event of an emergency during business hours or if a facility has a fire, carbon monoxide detected, or a medical emergency, the staff can connect to local emergency vendors through the access control system or by calling 911, whichever is faster.

During non-business hours, facility access control automatically notifies the security vendor and appropriate emergency services. The security vendor calls the point of contact for the location.

**Security System Testing**

2.4.1. **Alarm Testing**

The operations assistant tests the building alarm system and panic buttons at all stations quarterly and then logs the results. The log is available in the manager’s office.

Defective or delayed alarm functions must be reported the same day.

2.4.2. **Security System Checks**

Each CSC facility performs security system checks monthly to ensure both safety and operability of the security system. Each month, a manager on the access list must call the security system vendor (currently ADT), provide the necessary access information—such as name and password—and complete the following steps.

**To complete a security system check**

1. Ensure the building is empty. If employees remain, instruct them to remain motionless for approximately 10 seconds.

2. Ask the security vendor representative to place the security system in test mode. Unless the sensors detect motion, all points will reset and the manager can conduct the test.

3. Trigger each alarm by performing the following actions:
   1.) Open all doors which have sensors.
   2.) Wave an object in the motion detector’s range to trip it.
   3.) Tap the glass or make a loud noise in the vicinity of the alarm to trip the glass break alarms.
   4.) Hold the burglary/panic alarm button for 5 seconds to trip it.
After performing the test, the conducting manager must call the security vendor to place the system in normal mode and to review alarm performance. Specific malfunctions must be diagnosed and repaired as soon as possible by arranging a site visit.

**Personnel Security**

In order to ensure a safe working environment for all staff, CSC management has implemented the following personnel procedures in accordance with Faneuil company policies.

2.5.1. **Substance Abuse Policy for the Drug-Free, Violence-Free Workplace**

**Drug Free or place**

In response to federal requirements for drug-free workplaces, and in keeping with Faneuil concern for the health and safety of its work force, Faneuil has instituted the following Drug-Free Workplace Policy:

- This policy certifies Faneuil's intent to maintain a drug-free workplace. The first section describes the prohibitions of this policy such as the manufacture, distribution, sale, possession or use of a controlled substance in the workplace.
- In addition, this policy creates a Drug Awareness Program that provides information on the dangers of workplace drug use to all employees as well as information about available private and community treatment facilities.
- The last section of this policy lists the disciplinary actions that employees will face for any violation of Faneuil's Drug-Free Workplace Policy. Finally, an employee acknowledgement must be signed and dated by each employee who receives a copy of this policy.

The Drug-Free Workplace Act specifically requires Faneuil to notify each employee that, as a condition of employment, each employee must:

- Comply with Faneuil's Drug-Free Workplace Policy.
- Notify Faneuil of any conviction for drug-related offense committed in the workplace within three (3) days of conviction.
- Testing: Drug tests will be administered under the following conditions:
  - when an employee shows signs of impairment on the job;
  - after any accident or occurrence that results in an injury on the job as defined by the Occupational Safety and Health Administration;
  - after any vehicular accident when it appears that the employee might reasonably have avoided the accident or minimized the consequences, but did not do so;
at hiring time, when all new hires will be required to pass a pre-employment drug-screening test as a condition of employment; and

- random testing

Any employee who violates this company policy, including refusal to submit to drug testing, will be subject to disciplinary action including termination of employment.

**Prohibitions**

Faneuil's Drug-Free Workplace prohibits employees from engaging in any of the following activities:

- Use, possession, manufacture, distribution, dispensation or sale of illegal drugs on company premises or company business, in company supplied vehicles, or during working hours.

- Unauthorized use or possession, or any manufacture, distribution, dispensation or sale of a controlled substance on company premises or while on company business or while in company supplied vehicles.

- Storing in a locker, desk, automobile or other repository on company premises any controlled substances whose use is unauthorized.

- Being under the influence of a controlled substance on company premises or while on company business, or while in company supplied vehicles.

- Any possession, use, manufacture, distribution, dispensation or sale of illegal drugs off company premises that adversely affects the individual's work performance, their own or the safety of others at work, or Faneuil's regard or reputation in the community.

- Failure to adhere to the requirements of any drug treatment or counseling program in which the employee is enrolled.

- Failure to notify Faneuil of any conviction under criminal drug statutes for a workplace offense within three (3) days of the conviction;

- Refusal to sign a statement to abide by Faneuil's Drug-Free Workplace policy.

- Unauthorized Use of Prescribed Medicine. An employee undergoing prescribed medical treatment with a drug, which may alter their physical or mental ability, must report this treatment to Faneuil's HR Department. Human Resources will determine whether a temporary change in the employee's job assignment is warranted during the period of treatment.

2.5.2. Emergency Policies
In the event of a medical emergency, the CSC staff contacts the local emergency services by dialing 911 and asking for assistance. The staff member describes the situation and remains on the phone with the 911 operator until emergency service arrives at the scene.

In the case of any medical emergency, the operations staff writes up an account of the incident as soon as possible following the incident and files it with human resources.

In the event of a weather emergency, the staff has a call tree that facilitates the communication of any weather emergency that may affect the operation. The operations manager consults with VDOT in the event of a weather-related emergency that may affect one or more of the CSC locations.

Safety emergencies are emergencies that affect the facility where an urgent evacuation of a facility is necessary. This includes a fire or other immediate emergency.

In the event of a fire, the staff follows evacuations plans as described in the orientation program. The staff contacts the fire department when and where it is safe and as soon as possible.

Building evacuation diagrams are posted on walls throughout each service center. Fire drills are conducted on a quarterly basis to re-emphasize protocol for such situations.

2.5.3. Workplace Safety

Faneuil is committed to the safety of its employees and its property and equipment. To this end, we will utilize a safety program in our daily activities. Disregard of any company safety rule and regulation may result in disciplinary action including termination of employment.

It is necessary that Faneuil established safety rules and regulations be observed by all employees at all times. With regard to these rules, the following will be considered standard procedure for all employees.

All questions concerning the reason for doing something in a certain manner may be asked of any member of management at any time. The employee will inform the Human Resources Department in the event that a safety regulation is modified that may compromise an employee's safety.

Employees’ decisions will always be guided by Faneuil's commitment to safety. Should a hazardous situation or condition exist and a decision has to be made on safety or production, safety concerns will always take precedence over production.
It is the responsibility of each manager and supervisor to see that every employee at Faneuil is provided with safe working conditions, all safety regulations are observed and employees use good common sense to protect themselves as well as others. Management and supervisors will periodically inspect working conditions and may suspend all work activity until an unsafe condition is corrected.

The most important part of safety is the employee. It is the responsibility of each employee to abide by the safety rules; these rules are made for your protection. Employees are expected to report any personal injury immediately, however minor and all dangerous conditions and practices to the Human Resources department.

**Safety rules**

Besides the following listed safety rules, each employee will make himself familiar with the work place and check if there are any additional special safety rules in the designated work area.

- First aid supply kits are provided in the work area. It is the responsibility of the supervisors to see that the kits remain well stocked.
- Know where the fire extinguishers are located and how to use them.
- All defective materials or tools must be brought to the attention of the supervisor and not remain on the job.
- Practice good housekeeping. Keep work area clean and free from stumbling hazards, etc.
- No scuffling or horseplay on the job.
- Do not run within the work area.
- Do not allow raw material, finished goods or trash to be in aisles or stairways.
- Employees must be sure that their actions do not endanger other employees, or damage company or personal property.
- Keep guards and protective devices in place at all times.
- Do not attempt to operate special machinery or equipment without permission and instructions.
- Do not repair or adjust machinery while it is in operation and never oil moving parts except on equipment fitted with safeguards for this purpose.

**Reporting Injuries and Accidents**

Employees must advise management of all accidents, injuries or illnesses that occur while at work. All accidents, injuries or illnesses that occur while at work must be reported immediately no matter how slight they may appear.
Faneuil provides the proper forms for reporting job related accidents, injuries and illnesses. Failure to report these occurrences may be cause for disciplinary action.

In the event of a vehicular accident involving a company owned vehicle or while on company business, employees will report all information immediately to management. In no instance will responsibility for an accident be expressed to anyone until the proper person in Faneuil has been notified and permission has been obtained to make statements.

2.5.4. Corporate Vision

These values govern the manner in which Faneuil conducts all work.

mission

Our mission is to provide integrated customer management solutions that enable our clients to build profitable lifetime customer relationships and exceptional customer service. We accomplish this mission by focusing completely on the needs of our clients and their customers while developing core competencies to meet them.

vision

Our vision is to be a dynamic leader in diversified, innovative customer service solutions to clients worldwide.

values

Faneuil has established a set of core values that govern all of our internal and external relationships.

2.5.5. Equal Employment

Faneuil is built upon teamwork, equal opportunity and is committed to developing and implementing a program of nondiscrimination and affirmative action. Faneuil subscribes to the principles of an equal opportunity employer and will recruit, interview, hire, classify, train, promote, demote, discipline, transfer, terminate, and set rates of pay or other compensation on the basis of merit and qualification without regard to race, religion, creed, color, gender, age, national origin, disabled or Vietnam Era veteran status, pregnancy, ancestry, sexual orientation, or disability.

Any violations of Faneuil “Equal Employment Opportunity Policy” by an employee must be reported immediately to management. Further, management and supervisory personnel will be responsible for maintaining a work environment that is free of racial, sexual, or any other form of harassment.

Faneuil will cooperate with federal, state or local government agencies that have the responsibility to ensure our compliance with various laws relating to employment.
Management will furnish such reports, records and other matters as requested in order to foster the program of equal opportunity for all persons regardless of race, creed, religion, color, gender, age, national origin, disabled or Vietnam Era veteran status, pregnancy, ancestry, sexual orientation, or physical or mental handicap according to the policies stated in the previous paragraphs.

Management, individually and collectively, has the overall responsibility of carrying out Faneuil's Equal Employment Opportunity Policy in their respective work areas.

2.5.6. **Background Screening**

There may be times when it is necessary to screen and test an employee to determine what risks Faneuil may assume with employment of the individual. Screening and testing for security reasons and for drug or alcohol abuse may be required. Procedures such as psychological and medical laboratory tests will always be performed under the direction of a certified professional and according to the laws, which apply.

Personnel with a disability, which would affect their ability to take a particular test, shall advise Human Resources so that a suitable accommodation can be arranged. Medical documentation may be requested from the employee concerning a special request.

Candidates should not have any felony convictions within the past 7 years to be considered for employment. Convictions beyond the 7-year limitation will be assessed based upon the nature, severity and frequency of the offenses. Convictions for crimes of violence or involving theft or dishonesty (theft, fraud, etc.) may disqualify an applicant from consideration.

Candidates with misdemeanor convictions will be considered after review of each individual situation. Decisions will be made on factors including but not limited to:

- Frequency of offenses
- Position applied for versus convicted charge
- Time elapsed since most recent conviction

The E-ZPass Virginia Service Center will follow the policy and practices of Faneuil’s Human Resources department.

2.5.7. **Rules of Conduct**

Faneuil expects that all of its employees will conduct themselves with the pride and respect associated with their positions, their fellow employees, customers, suppliers and everyone else associated with Faneuil in one form or another. Employees will always use good judgment, discretion, and the highest standards of ethical conduct in carrying out Faneuil's business.
Failure to interact courteously and tactfully with managers, co-workers, customers, vendors or associates to the point that productivity or morale suffers may be grounds for termination.

2.5.8. Rest or Break Periods

All breaks are to be taken when scheduled. You will be considered tardy for leaving early or coming in late for your scheduled shift or taking a longer break than scheduled.

2.5.9. Information Security Policy

2.5.9.1. E-Z Pass Virginia Privacy Policy

The Virginia Department of Transportation (VDOT) respects the privacy of all customers who participate in the E-ZPass Virginia electronic toll collection (ETC) system, and VDOT intends to ensure and protect the privacy of all E-ZPass Virginia customers. This directive establishes a privacy policy and subsequent documentation of the guidelines and procedures for collecting, retaining, and releasing sensitive personal data and/or information that customers must provide to establish an E-ZPass Virginia ETC account and/or use the E-ZPass Virginia ETC system.

2.5.9.2. Policy

It is VDOT’s policy to collect and retain only essential E-ZPass Virginia customer information and/or personal data to properly conduct and record E-ZPass Virginia financial transactions. Also, personal data that E-ZPass Virginia customers provide to VDOT is not shared or released under any circumstances. Information that VDOT collects relative to individual E-ZPass Virginia customer usage, is only released to A) satisfy a bona fide court order/subpoena for information, B) assist authorized law enforcement officials/agencies in the conduct of criminal investigations, C) to the individual E-ZPass Virginia account owner(s), or D) to facilitate collection of unpaid tolls.

2.5.9.3. Conditions for Release of Information

VDOT releases E-ZPass Virginia customer personal information and/or data only under the following conditions:
• As directed by a bona fide court order or subpoena.
• In response to an authorized request by law enforcement officers and/or officials related to a specific toll violation and/or tollgate strike incident. In each instance, the requesting authority receives only the customer name, address, phone number, account status, and violation/incident specific toll transaction information.
• As requested by an E-ZPass Virginia account owner and/or co-owner.

2.5.9.4. Handing Media Contact

This section describes the policy and procedure for handling the media.

*CSRs do not make public comments on operations or any E-ZPass Virginia situations.* Any media (television, radio, newspaper, Internet) personnel who contact the CSC for information are referred directly to the CSC senior management.

2.5.9.5. Procedures for Release of Information

The following procedures strictly govern the release of any E-ZPass Virginia customer personal information and/or data by VDOT:

• Court order/subpoena: Upon receipt of a bona fide court order or subpoena for information, a copy of the subject court order/subpoena is made and kept on file. VDOT also records and documents all provided information.

• Requests made in person by law enforcement officers and/or officials at the CSC: Requests made in-person at the E-ZPass Virginia CSC must be made directly to the CSC manager. The CSC manager notifies VDOT of the request, obtains official identification (badge number) of the requesting officer/authority, and calls the respective enforcement agency to verify the badge number. After verifying, the CSC records and documents the official identification (badge number) and all provided information.

• Requests made in-person by law enforcement officers and/or officials at the VDOT Central Office: In-person requests at the VDOT Central Office must be made directly to the director of the innovative finance and revenue operations division or a designated assistant director. The director/assistant director obtains official identification (badge number) of the requesting officer/authority, and calls the respective enforcement agency to verify the badge number. After verifying, the director/assistant director records and documents the official identification (badge number) and all provided information.

• Requests made by law enforcement officers and/or officials while on duty (in lanes) at a toll facility: In this case, the officer calls the CSC and asks to speak with a manager. The CSC Manager contacts VDOT about the requested
information and receives authorization prior to giving out information. The CSC staff documents the request and the approval.

- E-ZPass Virginia account owners: Requests for information by individual E-ZPass Virginia account owners must be made in-person, and are honored only upon presentation of a legally recognized form of personal identification.

- Spouses of E-ZPass Virginia account owners: Account owner information is provided only to a spouse if a) it is a shared account, b) the spouse appears in person, and c) the spouse provides a legally recognized form of personal identification.

- Research-related requests: Individuals and/or organizations requesting E-ZPass Virginia information or data for research-related purposes are provided only applicable summary information. Under no circumstances shall personal or customer-specific information or data be disclosed.

- Investigations by non-law enforcement agencies and/or organizations: Requests for customer-specific information pursuant to investigations by non-law enforcement agencies and/or organizations is expressly disallowed and is not honored.

### 2.5.9.6. Documentation of Requests

Written requests in the form of Court Order, Subpoena or official request on law enforcement agency letterhead and copies of the information provided are retained in a file at the Customer Service Center.

The following list outlines the ways E-ZPass Virginia handles requests for information.

- All Requests for information must be directed to VDOT. VDOT advises E-ZPass Virginia how to proceed.

- VDOT determines what information to release and advises the CSC staff.

- At VDOT’s direction, the CSC staff forwards the information to VDOT or the requesting party.

This information remains on file for one year from date of release.

#### 2.5.10. Data Security

To protect property and ensure the security of customer information, all CSRs must follow these data security guidelines:

- Handle customer information in a manner consistent with the Privacy Policy. Forward all confidential or customer personal information to the appropriate location or dispose of the information properly in the shredder before leaving for the day.

- Always keep credit card receipts together and out of sight. Shred credit card receipts that contain account numbers.
Never leave cash or checks in the open. Always put cash and check payments in the
drawer when receiving them.

Never disclose computer passwords. Log in to Windows and the CSCWinClient system
at the beginning of the day and log out at the end of the day. Lock or log out of the
computer when leaving the desk. Press Ctrl+Alt+Delete to lock or log out.

Never leave assigned transponders unattended. During lunch and breaks, lock up or
return to inventory all transponders assigned. Return all transponders to inventory before
leaving for the day.

Staff members are personally responsible for all transponders assigned to them and any
financial transactions (cash, checks, credit/debit cards) processed during the workday.

2.5.11. Additional Personnel Policies

This section describes additional personnel policies.

2.5.11.1. Attendance Rules

In the daily production process at Faneuil the work passes from operation to
operation, each step contributing value added activities to the finished product. This
means that each job depends on the successful and timely completion of all other
jobs. Because of this fact, absenteeism is disruptive to all operations.

If one person is absent, this may cause others to work overtime in order to
accomplish work that is not completed by the absent person. Worse, a one-person
absence could cause other jobs to "catch up" or run out of work. In this case,
absenteeism does have an overall negative impact on Faneuil's production, resulting
in a loss of earnings or even the loss of customers.

Therefore, attendance is of vital importance, not only in relation to co-workers but
also with respect to the overall company. Providing high quality service for total
customer satisfaction does depend on commitment and attendance.

Note: Center Management may modify the level and enforcement of adherence to the
attendance policy in order to meet operational needs.

2.5.11.2. Time Clock Rules

Government regulations require that Faneuil keep an accurate record of hours
worked by employees. Employees are required to punch in when they report
to work and punch out when they leave. Employees must punch in no earlier
than five (5) minutes before their starting time and punch out no later than
fifteen (15) minutes after their scheduled shift has ended unless approved by management.

Employees who are not recording their working time on a time clock are required to keep track of their working hours on a departmental time card or time sheet which will be provided by the Human Resources Department.

2.5.11.3. **Dress Code**

Employees are expected to use their good judgment and common sense in presenting themselves as "appropriate" for their positions. Clothing, hairstyles or personal hygiene must not pose a safety hazard or create an unacceptable appearance.

Personal appearance, proper hygiene and appropriate attire are important to the work environment. Clients may gauge the quality of Faneuil by the attention Faneuil employees show to their personal appearance and attire. Employees are expected to report to work wearing clean clothing appropriate to their position.

A neat, well-groomed appearance is important to the employee, their fellow workers and to Faneuil's customers and suppliers. Faneuil does not object to male employees having reasonable long hair if it is groomed. Nor does it object to mustaches or beards if they are kept trimmed and do not hinder the employee's performance or safety on the job.

Business situations such as meetings with clients or customers or representing Faneuil require business attire. Men: Suits with ties and polished shoes with leather soles. Women: Suit, dress or matching skirt and blouse ensemble.

Normal working hours that do not require client meetings allow for a more relaxed and casual appearance with some minimum standards. Men: must wear shirts with collars and buttons, socks and no jeans or gym shoes. Women: dress appropriately observing the inappropriate attire below.

“Casual Day” occurs on Friday of each week. Faneuil may relax the “Casual Attire” standard above to allow jeans while still observing the inappropriate attire below.

Articles of clothing that either exposes too much of the employee, is in state of disrepair, contains obscene references or are too casual are considered to be unprofessional and may not be worn in a business environment. Such clothes can be considered harassing, offensive, or just too casual for the office.
Items of specific religious or cultural significance may be acceptable in the office provided they are being worn for such a purpose. Examples of unacceptable attire include:

- Tank tops, halter tops, or muscle shirts that expose the shoulders.
- Bare navels or transparent blouses.
- Obscene clothing adorned with foul language or images.
- Torn clothing or clothing with holes.
- Sweat pants, sweat suits, running shorts or "work out" clothes.
- Hats or headbands indoors.

2.5.12. Internet Use Policy

Company communications equipment such as telephones, computers, networks, and Internet access are important to our everyday operation and are provided to facilitate official company business. Employees must restrict their personal communications to emergency matters only.

The use of company communications equipment for personal calls, faxes, e-mails or other electronic communication is prohibited.

Offensive and or disruptive messages containing sexual, racial, or degrading commentary will not be tolerated and will be subject to disciplinary action.

2.5.13. Maintenance of the Workplace

The CSC operation strives to provide a clean and pleasant work environment. The responsibility for maintaining this environment is a joint one. All personnel must care for and maintain company property and facilities.

Consume meals in the break room. Remove food items from the refrigerator regularly.

The Grounds and Facilities Coordinator provides a clean working environment daily; however, everyone should leave the break room, work stations, and meeting rooms in a neat and orderly fashion after each use.
Clear workstations of daily work and leave desks clean and orderly at the close of each business day.

2.5.14. Personal Telephone Calls And Correspondence

The CSC’s main business is serving its customers, so it is important to keep the telephone lines free for customer calls.

The use of company telephone lines for personal calls is prohibited for CSRs. Routine personal calls may be made during personal time from the employee phone located in the break room. In case of an emergency, family members can contact the Call Center and ask the operator to locate you or your supervisor.

Cell phone usage during work hours is not permitted. Cell phones may be kept at employee work areas but must be placed on mute or vibrate. Cell phone calls may be made during lunch and break and before and after business hours. Supervisors or managers need to be advised if an emergency call is received via cell phone. Arrangements can then be made to allow a response to the emergency.

E-ZPass Virginia business addresses may not be used for personal mail.

2.5.15. Request for Time Off

For E-ZPass Virginia to successfully conduct business and serve customers, the staff must be reliable. Unplanned absences seriously hamper E-ZPass Virginia’s ability to meet service goals.

All time off must be requested from management via the Faneuil ETS Web Application. Time off requests need to be made two weeks prior to the absence date. Please see the Faneuil attendance policy for more details.

3. OPERATIONS PROCEDURES

3.1.1. Opening Procedures for CSC and Retail Customer Service Centers

The main E-ZPass Virginia Customer Service Center (CSC) opens at 6:30 a.m. to allow staff to enter the building and begin their workday. Each retail location has varying VDOT approved hours of operation,
• **To open the building**
  • A designated manager or supervisor uses a proximity card to unlock the door
  • The designated manager or supervisor will deactivate the alarm system
  • The building is now ready for employee access. They may access the building using their personal proximity cards.

### 3.1.2. Daily Preparations Call Center

• **To prepare for operations on a daily basis**
  1. A Lead CSR or Supervisor walks the facility to ensure systems are up and running and the staff is ready for the first call.
  2. A Lead CSR or Supervisor will stock work stations supplies as needed.
  3. A Lead CSR or Supervisor reviews the Echopass telephone system at 7:00 a.m. to ensure calls are coming in and are being distributed. The Lead CSR or Supervisor reports issues to the system administrator as needed.

### 3.1.3. Daily Preparations Retail Centers

The Retail Centers use specific start-of-day procedures to ensure accurate starting records and ensure successful proofing after funds are taken in during the day.

• **To prepare for the start of the day**
  1. The Lead CSR or Supervisor at the retail locations assign a specified amount of cash from the money vault (currently $200) for use during the business day. The Lead CSR or Supervisor counts the cash to ensure the start-of-day amount assigned is accurate.
  2. The Lead CSR or Supervisor opens the locked cabinet that holds the transponders for the walk-in counter. Here, a supply of working transponders is assigned to each retail center CSR.
  3. The transponder ranges and the specific CSR that they are assigned to are tracked for supervisor and inventory reference. Each CSR must return the inventory when their shift is finished. In addition to this, each box that is provided from the inventory staff includes a list of the transponder ranges. The CSR uses this log to note to which account the transponders are assigned.
  4. After the management staff provides the CSRs with their transponders, the CSRs carry them to their workstations, behind the front counter, for the remainder of their shift.
  5. The CSRs sign on to their workstations and log on to the CSC system.
3.1.4. Closing Procedures for CSC and Retail Centers

- To close the CSC
  1. The Lead CSR or Supervisor ensures that the lobby is clean and ready to open the following business day.
  2. The Lead CSR or Supervisor will lock entrance doors and attempt to open the lobby door to ensure that the manual lock is engaged. If locked manually, the door does not open.
  3. For the Retail locations, the Lead CSR or Supervisor changes the sign from “Open” to “Closed.”
  4. At the end of the day, the Lead CSR or supervisor will reconcile the cash. The specific assigned amount of cash used at the start of each business day ($200) is to be locked in the safe. Additional cash and checks are locked in the safe. The deposit is prepared the following business day and taken to the bank and deposited. The Coleman Service Center has an authorized company take the money to the bank for deposit.
  5. The Lead CSR or Supervisor collects the portable transponder tester and places it in the cashbox. The cashbox is then locked in the bottom portion of the safe.
  6. The Lead CSR or Supervisor conducts a final walkthrough of the premises to ensure that no employees or unauthorized persons remain in the office.
  7. Designated personnel arm the security system and exit the building.

Operations Center Close Procedures

This section describes the customer service center (CSC) software system and the procedures the call center and retail customer service representatives (CSRs) use.

3.2.1. CSC System

The CSC system employs user-friendly interface elements that allow for quick and easy access to multiple types of data. In addition, many screens allow the user to search for information in variety of ways, thereby retrieving all possible matches. The CSC software design uses various types of screens and activates “wizards” that walk a user through a series of decisions to simplify complex processes.

The design and functionality of the CSC system promotes near real-time communication between toll lane plazas and the CSC servers. Credit card data entered into the CSC system is used to make a real-time connection to the credit card providers, which will eliminate the use of external point of sale devices to process credit card transactions.

The CSC system is accessible from all CSR, Lead CSR, and Finance Clerks’ main workstations. Designed to support E-ZPass Virginia operations, the CSC system allows CSC personnel to enroll E-ZPass Virginia customers, maintain and service E-ZPass Virginia accounts, and fulfill E-ZPass Virginia transponder orders. Any edits made in the application by a user are attributed to that user in the database for audit purposes.
Table 3.1 provides an overview of the CSC system processes.

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</table>
| Enrollment  | Create/open E-ZPass Virginia accounts  
|             | Process customer payments  
|             | Send transponder orders to fulfillment |
| Account Maintenance | Update account records for customers including:  
|             | Change of address  
|             | Change of name  
|             | Change phone number  
|             | Add a vehicle  
|             | Change vehicle information  
|             | Process TRP requests  
|             | Change statement options  
|             | Change or update payment method information  
|             | Change account PIN  
|             | Add or change E-Mail address  
|             | Process requests in the ImageWorks system for the following: Lost/Stolen transponders, Found transponders, Disputed Toll Charges, Customer Complaints |
| Fulfillment | Control transponder inventory  
|             | Add transponder(s) to an account  
|             | Remove transponder(s) from an account  
|             | Receive, prepare, and disburse transponders to customers  
|             | In addition, provide upon request:  
|             | - Statements  
|             | - Dual Lock™ for transponder attachment  
|             | - Brochures  
|             | - Other information to support transponder purchases and installations |

### 3.2.2. Log-In Process

**To log in to the workstation**

1. Type the username and password when first logging on to the system at the Windows Login screen. This enables system access.
2. Log on to the CSC system using the correct username and password. After logging in, all CSR business applications are available.
3. Passwords to access the CSC application are at least eight (8) characters with at least one (1) capital letter and one (1) numeric character. Passwords must be changed every forty-five (45) days and cannot be changed to the password previously used. After four (4) failed login attempts, the user is locked out. Only System Administrators can unlock the user account once four (4) failed attempts have occurred.
**Telephone System**

At the start of every shift, the CSR logs in to the phone system. To do this, the CSR will log in to the Echopass Hosted Contact Center, which uses voice over internet protocol (IP) technology. With this technology, the CSR can use the application from the computer desktop. The log in procedure requires each user to log in to the Echocentral system with a login and password and then into the Echocontact 3 application with a login and password.

Figure 3.1 below shows the Echocontact 3 application screen that the CSR sees after logging in. The features are activated by cursor.

![Echocontact Application](image)

To begin using the Echocontact application, click on the red **Logged Out** button, changing it to a green **Logged In** button [see above]. This action also activates the red Not Ready button for use. When a user presses the red **Not Ready** button, it changes to a green **Ready** button. The user will begin receiving inbound customer phone calls. If a user needs to leave his/her desk or are unavailable for calls during breaks or meetings, he/she presses the green **Ready** button which changes the status to **Not Ready**. For lunches, the user must select “Lunch” from the options after right-clicking on the green **Ready** button. Then the user clicks the green **Logged In** button. This enables the system to bypass the user’s station until available again. To log out of Echocontact, the user presses the green **Ready** button and then the green **Logged In** button. To log out of the Echocentral system, the user presses the **icon** in the upper-right hand corner of the application.
3.3.1. CSR Call Management Guidelines

3.3.1.1. TELEPHONE CALL ANSWER TIME

On normal call days, all calls are answered within an average of 30 seconds. On days where the call volume is high, calls are answered within an average of 45 seconds.

The customer service manager monitors the daily activity to ensure this is a consistent practice.

3.3.1.2. TELEPHONE CALL ABANDON RATE

The targeted call abandon rate shall be no more than 4% of the total daily and monthly call load for the CSC. This includes all calls at least 30 seconds long terminated by the caller. These call abandonment rates are logged into the monthly report.

3.3.1.3. TELEPHONE CALL DURATION

The telephone CSR is expected to keep inbound customer calls to the CSC to an approximate average of 280 seconds per call to maximize availability. However, the needs of the caller and the resources of the CSR can dictate longer talk times for some calls.

3.3.2. IVR

The Interactive Voice Response (IVR) system answers all incoming calls first and provides the caller with the option to conduct business within the automated system. Several of the IVR options enable a caller to speak with a customer service representative (CSR), at which point the IVR transfers the call to the call center.

The CSC has an automatic call distributor (ACD) application. It receives IVR-transferred calls and routes them to the next available CSR.

During call center hours, the call remains in a queue until a CSR is available. If all CSR lines are busy, the caller immediately hears a message stating that the caller has reached the CSC and that the call is being routed to a customer service representative. The caller is asked to please wait and if all CSRs remain busy, he hears a series of helpful messages while waiting for a CSR.

To observe call center activity, supervisors have access to the Echoinsite display screen, a feature of the Echopass application. This screen shows call, group, and agent
status from the ACD. The current queue length for an individual group can also be viewed on a desk set logged into that group.

Customer Account Procedures

3.4.1. Individual Account Enrollment

Most E-ZPass Virginia customers are individual account customers. These customers must pre-pay their tolls. A refundable tag deposit of $25.00 is charged for each transponder requested. The tag deposit is waived only if the customer chooses automatic account replenishment via ACH direct debit, with a secondary credit card on file.

The enrollment process begins when a customer walks in or calls in to the CSC to open an E-ZPass Virginia account. The walk in customer gives the completed application to the CSR for enrollment. The process ends when the new customer receives his/her transponder(s). Individual accounts are subject to the following:

- **Start-up account balance:** The total start-up amount upon opening an account is the total transponder deposit plus the total pre-paid balance.
- **Transponder deposit:** A $25.00 deposit is required for each transponder assigned to the account. This deposit is waived only if the customer selects automatic replenishment via ACH direct debit, with a secondary credit card on file.
- **Prepaid tolls:** The initial prepaid toll amount is a minimum of $35.00 per transponder. If a customer does not think that the total amount of the pre-paid balance will cover his average monthly toll usage, the customer may add additional funds to the pre-paid balance.
- **Acceptable forms of payment to open an account are cash, check, credit card, debit card, money order, or gift certificate credit.**
- **Credit card rejection:** If the customer’s credit card is declined, the CSR requests another credit card to establish the account. If another credit card is not available, the CSR advises the customer of the nearest walk-in location to open an account and pay with cash or check.
- **Account/transponder activation:** The transponder is issued to the account and mailed or held for pickup at a walk-in location. The transponder will be active and ready to use once the transponder number is entered into the account, within 24 hours in the state of Virginia and within 48 hours out of state.
- **Transponder eligibility:** Customers with multiple vehicles may be issued multiple transponders, however there must be one vehicle listed on the patron’s account for every transponder. Vehicle information must be provided for each vehicle using an E-ZPass transponder. All customers must provide information about their vehicles, such as license plate number and license-issuing state, year, make, model, color and axle count.
1. Greet the customer and determine his/her needs. If the customer requests a new account, ask him/her to fill out an E-ZPass Virginia application form. Provide assistance to customers who submit applications with incomplete or missing information.

2. Ask what method of replenishment the customer prefers, suggesting that it is more convenient to do an automatic credit card payment or ACH direct debit rather than cash, check, or money order replenishment.

3. Inform the customer that the $25.00 tag deposit per E-ZPass transponder will be waived only if automatic replenishment by ACH direct debit is selected with a secondary credit card also on file.

4. Ask for the initial payment into the account. If the account is opened with a credit/debit card, (customers may have already written this information on the application, but the policy is to see the credit/debit card whenever possible). If declined, request a second credit card.

5. Ask for the driver’s license for identification verification.

6. In the CSC system, click on Customer Service from the main toolbar and select open New Account from the options that appear. A window appears prompting you to select the type of account from a drop-down list that includes: Commercial, Motor, Non-revenue, and Private. After selecting the account type, click .

7. Complete the application fields on the Contacts, Account Status, replenishment and Services tabs from the information given by the customer on the E-ZPass Virginia application form. Click Apply at the bottom when finished. Figure 3.2 provides a view of the New Account screen with the tabs listed across the top.

Note: Until further notice, if the customer’s name includes a suffix (such as Jr., Sr., III, etc.), include it in the Last Name field following the customer’s last name.
8. To add additional contacts to the account, click on **options** from the main toolbar and select **Contacts**, then **Add New Contact**. Edit the fields on the **New Contact** screen and click the **Apply** button.

9. Add vehicle information to the account by clicking on **options** from the main toolbar and selecting **Vehicles**, then **Add New Vehicle**. The Vehicle Maintenance Wizard prompts the user to enter the license plate number, state, make, model, year, color, and vehicle class code of the vehicle. Click the **Finish** button on the final screen of the wizard to complete the process.

**Note:** Customer accounts remain in an Open Payment Pending status until payment is made on the account. Once payment is made, the account status changes to Open Pending.

10. Use the CSC system to process a payment for the initial prepaid toll amount $35 x the number of transponders requested and any applicable transponder deposit. Payment may be entered into the account by the Tag Request Wizard or by making a payment into the account using the Payment Wizard. If the customer elects to pay by credit card and the authorization is declined, inform the applicant and request an alternate credit card. If a second credit card is declined, request that the customer pay with cash, check, or money order.

**Note:** Customer accounts remain in an Open Pending status until transponders are assigned. Once transponders are added to a new account, the account status changes to **Active**.
11. Assign transponders to an account by selecting **Options** from the main toolbar and selecting **Transponders**, then **Add New Transponders**. The Add/Maintain Tags Wizard prompts the user to designate the transponder number or range of transponder numbers, vehicle class, account type, and status. The user can also specify an applicable discount program to the transponder. Click the **Finish** button on the final screen of the wizard to complete the process. The status of the newly opened account will now be **Active**.

12. Use the CSC system to process a payment for the initial prepaid toll amount of all applicable transponders and any applicable transponder deposit. If the customer elects to pay by credit card and the authorization is declined, inform the applicant and request an alternate credit card. If a second credit card is declined, request that the customer pay with cash, check, or money order.

Reinforce the following points with the customer before completing an account setup:

- The low balance and replenishment amounts can be increased at the customer’s request.
- Replenishment amounts of less than $35.00 per transponder are not allowed and low balance thresholds of less than $10.00 per transponder are not allowed; however, customers can request an increase to either of those amounts.
- Customers should be encouraged to set the replenishment amount at the average amount of their monthly toll usage to reduce the number of replenishment transactions per month. The customer should calculate the amount and frequency he drives on toll roads and replenish his account accordingly to always keep sufficient funds in the account.
- Customers should also be encouraged to set the low balance threshold to the average 3-4 day toll usage if that amount is greater than the $10.00 per transponder minimum.
- If a customer’s replenishment fails, he is notified by mail. This notice explains that he needs to update the account with a valid card for continued auto replenishment, or he can manually replenish the account.
- Explain the activation process for the new transponder(s); inform the customer that the packet he receives includes a welcome letter, the Customer Agreement, mounting instructions and a customer account statement, which shows the transponders assigned to the account and the prepaid balance.
- Discount programs are offered directly from participating toll facilities. If applicable, select a program for the account. Contact information to the applicable toll facility is given to customers interested in enrolling. Upon contacting the toll facility, customers are given information about the program features and any applicable fees. After enrollment in the Chesapeake Discount Program, applicable fees are deducted from the customer’s E-ZPass Virginia account balance.
- When all of the customer information is entered, print a Customer Account Report, a receipt, and any other necessary paperwork. The CSR may add comments or notes to the account, if needed.
- Place the completed and signed customer application form and printed copy of the customer account summary in the collection box to be scanned.
- Only authorized CSRs can set up Non-Revenue and Hybrid as described in Table 3.2.
### Discounts

There are three forms of discounts applicable to E-ZPass Virginia customers:

- The E-ZPass Virginia discount (automatic) is a discount toll rate offered to all travelers using a transponder—it does not require special enrollment.
- The E-ZPass Virginia Plan (subscription) Chesapeake Discount Program
- The E-ZPass Virginia Discount Plan (subscription) Dulles Greenway VIP Program

### Non-revenue

VDOT determines the persons who receive free passage on Virginia Roadways, and any restrictions to enforce. Examples of vehicles receiving full passage may include the following vehicles traveling in the line of duty:

- Ambulances
- Police department vehicles
- Fire department vehicles

Participants eligible for non-revenue benefits must first establish a pre-paid account. (This can be waived at VDOT’s discretion.)

The CSC helps VDOT monitor its respective non-revenue customers and accounts.

Individuals authorized by VDOT who have non-revenue accounts can fund their accounts. This enables non-revenue account holders to use E-ZPass away agency facilities and pay the toll. Within Virginia, these accounts incur non-revenue transactions, while transactions out of state are debited from their account balance.

When all of the customer information is entered, print the Customer Account Report, a receipt, and any other necessary paperwork. The CSR may add comments or notes to the account, if needed.

#### 3.4.2. Individual Account Enrollment: Phone CSR

At the start of the workday, the call center CSR signs in to his workstation and then logs on to the CSC system following the same procedures as detailed for the walk-in CSR (See 3.2.1.2). The CSR logs into the EchoPass telephone system.

The enrollment process for an individual account begins when a customer calls the CSC to open an E-ZPass Virginia account. The process ends when the new account is forwarded to the fulfillment area where customer requests for transponders are processed.

1. **To create new Pass virginia accounts**
   - Greet the caller and ask how you can help today.
   - Inform the caller about the E-ZPass Virginia website and its application process functionality.
   - Ask what method of payment the customer prefers.
If the customer wants to pay with cash, check, or money order, direct him to the nearest walk-in center and provide the location and hours of operation of the walk-in center.

If the customer wants to pay with credit/debit card, request that the credit card be available.

The CSR should make the customer aware that they will need to provide their contact information and driver’s license number and the vehicle make, model, year, and color for each vehicle that they will be using the E-ZPass.

Complete the E-ZPass Virginia application in the CSC system for the customer. Customers may not open accounts for other people.

4. Complete a partial set up of the account by following steps 6 through 9 in section 3.2.1.4

5. Use the Tag Request Wizard in the CSC system to process payments for initial prepaid toll amounts and applicable transponder deposit made by credit/debit card

6. Completing the screens in the wizard automatically sends a Communication Event to the transponder fulfillment area where transponders will be added to the account. Once transponders are added, the account status becomes active.

7. Review new account information with the customer. Advise the customer that the transponders and a welcome package, will be mailed to the address on the account with expected delivery in 7-14 days.

3.4.3. Account Maintenance

The CSC staff is responsible for providing accurate and timely account maintenance for every E-ZPass Virginia account that requires updating or maintenance. The request can come from the customer, CSC management, or as a result of existing business rules.

To maintain customer accounts

1. Ask the customer for his account number and enter the number provided. If the number matches an account, the account appears on the application screen.
   a. If the account is not found, verify the account number with the customer.
   b. If the information still cannot be found, look up the account by any of the following:
      • Name
      • PIN
      • License plate
      • Transponder number
      • Credit card
      • Phone number
2. Request customer identification verification. Request the driver’s license for identification verification in a retail location. Call Center staff request three (3) pieces of matching account information. Only the account holder may access account information. Ask the customer for his or her four-digit PIN. If the customer has forgotten the PIN, ask for the address, phone number, and vehicle information to verify the person with the account. If the person cannot validate that he is the legitimate account holder, the CSR politely informs the customer that CSC policy does not allow him to make changes to the account information.

3. Update the account. Enter the new information and update the account through the following actions:
   - Go to the area where the customer is requesting updated information.
   - Delete the old or incorrect information and type the correct information.
   - Confirm the changes with the customer.
   - Click Apply.

4. Verify the vehicle information on the account with the customer to make sure it is current.

5. Communicate with the customer—if the account maintenance requested by the customer included a payment for replenishment, run a payment through the CSC system and post it to the customer’s account. (See section 3.4.4 to process a payment).

3.4.4. Account Replenishment

The low balance threshold amount is the amount that triggers an E-ZPass Virginia account replenishment transaction. Replenishment occurs automatically with a credit/debit card or ACH direct debit, or when paid by check/money order is processed into the account. The low balance threshold amount is a minimum of $10 per E-ZPass Virginia transponder on the account.

When the low balance threshold amount is reached, the driver may see a yellow low-balance message at the light or on the sign as the vehicle passes through a toll lane. If the account has reached zero-balance condition, the driver receives a “Toll Not Paid” message. A customer who has selected automatic replenishment as his/her option should only see this message if the credit/debit card on file or ACH fails to replenish due to decline, insufficient funds, expiration or similar situation.

The replenishment amount is set at $35.00 per E-ZPass Virginia transponder on the account or the average monthly toll usage, whichever is greater.

   To set up automatic replenishment

1. Ask the customer for the payment method—ACH direct debit with secondary credit card, or credit/debit card—he prefers to use to replenish the account
2. Enter the payment method and payment amount (if applicable) in the appropriate field of the Replenishment tab.

3. Check the boxes to turn on Auto Replenish and Allow replenishment amount recalculation.

- **To set up manual replenishment**

1. Ask the customer for the payment method—cash, check, money order, ACH direct debit, or credit/debit card—he prefers to use to replenish the account.

2. Process the payment through the CSC system and enter the amount in the proper field of the Payment Wizard.

3. Explain to the customer that he will continue to receive a yellow low-balance light or a “Toll Not Paid” message until the customer’s replenishment has been transmitted to the toll lanes. Replenishment transactions take 24 hours to update the toll lanes in-state and can take up to 48 hours to update toll lanes out-of-state. A green light at the toll lane will confirm the updated account status. If the customer continues to see a yellow light for two consecutive days after contacting the CSC, the account has not been replenished and the customer should call the CSC at their earliest convenience.

4. Communicate with the customer—explain that the replenishment transaction will be reflected on the customer’s next statement.

5. Thank the customer for using E-ZPass Virginia.

### 3.4.5. Processing a Payment

#### 3.4.5.1. CHECKS

- **To process checks**

1. Ensure the name, street address, driver’s license number, and phone number are preprinted on the check. Starter/temporary checks and blank checks are not accepted at walk-in locations, but will be processed if received by mail.

2. Stamp the check on the back with the “Deposit Only” stamp.

3. Stamp the check with the “Approval” stamp and record the account number and the CSR ID.

4. Post the check in the proper account in CSC system noting a check payment and record the check number as required.

   - Click on Options from the main toolbar, select Payments from the options that appear.
   - The Transaction Wizard appears and the CSR clicks on Next.
   - Select Check Payment as the Transaction Type and fields will be present to enter the check number and amount.
By clicking Next, the wizard will show a final verification screen of the transaction. When the user clicks Finish, the transaction is applied to the account.

At any time prior to clicking the Finish button, the user can press the back button to return to the previous screen to view or edit. The Cancel button can be used to abort the transaction and close the Transaction Wizard.

3.4.5.2. CREDIT/DEBIT CARDS

Note: All credit card transactions are processed in the CSC system. American Express, Visa, MasterCard, Discover, and Diner’s Club are all acceptable forms of payment, including debit cards with a Visa, MasterCard, Discover, American Express, or Diner’s Club logo.

To process credit card payments using the CSC system:
1. Click on Options from the main toolbar and select Payments from the options that appear.
2. The Payment Wizard appears. Click on Next.
3. Choose Credit Card Payment as the Transaction Type and fields will be available to enter the name on the card, the credit card type, card number, expiration date, verification code, zip code, and the payment amount. These fields auto-populate with the credit card information populated on the Replenishment tab, if applicable.
4. The last screen of the wizard will show a final verification screen of the transaction. When the user clicks Finish, the transaction is applied to the account.

At any time prior to clicking the Finish button, the user can press the back button to return to the previous screen to view or edit. The Cancel button can be used to abort the transaction and close the Payment Wizard.

3.4.5.3. CREDITS

Note: All credits require supervisor or manager approval.

To process credits:
1. Choose Adjustments from the Options menu in the CSC system. The Transaction Adjustment Wizard will appear.
2. Choose Credit Card Refund as the Transaction Type.
3. Populate all of the remaining fields on this screen with the applicable credit card information.
4. Enter the amount of the credit/refund as a positive dollar amount into the Amount field. Click Next at the bottom of this screen.
5. Verify all information on the final screen. Press **Finish** to complete the transaction.

### 3.4.5.4. VOIDS AND ADJUSTMENTS

**Note:** *The CSC system processes credit card transactions in real time, which eliminates the option of voiding credit card payments. To correct a credit card payment, a credit card refund must be completed. This process is outlined in Section 3.4.5.3.*

Cash and check entry voids can be completed; however, a supervisor’s approval is needed for all voids and adjustments.

- **To process voids/edits**
  1. Choose **Adjustments** from the **Options** menu in the CSC system. The Transaction Adjustment Wizard displays.
  2. Choose **Cash Void** as the **Transaction Type** to void a cash entry. Choose **Check Void** as the **Transaction Type** to void a check entry.
  3. Enter the applicable dollar amount into the **Amount** field.
  4. For a check void, enter the check number into the **Transaction Comments** field.
  5. Click **Next** to see the final verification screen. By pressing **Finish** on this screen, the void transaction is recorded.

### 3.4.6. Adding a Transponder to an Account: Retail CSR

This process begins when the customer requests to add a new transponder to his account and ends when the customer receives the new transponder.

A $25.00 transponder deposit is required for each additional transponder requested. The tag deposit is waived if the customer has auto replenishment through ACH with credit card backup.

Before the request can be fulfilled, customers must have the funds ($35.00 per E-ZPass Virginia transponder or their average monthly usage) in their accounts to cover their pre-paid toll account balance.

To add a transponder to an account:

1. Ask for the customer’s account number and enter it into the CSC system. If the number matches an account, the account appears.
   - If the account is not found, verify the account number with the customer.
   - If the information still cannot be found, look up the customer’s account by transponder number, license plate number, name, credit card number, PIN, or phone number.
2. Request customer identification verification. Request the driver’s license for identification verification. For the customer’s security, verify three (3) pieces of account information. This does not include the name on the account. Only the account holder, or authorized contacts, may access account information.

3. Verify information on the account and update the account. There must be a minimum of one vehicle per E-ZPass Virginia transponder on the account.

**Note:** There is no limit to the number of transponders that a customer can have on his account. Customers can add a new transponder (s) at any time to their account; however, the account must be in good standing. Customers with five or more transponders on their account must use automatic replenishment.

4. If the customer is adding a vehicle, enter the new vehicle information.

5. Ask what payment method—account balance debit, cash, check, money order, ACH direct debit or credit/debit card—the customer prefers for the transponder deposit and the replenishment payment.
   - If the customer has a balance in his account and would like to pay the $25.00 tag deposit for the new transponder out of those available funds, debit his account for the amount of the deposit using the Adjust menu/Deposit from Balance selection.
   - If the customer pays with credit/debit card, cash, check or money order, accept the payment and process the payment through the CSC application.
   - If the customer pays with a credit card or ACH direct debit, accept the customer’s credit card or ACH information and process the payment through the CSC system. Enter into the account the dollar amount of the charge.

6. Assign the transponder to the account

7. Communicate with the customer—explain the activation process for the new transponder. Explain the changes to the replenishment amount and low balance levels. Explain that the payment transaction will be reflected on the customer’s next statement.

8. Thank the customer for using E-ZPass Virginia.

### 3.4.7. Adding a Transponder to an Account: Phone CSR

This process begins when the customer calls to add a new transponder to his account and ends when the transponder request is forwarded to the Fulfillment area, where customer requests for transponders are processed.

A $25.00 transponder deposit is required for each additional transponder requested. The tag deposit is waived only if the customer has automatic replenishment via ACH direct debit with a backup credit card on file.
Before the request can be fulfilled, customers must have the necessary funds ($35.00 per E-ZPass Virginia transponder or their average monthly usage) in their accounts to cover their pre-paid toll account balance.

To add a transponder to an account:

1. Follow the procedure in section 3.4.6 above, steps 1-3.
2. If a customer has a manually replenished account, verify that the customer has enough money in his Available Balance to cover the $25.00 tag deposit for each new transponder requested. The account must have enough money in it so that the security deposit can be deducted from the account’s available balance without the Available Balance going below the new low-balance level. If there is not sufficient money in the available balance, then the customer must make a payment.
3. Use the Tag Request Wizard in the CSC system to process a payment for prepaid toll amounts or transponder deposit for the new transponder(s). Completing the wizard screens automatically sends a Communication Event to the transponder fulfillment area where transponder(s) will be added to the account.
4. Tell the customer that he will receive his new transponder within 7 to 14 business days at the address listed in his account. The 7 to 14-day time allotment includes the normal delivery time by the U.S. Postal Service.
5. Follow the procedure in section 3.4.6 above, steps 6-7.

3.4.7.1. TRANSPOUNDER PICK UP PROCEDURE

Customers can call the service center to open an account, or request a transponder then pick up the transponder at a retail location. This is not a service that is offered. The customer must specifically ask for this service.

- Verify which service center the customer wants to pick up the transponder.
- Complete a Communication request directed to the specified location.
- Communications sent before 1:00 p.m. can be picked up after 1:00 p.m. that day. Exceptions to this policy must be approved by a supervisor.
- Communications sent after 1:00 p.m. can be picked up the next business day. Exceptions to this policy must be approved by a supervisor.
- If someone other than the account holder is going to pick up the transponder, the name of the person picking it up must be noted in the Communication event and in the comments in the account. This person must provide his driver’s license to pick up the transponder.
- The account holder must provide a driver’s license for verification to pick up the transponder.
- Transponders will not be released to any other person other than the account holder or the person they designate to pick up the transponder.
• Customers exchanging transponders must bring the transponder being replaced or the new transponder will not be released.

• Transponders will be held in “Will Call” in the front lobby for seven days from the requested pickup date and then contact will be made with the customer for alternate arrangements.

3.4.8. Handling Customer Inquiries for Failed Transponders

Customers call if the transponder in their vehicle does not read in a toll lane. Use the following procedure to determine if the read error was a lane, account, or transponder problem. The problem can be narrowed to a few options:

- Transponder-related: Includes mounting, age of transponder, damaged transponder.
- Financial-related: Includes insufficient funds at time of transaction failure.
- Information-related: Includes inaccurate vehicle information on account, or wrong transponder.
- Account-related: Includes closed accounts for inactivity.

Note: If the transponder’s serial number on the front bar coded sticker does not begin with *, which indicates it is a technology transponder, it could be intermittently working or failing. A G3 transponder always works or always does not work, but is not intermittent. If a G3 transponder fails once, it will not start working again. Therefore, look for transactions after the reported failure date and time to determine if something other than the transponder caused the read error.

Note: If the transponder serial number starts with 010 as the starting numbers, it is a Virginia transponder. Any other number starting the serial number indicates the issuing agency (i.e. 015 indicates an Illinois agency). Refer to Figure 3.3.

Figure Determining Issuing Agency

• To process questions regarding problematic transponders

1. Request the number of the problematic transponder.
2. Validate the account. Verify the transponder in question is in fact on the customer’s account.

3. Verify there were funds available for the transaction. If not, advise there were no funds for the toll, and update account accordingly.

4. Ask where and when the problem occurred or was noticed.

5. Look to see if the transaction was posted. If the transaction was posted, the problem may be relative to another car in the lane at the time.

   - **Determine Possible Causes**

1. Ask the customer the following question, “Where do you have the transponder mounted?”
   - If the customer has the transponder mounted, it eliminates this possibility.
   - If the customer holds it up, the transponder may have been read and transacted the toll, but on an adjacent lane in error, as the transponder has a directional antenna.

2. Ask the customer what make and model of car they had the problem in. If the vehicle is not on the account, ask him to update all the vehicles in which they use E-ZPass Virginia transponders. Determine if the vehicle requires an external mount transponder.

3. Update the account.

4. Determine the transponder’s age. A transponder nearing its 8 to 10 year life expectancy may be subject to failure. Check the transponder serial number against the serial numbers provided by Inventory identifying transponders that have been in the system eight years and are therefore past their warranty period. An out-of-warranty transponder should be replaced by following the Transponder Replacement Program (TRP) process.

5. Look at the account and answer the following questions:
   - Does the account currently have adequate funds? If not, attempt to post a payment to the account.
   - Did the account have funds at the time of the problem? If the problem was on a Virginia toll road, check the at the time of the transaction. If the problem was on an away-agency toll road, check the funds on the account based on the status of the account when the transponder file was sent to the away agency, generally between midnight and 5:00 a.m. of the previous day. A posted payment on the day of the transaction will not be reflected in the lane of an away agency.

   If the answers to the financial questions are all positive, ask probing questions to further investigate the issue.

6. Ask the customer about the last time he saw a red light.
   - Information possibilities: Did that transaction post to the customer account?
   - If yes, do they have another transponder in the car either from another agency or another E-ZPass Virginia transponder? The other transponder
may provide the red light after the good read on the mounted transponder. Only one (1) transponder should be in the car at a time. Wrap any other transponder in aluminum foil or place it in a mylar bag.

- Information possibilities: Has the customer purchased a new car? If yes, the following questions should be asked.
  - What is the make and model of the vehicle? CSR’s should refer to training handouts that lists vehicles known to have certain features that interfere with a transponder’s signal. These features include:
    o GPS, OnStar, or another navigational system
    o Polarized windshields
    o Radio antenna built into the windshield
    o Rain sensors built into the windshield
  - Other things that can interfere with the performance of a transponder include Lo-Jack for bumper tags and military stickers that allow access to restricted military areas.

- Transponder or Information possibilities: Did it stop working sporadically? Check to see if the transponder number is above or below the current number for the Transponder Replacement Program (TRP).

- Transponder or Information possibilities: Is the transponder mounted properly or is the customer holding it up to the windshield? (Transponder is required to be mounted for driver safety and to assure positive transmission of toll data).

3.4.9. **Lost/Stolen/Damaged Transponder**

Until the CSC is notified, the customer is responsible for charges resulting from usage. Therefore no refunds are issued for any unauthorized activity on a customer’s account that occurred before the customer contacted a service center to report their missing transponder.

A $25 fee is charged for each transponder reported Lost, Stolen, or Damaged. The fee may be waived in certain instances such as:

- The transponder was lost in the mail enroute to the customer or returned via certified mail where proof can be produced.
- The customer provides the Service Center with a copy of an official police report indicating the *E-ZPass* was stolen.
- The transponder number is in TRP range.
3.4.9.1. PROCESSING LOST/STOLEN/DAMAGED TRANSPONDER REQUESTS

1. Ask the customer for his/her account number.
2. Enter the number provided. If the number matches an account, the account appears.
   - If the account is not found, verify the account number with the customer.
   - If the information still cannot be found, look up the customer’s account by transponder number, license plate number, name, credit card number, PIN, or phone number.
3. Only the account holder or authorized user may access account information—ask for the customer’s four-digit PIN. If the customer has forgotten the PIN, ask for account-specific information to match the person with the account on-screen.
4. Complete the Lost/Stolen/Damaged form in ImageWorks. If a customer is reporting more than one missing transponder, then a separate Lost/Stolen Form must be completed for each transponder. If a customer informs the CSR that the transponder has been damaged, the CSR is to complete a Lost/Stolen Form.
5. Report the transponder as Lost/Stolen in the account. The transponder status in the Transponder Maintenance screen of the customer account is changed to Lost/Stolen.
6. Comment the account. Note the transponder number and any additional relevant information.
7. CSR applies payment for the Lost/Stolen/Damaged fee to the account and applies the Lost/Stolen Fee Adjustment. If a Lost/Stolen transponder is returned, the transponder’s condition will be evaluated. If damaged, theLost/Stolen fee will be refunded back to the customer’s Available Balance. A $25 Damaged fee will then be taken from the customer’s Available Balance.
8. Lobby CSR issues a replacement transponder at the customer’s request. Telephone CSR creates a Communication Event in the CSC application requesting the replacement transponder be mailed to the customer.

3.4.9.2. LOST/STOLEN TRANSPONDER RECONCILIATION

Each Service Center maintains a spreadsheet of Lost/Stolen/Damaged transponders with found data entry is applicable. The CSR in charge of handling Lost/Stolen/Damaged transponders completes the following processes after the CSR submits the proper information:

- Each time a CSR reports a transponder lost or stolen on an account a communication is created in the CSC system. A Lost/Stolen/Damaged form should be completed and saved within the ImageWorks application for each Communication event that is in the CSC system.
• The CSR responsible for Lost/Stolen/Damaged transponders searches the CSC system for all lost/stolen communications. Once these have been pulled up, the CSR opens the E-ZPass VA Reports Menu (Lost/Stolen report), selects the date she needs to pull a report for, and selects the location for her service center.

• The CSR responsible for Lost/Stolen/Damaged transponders prints the report in landscape from Excel and compares the report with what has been entered in the CSC system. Once the transponder number is located that has a Lost/Stolen form, the CSR closes the communication in CSC.

• When all Lost/Stolen transponder communications for the dates selected that the CSR has forms for are closed, the CSR pulls up each account to see if the Phone CSR processed a Lost/Stolen adjustment ($25 per transponder). If the adjustment was not processed, the CSR responsible for Lost/Stolen/Damaged transponders will process the lost/stolen adjustment. (Exceptions listed in Section 3.4.9). The account should be noted that no fee was processed for that transponder number and the reason for the waiver.

• After all fees have been verified, the CSR responsible for Lost/Stolen/Damaged transponders opens the ImageWorks system and completes all lost/stolen forms. All information is then exported to the Excel spreadsheet.

• “After the reconciliation is complete and prior to end of month balance, transponders are revoked from the customer’s account and placed in Lost/Stolen inventory location in the system.”

• The Lost/Stolen/Damaged spreadsheets are forwarded to the Quality Department monthly for system audit. Reports generated from the CSC system identify the transponders that have been placed into the Lost/Stolen/Damaged status within the prior month. This report is reconciled to the spreadsheets that have been forwarded by the individual customer service centers. Once the reconciliation is completed, the Quality department ensures the paperwork is on file for every Lost/Stolen/Damaged transponder identified.

• Lost/Stolen/Damaged paperwork is saved in ImageWorks for data retention.

3.4.10. Found Transponders

For all found transponders returned to CSC undamaged, or reactivated in an account, a refund is processed for the entire Lost/Stolen fee collected if returned within one year of being reported lost/stolen. Returned transponders are reported to the CSC and sent to inventory for proper channeling.

Found transponders still under their warranty period may be reactivated at the customer’s request.

3.4.10.1. TO PROCESS FOUND TRANSPONDERS

1. Ask the customer for his account number and enter the number provided. If the number matches an account, the account appears.
• If the account is not found, verify the account number with the customer.

• If the information still cannot be found, look up the customer’s account by transponder number, license plate number, name, credit card number, PIN, or phone number.

2. Only the account holder or authorized user may access account information—appropriate verification is required before any maintenance is performed.

3. The CSR needs to verify the current account status and also determine from the customer what he/she wants to do.
   • If the account is still open and the transponder has not been revoked from the account, the transponder can be reactivated to the account provided the Found transponder is still in warranty. A Found Tag form must be completed.
   • If the account is still open but the transponder has been revoked from the account, a Found Tag form must be completed so that authorized personnel can reassign the transponder to the account if that is the customer’s request. In this scenario as well, the transponder must be in warranty.
   • If the customer wants the transponder activated and the account is closed, reopen the account. The transponder can be reactivated to the account provided it is still in warranty. A Found Tag form must be completed.
   • If the customer does not want the transponder activated and the account is closed, the CSR advises the patron how to return the transponder to one of the service centers. A refund for the Found transponder is processed only when the transponder is returned to one of the service centers, within one year of being reported Lost/Stolen. A Found Tag form is processed by personnel at the time the transponder is physically within any of the service centers.

4. Complete a separate Found Form for each transponder (if applicable)

5. If the transponder number is still in the account, the transponder status in the Transponder Maintenance screen of the customer account is changed to Found.

6. Comment the account, notating the transponder number and any additional relevant information.

3.4.10.2. FOUND TAG RECONCILIATION

The CSR in charge of handling Found transponders completes the following processes after the CSR submits the proper information.

1. Each time a CSR reports a transponder found on an account a communication is created in the CSC system. The CSR responsible for found transponders should have a Found form for each communication that is in the system. If they do not have a form for each transponder reported found they are to E-Mail the information to that CSR’s Supervisor so they can fill out the form.
2. The CSR responsible for found transponders searches the CSC system for all found communications. Once these have been pulled up, the CSR opens the Pass A reports enu (Found report), selects the date she needs to pull a report for, and selects the location for her service center.

3. The CSR responsible for found transponders prints the report in landscape from Excel and checks the report with what has been entered in the CSC system. Once the transponder number is located that has a Found form, the CSR closes the communication in CSC.

4. When all found transponder communications for the dates selected that the CSR has forms for are closed, the CSR checks the date that the transponder was reported Lost/Stolen in the CSC system.

5. Each account that has a found transponder is reviewed to see if there was a Lost/Stolen fee processed for that transponder. If a fee was charged, the CSR should do a Lost/Stolen fee refund making sure to enter the transponder number and when it was reported Lost/Stolen.

6. If the system did not create a communication but there is a Found Tag Form, the transponder is probably not on the account; it is in Lost/Stolen location.

7. A Lost/Stolen fee refund adjustment is made to the account to credit the transponder fee and includes the CSC location, transponder number, date the transponder was marked lost/stolen, and CSR number and initials. Account is commented also. The Account History is printed for verification and attached to the completed Found Tag form.

8. After all fees have been verified go into ImageWorks and complete all found forms.

9. When all forms are completed, the Excel spreadsheet is updated. The transponders are removed from the Lost/Stolen section and entered in the found section. If a transponder is not in the spreadsheet as lost/stolen it may belong to another service center. In this case, locate the service center where the transponder was reported Lost/Stolen and send the found form to that location to update their spreadsheet.

10. Found Tag paperwork is saved in ImageWorks for data retention

**Note:** If there are variances that correspond with a lost/stolen transponder that belongs to another service center, the appropriate Supervisor is contacted by E-Mail with the transponder number and why it is listed as a variance.

### 3.4.10.3. Refunds

- Refunds are processed on a weekly basis.
- A customer receives a refund for a found transponder if the transponder is returned within one-year of being reported Lost/Stolen and:
  - A Lost/Stolen fee was paid and the transponder is being reactivated to the account.
A Lost/Stolen fee was paid and the transponder is returned CSC office and it is not damaged.

- If only a partial Lost/Stolen fee was originally collected, only the amount that was collected is refunded.

- If the customer’s account is still active, any applicable refund is credited to his existing account’s available balance. If the customer’s account has been closed, the customer is contacted to resolve how any applicable refund is issued. If the refund is $3 or less, it is refunded by credit card or transfer to another active account.

- CSR comments the customer account.

- CSR prints a Customer Account record to attach to the form. The form is placed in the designated area for fulfillment.

3.4.11. Financial Inquiries

CSRs can provide information for balance and statement requests, as described in this section.

3.4.11.1. BALANCE REQUEST

To process a balance request

1. Ask the customer for his account number and enter the number provided. If the number matches an account, the account appears.
   - If the account is not found, verify the account number with the customer.
   - If the information still is not found, look up the customer’s account by transponder number, license plate number, name, credit card number, PIN, or phone number.

2. Ask for the customer’s four-digit PIN—only the account holder may access account information. If the customer has forgotten the PIN, ask for account-specific information to match the person with the account on-screen.

3. Give the customer his or her account balance.

3.4.11.2. STATEMENT REQUEST

Quarterly statements will be generated automatically for each customer at no cost. The customer can choose to have quarterly statements sent by mail or made available online via the E-ZPass Virginia website. Customers can also contact the CSC to request a copy of the most recent quarterly statements.

As an alternative, a customer can request to have a detailed monthly statement mailed or can view a statement online automatically. A detailed monthly statement provides itemized toll transactions for all transponders assigned to the
account. If the customer elects to have a detailed monthly statement mailed, a $2.00 fee per every 3 transponders on the account is charged per statement and the customer is notified at the time of the request. However, a $1.00 fee will apply if the customer elects to have access to detailed monthly statements online.

Customers can view and print a transaction history for free from the E-ZPass Virginia website once they have set up a username and password for the website.

If a patron requests to have a statement mailed or faxed, they are advised that the request will be fulfilled within two (2) business days. The CSR then places a Communication event in the CSC application using “Statement” as the Communication “Category” and “Type”. Applicable notes are placed in the Communication event, i.e. fax number or different mailing address. A designated associate will query the application for Communications regarding statement requests and fulfill the requests.

3.4.12. Account Transfer of Ownership

An E-ZPass Virginia account may be transferred from one account name to another. Change of ownership of an account must be made through a written request (either faxed or mailed); both parties’ signatures are required. Legal documentation is required in lieu of signature.

- The account number remains the same and all transponders in the account are transferred to the new owner.
- Only the persons listed in the account are authorized to make ownership changes to the account.
- The Transponder Transfer form is not needed to update a name change as a result of marriage or divorce. Appropriate documentation is required for name changes.
- The Transponder Transfer form is not needed to delete a name from a multiple name account.

- To transfer account owners

1. Ask the customer for his or her account number, and enter the number provided. If the number matches an account, the account displays.
2. Only the account holder may access account information. Ask for the customer’s 4-digit PIN. If the customer has forgotten the PIN, ask for account-specific information to match the person with the account displayed in the CSC system.
3.4.12.1. Account Name Change Resulting from Marriage or Divorce

- To process a name change on an account
  - Verify account information and update as needed.
  - Advise customer to fax, mail verification of legal name change (Driver’s license, marriage license, etc.)
  - Write account number on documentation when received.
  - Forward all information to authorized staff for processing. All paperwork is scanned for retention.

3.4.12.2. Account Name Change Resulting from Marriage or Divorce

One personal account cannot be transferred to another personal account. One account holder would need to complete a Closed Account Form.

- If transponders are to be transferred to another personal account, both personal account holders would need to complete and sign the Transponder Transfer Form.
- The completed paperwork must be mailed, faxed, or hand-delivered one of the Customer Service Centers.
- Forward all information to authorized staff for processing. All paperwork is scanned for retention.

3.4.12.3. Change Ownership from Individual to Company

An individual personal account cannot be transferred to a commercial account. The personal account holder, or authorized contact(s), would need to:

- Complete a Close Account form for the personal account,
- Complete a Commercial Account Application
- The completed paperwork must be mailed, faxed, or hand-delivered one of the Customer Service Centers.
- Forward all information to authorized staff for processing. All paperwork is scanned for retention.

3.4.12.4. Change Ownership from Company to Individual

A commercial account cannot be transferred to a personal account. The commercial account holder, or authorized contact(s), would need to:
• Complete a Close Account form for the commercial account to open the Commercial account.
• Complete a Personal Account Application
• The completed paperwork must be mailed, faxed, or hand-delivered one of the Customer Service Centers.
• Forward all information to authorized staff for processing. All paperwork is scanned for retention.

3.4.12.5. DECEASED CUSTOMER

Accounts in which the primary account holder is deceased cannot be transferred to another individual, unless the requesting individual is the surviving spouse of the primary account holder and is listed as an authorized contact on the account.

If the requesting individual wants to keep the account open, the following process is followed:

• Request a copy of the death certificate
• If new account holder is not listed on the death certificate as an Informant, request court documentation that new account holder is executor/executrix of the deceased customer’s estate.
• Advise the primary account holder’s account will be closed.
• The new account holder would need to complete a Personal Account Application
• Transponder Transfer Form needs to be completed and mailed/faxed to service center to transfer transponders to the new account. Forward all information to authorized staff for processing. All paperwork is scanned for retention.

Note: If the new account holder’s name is not on the death certificate and/or not the Executor/Executrix of the Estate, the Transponder Transfer Form has to have the new account holder’s signature and the signature of the Informant on the death certificate or the signature of Executor/Executrix of the Estate.

Note: Funds from the deceased customer’s account will not be transferred to the new account. Any funds in the Available Balance will be refunded by check to the deceased customer’s estate.

If the requesting individual wants to close the account, follow this process:

1. Request a copy of the death certificate.
2. CSR completes a Closed Account Form in Imageworks.
3. If caller is not listed on the death certificate as an Informant; request court documentation identifying the Executor/Executrix of the Estate of the primary account holder.

4. Advise that the transponders need to be returned to the service center or retail center within 7-14 days. If not returned, a lost/stolen fee of $25 per transponder will be assessed.

5. If deceased customer’s account is in Insufficient Funds status, CSR is to attempt to take a payment to bring account to $0.00.

6. Advise that any funds remaining in the Available Balance at the end of the 65 days (time period to completely close account) will be refunded by check to the deceased customer’s estate.

7. Forward all information to authorized staff for processing. All paperwork is scanned for retention.

If a surviving spouse wants to keep the E-ZPass account open and now have he/she listed as the primary account holder, the following process applies:

1. The surviving spouse must be listed as an authorized user on the account.

2. A copy of the death certificate must be obtained. The surviving spouse’s name must be listed on the death certificate as the “Next of Kin” or “Informant”.

3. Upon receiving the necessary paperwork, authorized personnel will change the name of the primary account holder for the account to the surviving spouse’s name and notate the account.

4. All paperwork is scanned for retention.

**Note:** If the surviving spouse is not able to provide the above information, a new account should be opened and tag transfer form completed.

### 3.4.13. Account Closure

This process begins when the customer contacts the CSC to close his account. The process ends when the transponder is received from the customer and a refund is issued.

Individual accounts adhere to the following policies:

- **Check/money order refunds:** Refund checks are sent out to cash/check/money order customers, if a credit card is not given. Checks will not be issued for less than $3.00 refundable balance.

- **Credit card refunds:** Refunds for credit card users appear as credits to the credit card accounts.
- Transponders received: Refunds are not issued until the CSC receives all transponders associated with the account.

- Refund processing: Refunds are processed after a delay of up to 65 days to allow for all tolls to post to the account.

- PIN: Customers must know their PINs or provide three specific pieces of account information (address, phone, credit card or vehicle information) to make changes to their accounts. The account holder, or authorized account contact, is the only one who can make changes.

3.4.13.1. Processing Account Close Requests for Phone CSRs

1. Ask for the customer’s account number and enter it into the CSC application. If the number matches an account, the account appears.
   - If the account is not found, verify the account number with the caller.
   - If the information still cannot be found, look up the account by transponder, license plate number, last name, or device number.

2. Only the account holder, or authorized account contact, may access account information—ask for the customer’s four-digit PIN. If the customer has forgotten the PIN, ask for three pieces of account-specific information to match the person on the phone with the account on-screen.

3. Verify all account information for accuracy, including the credit card number, if applicable.

3. Advise the patron to return all transponders within 10-14 days to avoid lost/stolen fees being assessed to the account. Tell the customer to mail, via certified mail, his/her transponder to the CSC (ensure the customer has the address) or bring it to the closest Retail Center.

4. CSR is to explain that funds remain on the account for up to 65 days before a refund is processed. This is to allow for possible IAG transactions to post to the account. The patron is also advised that a refund check will be mailed unless a valid credit card is given. For patrons with automatic replenishment via credit card, the credit card information can simply be clarified for validity. Also advise the customer that no refund will be given via check for amounts less than three (3) dollars.

5. CSR must place notes in the customer(s) account, notating the request to close the account.

6. CSR is to complete a Close Account Request form in ImageWorks.
3.4.13.2. Processing Account Close Requests for Retail CSRs

1. Ask the customer for his or her account number, and enter the number provided. If the number matches an account, the account displays.
   - If the account is not found, verify the account number with the customer.
   - If the information still cannot be found, look up the customer's account by transponder number, license plate number, name, credit card number, PIN, or phone number.

2. Only the account holder or authorized user may access account information—ask for the customer’s four-digit PIN. If the customer has forgotten the PIN, ask for account-specific information to match the person with the account appearing on-screen.

3. Confirm that all transponders on the account have been returned. All unreturned transponders are subject to $25 Lost/Stolen fee.

4. Complete a Lost/Stolen form if necessary. If funds in the account are not sufficient to cover the fee, charge credit card or collect funds from customer.

5. Complete a Found Transponder form if customer returns a transponder on his account that had been previously marked Lost/Stolen so a Lost/Stolen Fee Refund may be processed.

6. Print a customer account report showing transponders and available money on the account. The account is placed in a Closed Pending status until all transponders are returned, even if the account balance is zero ($0.00).

7. Revoke the transponder(s) in the CSC system as they are returned. The system location of the revoked transponder(s) becomes that Retail Center. The transponders returned to the CSC at the counter are retrieved by the Inventory Department once each day, or as needed.

8. Comment the customer’s account, specifically noting the transponder number of each returned transponder.

9. When all transponders have been removed from the account, complete a Close Account Request form in ImageWorks and inform the customer that any refund amounts will be processed in approximately 65 days, ensuring that all transactions can post. Document the reason for closing the account.

10. If the account has a positive or negative balance, place the account status in Close Balance Pending. If the account balance is zero, leave the account in Close Pending status.

3.4.13.3. Completing Close Account Requests

*Note: Only authorized personnel complete this process.*
• The CSR responsible for closed accounts runs the **Closed Account report** in the CSC system and prints the report.

• This CSR checks for duplicates and pulls the corresponding account numbers from the ImageWorks system. If there are two forms for the same account, the CSR deletes one of the duplicate forms, making sure that all information is correct on the **Close Account** form.

• The same CSR reviews the closed account, making sure that website access is disabled, vehicles are deleted, and the replenishment feature is turned off. The CSR then makes a comment in the CSC system that states when we received the **Close Account** form and when the account is supposed to be closed. 
  Ex: Recv’d close acct form on x/x/xx schedule to be closed on x/x/xx).

• The account is closed 2 months from the date we received the **Close Account** form. (Ex: Recv’d close acct form on 1/1/08 schedule to be closed on 3/1/08)

• If an account is pulled up that is already in **Closed** status, the account is marked on the sheet. A comment does not need to be made about closing the account.

• Once the report is completed, it is filed in the **Close Account** filing cabinet. The report is filed in the appropriate month and day folder/file it is scheduled to be closed.
  (Ex: Report ran on 1/2/08 will be filed in folder March, file 2).
3.4.13.3.1.  After 65 Days

- In the Close Account filing cabinet, the date is pulled that needs to be closed.
  (Current date or before, depending on how the days fall in the week).

- The CSR responsible for handling the closed accounts pulls up each account and
  reviews the recent communications to see if the patron has called in and hasn’t
  changed anything that the CSR would need to know. The CSR makes sure that
  the web access is disabled, vehicles are deleted, and the auto replenishment is
  turned off.

- Any transponders with status Lost/Stolen on the account are revoked to the
  lost/stolen transponder location. The CSR checks to see if there are transponders
  listed on the account. If there are transponders on the account and they are
  marked Lost/Stolen, they only need to be revoked from the account. If the
  transponders aren’t marked Lost/Stolen then a Lost/Stolen form needs to be filled
  out. If the transponders are marked Lost/Stolen, then a lost/stolen fee should be
  charged, if applicable. If there are not enough funds on the account to make the
  fee adjustment and there is a valid cc on file, then charge the card for the funds
  need and charge the fee. If there is not enough funds on the account, and there is
  not a valid cc on file, then try to collect the funds from the customer. If
  unsuccessful, then charge the available amount as the lost/stolen fee and close the
  account.

- The CSR responsible for closed accounts refunds the remaining balance through
  the payment method that was last used on the account (Ex: credit card or check).
  If there is not a credit card on the account or the credit card is expired, then a
  check refund will be issued.

- The CSR then changes the status of the account to Closed and completes the
  Close Account form in ImageWorks.

- Finance sends a report to the corporate office every Friday for checks to be
  generated and mailed.

2 Negative balances

- If after the transponders are revoked off the account, and it is noted
  that the account balance is a negative, a payment is attempted for
  the exact amount.

- If the payment processes, the account can be closed.

- Be sure when processing a payment that a comment is such as the
  following: “cc pmt to cover negative balance to close acct.”

- The Close Account form is then completed in ImageWorks with
  the date closed and the amount of the refund.

Commercial Accounts
3.5.1. Setting Up a Commercial Account

Commercial account setup occurs in the main CSC.

Each CSC location has CSRs specifically trained to meet the different needs of the commercial customers that visit or contact that location.

When the commercial application is processed, verify that:

- All required information is entered and validated, to include the following:
  - Business name/DBA
  - Physical mailing address
  - Federal tax ID or tax exempt number
  - Two points of contact
  - Phone/fax numbers
  - E-Mail address
  - Valid credit card (commercial accounts with at least five vehicles must use auto-replenish)
  - Accurate vehicle class codes
  - The customer understands and agrees to the E-ZPass Virginia rules and policies as outlined in the terms and conditions portion of the agreement.

- Transponders are programmed with the E-ZPass vehicle classification code applicable to the vehicles on the account prior to being issued to the commercial customer.

3.5.2. Commercial Account Replenishment Policy

Commercial accounts with at least five E-ZPass Virginia transponders must use automatic replenishment; there are no exceptions to this rule.

Commercial account customers are encouraged to use auto replenishment to minimize the risk of low balance or insufficient funds, causing potential gate crash damage to their vehicles.

Non-revenue Accounts

3.6.1. Managing Non-Revenue Accounts

The following rules apply to Non-Revenue account management:
Only walk-in center CSRs may handle certain Non-Revenue account issues. If a call center CSR receives a call regarding a Non-Revenue account, they must assess the situation to determine if it is something they are able to handle. (Outlined guidelines below)

**Call Center CSs are able to**

- Update account (address changes, {Request must be sent in writing on business letterhead and document must be given to Quality Manager}, credit card information, E-Mail address, phone number.)
- Take a payment if applicable and requested by the customer.
- Add/Delete vehicles.

**All Service Center CSs perform the following**

- Open all call-in and/or walk-in Non-Revenue accounts.
- Handle all call-in and/or walk-in add-on transponder requests for Non-Revenue accounts
- Replace or accept turned-in old E-ZPass Virginia Non-Revenue transponders.
- Handle reporting lost/stolen E-ZPass Virginia Non-Revenue transponders.

CSRs will use the appropriate Non-Revenue forms for transactions and the customer, CSR, and supervisor on duty must sign all paperwork and then give the forms to the CSC Supervisor following the transaction.

When processing a walk-in or call-in Non-Revenue account holder, the following paperwork must be processed to accompany any action taken on the account.

- Non-Revenue New Issue Transponder form
- Non-Revenue Returned Transponder form
- Non-Revenue Lost/Stolen form

Employees must ensure that the written authorization from the proper authorities within VDOT accompanies all new Non-Revenue accounts. They must also ensure that, despite the number of E-ZPass Virginia transponders requested, the requestor receives exactly the number of E-ZPass Virginia transponders that VDOT authorizes.

All non-revenue applications (originals), all account forms, approvals, email confirmations, etc. must be faxed to Clifton Forge service center for monthly audit.

### 3.6.2. Processing Non-Revenue Add-On Transponder

When a new E-ZPass Virginia transponder is issued to a Non-Revenue account, the Non-Revenue Add-On Transponder form must be filled out completely, including the following fields:

- Account Number—customer’s account #
The New Issue form, accompanied by the written authorization form from corresponding VDOT personnel, must be faxed to Clifton Forge for monthly audit.

3.6.3. Processing Non-Revenue Returned Transponder

When a non-revenue account holder turns in an E-ZPass Virginia transponder, the Non-Revenue Returned Transponder form must be filled out completely.

The following rules apply to returned non-revenue transponders:

- If the returned E-ZPass Virginia transponder has a dead battery, this transponder may be replaced as normal.

- If the returned transponder has been listed as either lost or stolen, verify the approved number of transponders authorized for the account. If a replacement has been issued, the returned transponder cannot be reactivated; it must be returned. Complete a Found Tag form. A Lost/Stolen fee processed on the account may be refunded if the transponder is found and returned within one year of being reported Lost/Stolen.

- If the E-ZPass Virginia transponder is returned to the CSC damaged, the customer must make a payment then via cash, check, or credit card. See the supervisor on duty to process payment.

3.6.4. Processing Non-Revenue Lost/Stolen Transponder

To process a non-revenue lost/stolen transponder

1. Fill out the Lost/Stolen Form accordingly.

2. Ensure that the customer has made a payment for processing. The $25 Lost/Stolen fee applies.

3. Deliver the Lost/Stolen Form to the designated employee for processing.

3.6.5. VDOT Handicapped Account

VDOT has a special handicap account for qualifying individuals with permanent upper limb mobility in accordance with Section § 33.1-252 B1 of the Code of Virginia.
Applicants must complete the Non-Revenue Transponder Application – Permanent Upper Limb Mobility Impairment form, provide physician’s certification and have the documents notarized.

Interested applicants are directed to the E-ZPass Virginia retail center nearest to them. The retail center supervisor will provide the aforementioned form, instructions, and process the request through VDOT.

3.6.6. Non-Revenue Slip Ramp Access Procedures

Each transponder that is to be activated for the slip ramp must be individually marked under the Assign Current Transponder to Discount Plan option. This is done in the CSC software application by right-clicking on the transponder and assigning it to the Discount Plan for DTR Slip Ramp Access.

**IMPORTANT:** Enrolling a transponder in the CSC application does not actually activate the transponder for the slip ramp. Each individual transponder number that is to be activated for the slip ramp must be communicated to the Dulles Toll Road by E-Mailing the designated toll road administrator.

3.6.6.1. Processing New Non-Revenue Accounts Requiring Slip Ramp Access

- To process new Non-revenue accounts requiring slip ramp access

1. The applicant fills out the Non-Revenue application, ensuring the slip access box is checked.
2. The Northern Virginia CSC submits the application to VDOT for approval. Once approved, the Northern Virginia CSC will open the account.
3. The new Non-Revenue account is created in the CSC by authorized personnel. Transponder deposits may be required for each new transponder according to the terms of the E-ZPass Customer Agreement. Once transponders are added to the account, the transponder numbers must be communicated via E-Mail to the Dulles Toll Road so they can be activated for the slip ramp.
4. In addition to the regular information provided to Non-Revenue accounts, customers are notified that slip ramp access could take up to 5 business days for processing and to proceed with caution.

3.6.6.2. Replace/Return Transponders for Non-Revenue Accounts Requiring Slip Ramp Access

1. The customer begins the process by filling out the Non-Revenue Exchange Form and stating the reason for exchange.
2. Authorized personnel in the CSC add the new transponder to the account, and select the box indicating they are replacing a current transponder on the account. Comments are left in the account indicating the transponder serial numbers involved in the exchange. The completed Non-Revenue Return/Replacement form is given to the Supervisor.

3. The Supervisor must inform the Dulles Toll Road via E-Mail of the transponder numbers of both the replaced transponders (for de-activation) and the new transponder numbers (for activation).

4. In addition to the regular information sent with Non-Revenue accounts, customers are notified that slip ramp access could take up to 5 business days for processing and to proceed with caution.

Hybrid Accounts

Hybrid accounts are Non-Revenue accounts within the state of Virginia; however, they allow the customer to pre-pay toll fees for outside-of-state tolls. Please refer to Table 3-2.

The following procedures apply to hybrid account management:

- The applicant must designate on the Non-Revenue/Hybrid account application form whether the account to be activated is a Hybrid account or a Non-Revenue account.

- Written authorization from VDOT is required and should be submitted with the application form. The account is not to be activated without VDOT approval on file. The customer is to receive only the number of transponders that VDOT has approved. Any future requests to add new transponders to Hybrid account must have written authorization from VDOT.

- Hybrid accounts will be set up as either commercial or personal accounts to facilitate account balances. A separate check-box designation will be activated to make it a Hybrid account.

- A CSC Supervisor or Manager’s system password is needed to designate any new account as a Hybrid account. The Supervisor or Manager must account for written VDOT approvals before completing this step.

- Existing accounts of any type cannot be converted into Hybrid accounts. Hybrid accounts cannot be converted into other types of accounts either. New accounts need to be created in this instance and the old account would be deactivated.

- CSRs will use the appropriate forms for transactions. The customer, CSR, and Supervisor on duty must sign all paperwork. Currently, a copy of all paperwork is forwarded to the Quality department for review and filing.

- Hybrid accounts are managed as described in Section 3.6.1 Managing Non-Revenue Accounts.

- The CSC supervisor maintains a clear and concise filing system for all Hybrid accounts and ensures that all folders are clearly labeled and filed accordingly.
Employees must interact with the other CSCs to ensure that all Hybrid account records remain current.

When processing a walk-in or call-in Hybrid account holder, the following paperwork must be processed to accompany any action taken on the account:

- New Issue Transponder form
- Add-on Transponder form
- Returned Transponder form
- Lost/Stolen form

The paperwork should be marked in an appropriate manner to designate the action as a Hybrid account.

The procedures for processing a new issue transponder, a returned transponder, or a Lost/Stolen transponder are the same for Hybrid accounts as Non-Revenue accounts. Sections 3.6.1.1 through 3.6.1.3 outline the steps to be taken.

**Gift Certificates**

### 3.8.1. Issuing Gift Certificates

**To issue a gift certificate**

1. The CSR or customer completes the Gift Certificate Form in the ImageWorks system.
2. Complete the necessary fields on the Gift Certificate Form including purchaser’s name, address, phone number, and payment information.
3. The supervisor responsible for handling gift certificates will run a report on the ImageWorks system daily to locate any new Gift Certificate forms. The supervisor will process the payment into the appropriate service center’s gift certificate account.
4. The supervisor will edit the gift certificate form in ImageWorks to delete all but the last four numbers of the credit card and expiration date.
5. The appropriate supervisor adds the gift certificate information to the Gift Certificate spreadsheet located on the shared drive. The following information is required on the spreadsheet:
   - Date
   - Gift certificate number
   - Amount
   - Purchased by
   - Telephone number
6. The gift certificate is either mailed or issued if the customer is in the lobby of a walk-in service center. The issuing CSR or Supervisor will write a date in the Expiration Date field, exactly one (1) year in advance of the date the gift certificate is issued. Recipients of a gift certificate have one (1) year to redeem it, otherwise the funds are forfeited.
7. The form is filed in numerical order for future redemption (in Gift Certificate binder).

3.8.2. Redeeming Gift Certificates

To redeem a gift certificate

1. The CSC must receive the physical gift certificate to redeem it.

2. The appropriate supervisor redeems the gift certificate by processing “gift certificate debit” and “gift certificate credit” adjustments to the issuing CSC account and customer account, respectively.

3. Add comments to each adjustment to indicate the redeemed gift certificate number, amount, and future fund destination (customer account). Similar comments are also added to each account’s comment field.

4. After funds have been transferred, the appropriate supervisor collects the gift certificate and marks its redeemed status by writing the date redeemed, the account number, and “VOID” across the front side.

5. The appropriate supervisor locates the issue form from the Gift Certificate binder and completes redemption fields. Form, gift certificate, and a customer account snapshot are stapled and filed accordingly in the Gift Certificate binder.

6. The appropriate supervisor updates gift certificate status in the Gift Certificate spreadsheet by completing Amount redeemed, Amount redeemed Into, verified, and Date redeemed fields. The redeemed gift certificate is removed from regular spreadsheet view by selecting the row and using the delete function.

3.8.2.1. Redeeming Gift Certificates from Other Service Centers

To redeem a gift certificate from other service centers

1. The appropriate supervisor follows previously described procedures (see 3.8.2).

2. The appropriate supervisor notifies the issuing center that the gift certificate has been redeemed and sends the original gift certificate to the issuing walk-in service center.

3. Upon receipt, the issuing service center updates their Gift Certificate spreadsheet accordingly.

3.8.3. End-of-Month Gift Certificate Procedures

Gift Certificate accounts are reconciled each month by each service center. The designated service center supervisor runs a detailed monthly statement and verifies all credits and debits to the Gift Certificate account, against the account issue and redemption information on the Gift Certificate spreadsheet.
After reconciliation, the next month's spreadsheet is created by opening the current month's spreadsheet and using the Save As function to rename it for current month. The redeemed gift certificates are removed from regular spreadsheet view by selecting the row and using the Hide function.

### 3.8.4. Retention of Gift Certificate Request Forms

Gift Certificate Request forms can contain full credit card numbers. If a form is submitted with a full credit card number, the request is fulfilled, payment posted, and the gift certificate is mailed to the desired recipient. The credit card number on the request form is then masked with a black marker, except for the last four digits. The request form is subsequently photocopied; the original is placed in the shred bin, the photocopy is retained until the gift certificate is redeemed. After the gift certificate is redeemed and the monthly reconciliation is completed, the gift certificate and the request form are both shredded.

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**escalated Inquiries**

A customer may contact the CSC for an inquiry, complaint, or discrepancy regarding his account. Customer exchanges not satisfied at the CSR level are escalated to the Lead CSR and then to a supervisor or manager. The following scenarios describe typical procedures for escalating an issue received at the walk-in counter of the CSC, through the mail, or on the telephone.

**To process escalated inquiries complaints and discrepancies**

1. The customer describes the issue to the CSR.
2. The CSR attempts to resolve the issue without escalation.
   - If successful, the CSR thanks the customer and moves on to the next task.
   - The normal escalation procedure for a CSR is to locate a Lead CSR for mail-in or call-in cases. For more extreme customer service issues, the CSR can bypass the Lead CSR and locate a supervisor or manager for assistance.
3. If a customer reports a roadway issue to the CSC, the CSR immediately contacts his supervisor. The supervisor immediately contacts the nearest toll plaza to report the incident.
4. Escalations go up to the appropriate department manager and then to the operations manager.
5. CSRs are the first line for resolving walk-in and call-in customer complaints. The CSR (or mail clerk for issues coming in through the mail) is trained to understand where to send the complaint if he cannot resolve the issue.
6. Customer issues and inquiries often involve questions of refunds and charge reversals. While the Lead CSR or supervisor on duty is responsible for making the adjustment, he only makes these adjustments per the CSC policies.

The Finance Manager periodically reviews the adjustments to ensure that they are made appropriately.

3.9.1. Gate Strikes

A gate strike happens when an E-ZPass Virginia customer’s vehicle either hits or is hit by the gate at a toll facility lane.

If the customer calls and advises that a gate has hit his car or he has hit a gate, follow the next procedure.

To process a customer contact a gate strike incident

1. The CSR locates the customer’s account in the CSC application.
2. The CSR verifies the customer as either the account holder or an authorized user then ensures there is money in the account.
3. The CSR verifies account information, including all vehicles and assigned transponders, to troubleshoot any issues.
4. The CSR provides the customer the contact information for the applicable toll facility. From this point, any resolution will have to occur between the applicable toll facility administration and the customer.

Note: If the customer is not an E-ZPass patron, Step 4 only applies.

3.10.1. Toll Disputes

When a customer disputes a toll charge on his/her E-ZPass account, the CSR fills out the Disputed Charge Form from the ImageWorks application. Detailed information must be provided on this form, such as:

- State (If other than Virginia)
- Toll Road
- Plaza Name
- Lane Number
- Date and Time of the transaction
- Any additional comments
The CSR gives this form to their Supervisor. The Supervisor contacts the applicable toll facility and provides then with all of the information provided on the Disputed Charge Form. A statement of why the toll charge is being disputed is also required.

If the toll road approves an adjustment to the original toll charge, the Supervisor locates the toll charge in the CSCWinClient application and adjusts the toll amount to the corrected total. Appropriate notes are placed in the Adjustment Wizard explaining what prompted the adjustment and who authorized the adjustment. After the adjustment is complete, the Supervisor then contacts the customer to tell them the disposition.

3.10.2. Credit Card Disputes

When a customer wants to inquire about or dispute a credit card payment, the CSR requests the customer’s full credit card number and a telephone number where he/she can be reached. This information, along with the customer’s name, is entered on a Credit Card Dispute Form. Other pertinent information, such as the date and time of the charge, should also be obtained from the customer. The customer is advised that a response should be expected within two (2) business days. The CSR gives the Credit Card Dispute Form to their Supervisor on the same day the dispute or inquiry was made. (The form is not to be left in the Supervisor’s area)

3.10.2.1. CLIFTON FORGE CENTER

The Finance department is located within this facility. The Supervisor delivers the Credit Card Dispute Form to the Finance Manager or Finance Supervisor on the same day the dispute or inquiry was made. Once the Finance department has researched the dispute or inquiry, they provide that documentation to the Supervisor. The Supervisor will contact the customer with the results of the research. The Credit Card Dispute Form is then placed in the shred bin to be destroyed later.

3.10.2.2. RETAIL LOCATIONS

The Retail Supervisor will call the Finance Supervisor or Finance Manager, giving him/her the necessary information on the Credit Card Dispute Form. The form is never e-mailed or faxed. Once the Finance department has researched the dispute or inquiry, they provide that documentation to the Retail Supervisor. The Retail Supervisor will contact the customer with the results of the research. The Credit Card Dispute Form is then placed in the shred bin to be destroyed later.
3.10.3. Customers From Other E-ZPass Agencies

When a customer enters a walk-in center and provides an account number or transponder serial number that does not match the CSC database, the CSR listens to the customer’s issue, and if the CSR can explain or resolve the issue, the CSR does so.

If there is nothing that the CSR can do because the issue belongs to the customer’s home E-ZPass agency, the CSR gives the customer the home agency’s phone number (if the CSR can determine the home-agency from the customer’s information), E-Mail address, that agency’s walk-in center locations, and the hours of operation and then requests that the customer contact his home-agency directly.

Daily CS Cas ut

3.11.1. Cashing Out

Telephone CSRs may begin the cash out procedure at the end of their shift. For CSR’s who work until the close of the business day, they begin the cash out process after all calls are cleared from the ACD queue. Lobby CSRs remain on duty as needed until the close of walk-in business and all customers have left the lobby.

Note: For cashing out during end-of-day cash-out procedures, the call-in CSR follows the same procedures and uses the same screens that the walk-in CSRs use. Additionally, the call-in CSRs do not assign transponders to accounts. The CSRs forward form requests to the appropriate department for fulfillment processing.

3.11.1.1. Customer Service Representative Responsibilities

To cas out for t e day

1. In the CSC application, select Financial from the main toolbar. Go to Deposits, then New. The Staff Deposit Wizard will appear. The CSR is to proceed through each screen within the wizard.

2. The first screen of the wizard has pre-populated fields for the CSR’s name and the Deposit Date. The Deposit Date field populates with the current date. Click the Next button to proceed.

3. A pop-up screen appears, asking if the CSR took both VPS and CSC payments on the current date. If the question is answered “No,” the wizard proceeds in the cash out process of the CSC. If the question is answered “Yes,” the CSC system automatically populates the cash, credit card, and check amounts for the CSC and proceeds to the cash out process of the VPS.

4. Assuming the CSR did not take VPS payments, the next screen of the Staff Deposit Wizard allows users to enter the cash counts by the denomination of money, from pennies to hundred dollar bills. This screen calculates the
cumulative total of money as amounts are entered. Click on the Next button when finished.

5. Credit card amounts are reconciled on the screen that follows the cash totals. The totals by credit card type (Visa, MasterCard, Discover, American Express, and Diner's Club) will automatically be populated on this screen based on the activity since the last deposit. This screen also displays the cumulative total of credit card payments for the current deposit. Press the Next button to continue.

6. Check amounts are reconciled on the screen that follows the credit card totals. This screen populates all of the check payments since the last deposit automatically. The first column is designated for check numbers and the second column is designated for the corresponding check amounts. This screen also displays the cumulative total of check payments for the current deposit. Press the Next button to continue.

7. The final screen is used by a CSR to verify all of the information entered on previous screens. After the totals and calculator tape (if cash and/or check payments were made) are verified by a Lead CSR or Supervisor, the CSR will press the Finish button to complete the deposit. Prior to pressing the Finish button, at any point in the wizard, a CSR can press the Back button to return to a previous screen and make necessary edits.

3.11.1.2. Close Out Lead CSR or Supervisor Responsibilities

After all CSRs have cashed out, all deposit bags are put in the safe and the deposit reconciliation begins. Lead CSRs or Supervisors will verify the deposits made by the CSRs. The verification process for a Lead CSR or Supervisor is two-fold:

1. A Lead CSR or Supervisor will run the Cler Financial Activity report from the CSC system. The current date is used for the date parameter and the report is filtered by Staff Location (Clifton Forge, Northern Virginia, Coleman, or Richmond). This report lists the total cash, check, and credit card amounts taken for the day by CSR in the chosen location. The CSR deposits are reconciled to this report. Any variances are reconciled before leaving for the day.

2. A Lead CSR or Supervisor then can search deposits by clicking on the Financial option from the main toolbar in the CSC system, selecting Deposits, then Search. The search function allows the supervisor to see deposits made by one CSR at a time or all deposits made within a time period. The time specification is configurable based on user needs; however, the normal date parameter will be the current date.

3. By clicking on the Search button, the user will see all deposits based on the specifications entered. The Lead CSR or Supervisor can then right-click on any listed deposit and select Verify Deposit.

4. The Add/Verify Staff Deposit Wizard activates and the supervisor can navigate through the same screens the CSR edited during the cash out process.
5. All receipts will be reconciled to the totals listed in the Add/Verify Staff Deposit.

6. When the supervisor has completed the verification process, the Lead CSR or Supervisor clicks on the Finish button to show the deposit as being verified. All of the day’s deposits must be verified.

7. The Lead CSR/Supervisor and the CSR both sign the CSR’s deposit receipt.

8. The CSR places the deposit receipt in the bag with the cash deposit.

9. The Supervisor in the Richmond retail center makes nightly bank deposits of all cash, check and money order payments received that day after the conclusion of the work day. All check, cash, and money order payments collected in the Clifton Forge, Northern Virginia and Coleman centers are placed in a locked safe overnight and deposited into the bank the following business day.

**The E-ZPass Virginia Web site**

The E-ZPass Virginia Customer Website application provides users information about the E-ZPass of Virginia program and other participating toll roads. This site is interactive, allowing the customer to open a personal or commercial prepaid account, to make updates to accounts, to view statements, make payments, review contact information, and to obtain answers to frequently asked questions (FAQ).

The functionality on the Web server links to the databases that retain account and violation data. The system updates in real-time any changed information on the Website and sends select confirmation E-Mails to the E-Mail address associated with the account.

Authorized E-ZPass Virginia staff will update content on the website up to four times per year as requested by VDOT.

**3.12.1. Website Functionality**

- **Customers are able to perform the following functions from the site**
  - Create a personal or commercial account
  - Create or change their logon and password
  - View or update personal, vehicle, or transponder information
  - View or update replenishment information
  - Make a payment
  - Make a request to close an account
  - Order more transponders
  - View, appeal, or pay violations
  - Send an E-Mail request to Customer Service
A confirmation page will display for the customer after a successful change or transaction has occurred via the website. This page will summarize the event that has been entered and provide a confirmation number, when applicable. This page can be printed for recordkeeping.

3.12.2. Forms

The E-ZPass Virginia website will provide a page that allows users to view, download, or print frequently used E-ZPass Virginia forms. Customers can then fax or mail these forms to a CSC for fulfillment.

3.12.3. Transactions

The E-ZPass Virginia Customer website contains a Transactions link that allows the user to select a date range within the last 30 days. The feature will return all transactions posted to the account within the specified time parameters. This screen will display the transaction, the transponder number, the date and time of the transaction, the toll facility, and the amount of the toll. This screen can be printed using the Print icon within the Web browser.

For transactions older than 30 days, the Statement link can be accessed. Customers who have selected online monthly or online quarterly statements can select a statement from a list displaying statements up to 6 previous months. The link displays the statement from the Questmark Website where the statements are stored. From this Website, the user can view and print their statement.

Mail Processing

The CSC mail department processes E-ZPass Virginia customer mail. This process includes the following tasks:

- Opening and transferring incoming mail
- Delivering requested items to the customer through the outgoing mail
- Monitoring the outsource mail files

The CSC provides post office boxes as available addresses for customers to send mail to the operation. Currently, the post office box address given for receiving applications is in Clifton Forge, Virginia.

3.13.1. Incoming Mail

All mail received is sorted, counted by type and logged on the Daily Inbound Mail Log. The following list includes the different types of incoming mail:

- Account-Related Mail Processing
3.13.2. Account-Related Mail Processing

Account-related mail includes account applications, account maintenance, payments, and general mail. All mail goes through the E-ZPass Virginia CSC postal address, which is P.O. Box 1234, Clifton Forge, VA 24422. Mailroom personnel go to the post office twice a day, once in the morning to pick up the incoming mail and then again in the afternoon to deliver any outgoing mail.

- **To retrieve and prepare general mail**
  1. When the mail arrives from the post office, it is sorted into several categories. This is done to verify that no misdirected mail was added by the post office. If so, this mail is removed and returned to the post office.
  2. Sort the CSC mail into the following categories:
     - Misdirected mail
     - Return mail
     - New account applications and add-transponder requests
     - Account maintenance correspondence
     - Account payments
     - Returned transponders
     - Miscellaneous incoming mail
     - Certified mail
     - Check payments
     - Cash payments
     - Credit card payments
     - Credit card updates

3.13.3. Misdirected Mail Processing

The CSC staff returns misdirected mail pieces to the post office on the next available trip so that the mail can be re-routed to the correct recipient.
3.13.4. Return Mail Processing

A sequence of attempts is made to send the correspondence that has been returned to the CSC to the customer’s correct address.

3.13.4.1. To Process the Returned Mail with Forwarding Address

To process correspondence excluding statements

1. Access the customer’s E-ZPass Virginia account to see if there is a record of an address change for this customer.

2. If the address is current in the system, repackage the correspondence using the new address and set it aside to be processed with the outgoing mail.

3. If the address is not current in the customer’s account, update the address and repackage the correspondence using the new address and set it aside to be processed with the outgoing mail.

   To process the returned statements

   1. Process the mail that has a forwarding address provided by the post office.

   2. Access the customer’s E-ZPass Virginia account to see if there is a record of an address change for this customer. The statement is not E-Mailed.

   3. If the address is not current in the customer’s account, update the address in the customer’s account. The statement is not E-Mailed.

3.13.4.2. Return Mail with No Forwarding Address

To process the returned mail excluding statements

1. Access the customer’s E-ZPass Virginia account to see if there is a record of an address change for this customer.

2. If the address is current in the system, repackage the correspondence using the new address and set it aside to be processed with the outgoing mail.

3. If the address is not current in the customer’s account, an attempt is made to contact the customer by telephone or E-Mail. If successful contact is made, the address is updated during that contact. If contact is unsuccessful, the E-ZPass account is noted and the mail is shredded.

   To process the returned statements

   1. Access the customer’s E-ZPass Virginia account to see if there is a record of an address change for this customer. The statement is not E-Mailed.

   2. If the address is not current in the customer’s account, an attempt is made to contact the customer by telephone or E-Mail. If successful contact is made, the address is updated during that contact. If contact is unsuccessful, the E-ZPass account is noted and the statement is shredded. The statement is not E-Mailed.
3.13.5. Account Maintenance Correspondence Processing

Processing CSC account correspondence falls into the following groups:

- Letters requesting account information change
- Transponder returns

3.13.5.1. Application for Account Enrollment and Requests for Additional Transponders

The mail clerk delivers the individual applications to the CSR for processing. If a check payment accompanies the new application, the mailroom clerk attaches the check to the application. The CSR posts the payment on the new account during the application processing and assigns the correct transponders to the account. The transponder request can also be filled through the fulfillment queue process after the application information has been entered.

When commercial applications are received, the mail clerk delivers the mailing to a commercial CSR to open the account. Once the account is open, the commercial CSR completes the process, including fulfilling the transponder requirements.

If an application is received and it is incomplete, the CSR follows up with the applicant to get the missing information.

3.13.5.2. Account Information Changes

The mailroom staff forwards correspondence relating to account information changes to a CSR for processing. The CSR accesses the appropriate account, processes the customer’s requested information change.

When an account holder sends a request in writing to close his account, the mail department checks to see if any transponders were sent with the letter. If any were sent, the mail department forwards the transponder to the inventory department for processing. If no transponders were sent, the close account request is forwarded to a CSR for processing the request.

The mail clerk records delivery of all returned transponders via the mail on the Daily Mail Log.

3.13.5.3. Account Payments

The mail clerk counts the payments and records the number of checks received on the Daily Mail Log.
The actual check payments, envelope, and all account information received are forwarded to the designated CSR to enter into the system.

3.13.5.4. Credit Card Updates

Each month, the E-ZPass service center sends notification to all patrons who have a credit card on file that is about to expire. If only the expiration date on the credit card has changed, one of the options a patron has once receiving this notification is to write the new expiration date on the notification/mailer and mail it back to the service center.

After credit card updates are sorted, counted, and logged, they are grouped into batches of 50 and given to a CSC Supervisor. The Supervisor does an independent count of the credit card updates received and disperses them to authorized CSRs for processing.

When the updates are returned to the Supervisor, a second count occurs as is compared to the first count for reconciliation. The Supervisor also verifies that all credit card numbers have been appropriately marked through, except for the last four (4) digits and the expiration date. After the quality check is complete, the Supervisor places the credit card updates in the appropriate tray/box to be scanned later. All credit card updates are completed within the same month received. Supervisors keep a spreadsheet of daily activity, showing the date and the number of credit cards updated.

3.13.5.5. Miscellaneous Administrative Correspondence

As it arrives, administrative mail is distributed to the recipient or to his immediate supervisor if the individual is temporarily unavailable for delivery.

3.13.5.6. Returned Transponders

The mail clerk records delivery of all returned transponders via the mail on the Daily Mail Log; these are then forwarded for processing. Returned transponders may be from different sources when they arrive in the mailroom:

- A returned transponder that should have been sent to a different E-ZPass agency. The mail clerk mails the transponder to the correct agency.

- An undeliverable transponder. Research the account to determine the proper address. If the mail clerk finds the correct address, he changes the address and resends the transponder. If the clerk cannot determine the correct address, he gives the returned package to the inventory department for further processing.

- A returned transponder that comes with an account maintenance request, including close account requests. Forward the transponder to the inventory department. These are counted and recorded on the Mail Room Activity Chart.
3.13.6. Outgoing Mail

Mail sent out from the CSC either goes through the post office as described in paragraph or is sent through Questmark, a third party vendor. The use of a third party vendor allows the operation to realize discounts for sending large quantities of mail.

The CSC sends out several types of mail. These are to communicate specific information to the customer, or advise them of an issue with their account; these include:

- Account Statements
- Inactive Account Notices
- ACH Rejection Notices
- Credit Card Rejection Notices
- Notices of Failed Replenishments
- Request for Customer Account Updates
- Credit Card Expiration Notices
- Transponder Replacement Program (TRP) Notices.
- Replenishment amount change notice

The CSC also responds to incoming mail and inquiries from other sources that are included in the outgoing mail, including orders for replacement transponder fasteners and commercial account updates. Also, on occasion, VDOT may instruct the operation to send a mailing to a specific number or population of the customer base.

Outgoing mail is posted with a digital mailing system meter. The operation maintains the pre-paid account for the digital mailing system funds.

To prepare general outbound mail:

1. Collect, weigh, meter, and place outbound mail in postal bins.
2. Collect outbound transponder mail from the fulfillment department and then weigh, meter, and place it in postal bins.
3. Outbound mail is delivered to the post office twice daily.
4. Prepare Federal Express mail for pickup once each day.

The amount of outgoing mail supplies is tracked by the inventory personnel to ensure that there is an adequate volume on hand for day-to-day activity.

Mail Processing
E-Mail correspondence is received from customer requests made on the E-ZPass Virginia Website, mailings, and/or brochures. Customer inquiries received on a regular basis include changes to their credit card information, address corrections, requests for additional transponders, requests to close accounts, and statement explanations for toll charges, discounts, and transponder usage. CSC staff process incoming E-Mails daily. All E-Mail must be responded to within 3-5 business days of receipt but typically are answered within 24 hours after they have been received.

3.14.1. To Process E-Mail

Outlook is the application used currently to read and respond to all emails sent by customers to the following email address: customerservice@ezpassva.com. E-Mail is answered in the order in which it is received.

Standard verification procedures apply to E-Mail. The return E-Mail address is compared to the E-Mail address in the customer account. The name and account number referenced in the E-Mail are also compared to those pieces of information in the customer account. If the information does not match, respond to the customer with a request for additional information. Three pieces of information must be verified before maintenance to the account is performed.

Account information is updated based on content within the email, if applicable. Also, if the account is in a low-balance or insufficient funds status, the patron is notified in the response E-Mail.

If any compliment or complaint is received via E-Mail, it is forwarded to the appropriate Supervisor for review.

There are prepared responses to commonly asked questions that can be copied and pasted into the response of E-Mail.

3.14.2. E-Mail Etiquette

Response to all E-Mail begins with thanking the customer for contacting E-Z Pass VA. The response is concluded with an appropriate salutation, i.e. "Kind Regards" and the name of the organization, E-Z Pass VA Customer Service Center. The CSR’s name and CSR number is also added.

All content contained in E-Mail responses is a reflection upon the sender. Because of this, all E-Mail is checked for spelling and/or grammatical errors prior to being sent. The information provided to the patron is verified for accuracy and the E-Mail is reviewed for appropriate wording and absence of possible negative tone.

3.14.3. PCI Compliance

Credit card information is not to be sent or received via E-Mail. The only exception is for certain instances from patrons who are outside the United States and unable to call the toll-free number or send a fax. The credit card number and expiration date are to be divided among three
separate E-Mails: the first six digits of the credit card number in the first E-Mail, the second six
digits in the second E-Mail, the remaining digits and the expiration date in the third E-Mail. As
soon as the information has been processed for the toll violation payment, the first two E-Mails
must be permanently deleted. The third E-Mail, containing the last digits and the expiration
date, will be retained.

3.14.4. Archive

After responses have been sent, E-Mails are retained and sorted into the following
folders:

- Inactive Accounts
- Tag Replacement Notification responses
- Violations
- Account Inquiries, general questions, compliments or complaints
- Sent Items

3.14.5. Returned E-Mail

If an E-Mail is received stating the wrong person has been contacted with the E-Mail
address, the CSR will search for the account on which the E-Mail is listed. The E-Mail
address is deleted from the account information. Also, the account is noted stating the
present user of the E-Mail address is not an E-Z Pass VA account holder.

3.14.6. Tracking

E-Mail spreadsheets are submitted on a monthly basis to a manager for performance
reporting. All E-Mails, received and sent, are totaled and tracked on a spreadsheet
daily. The cumulative daily totals result in monthly statistics that are reported to VDOT
(see section 3.19 below)

The spreadsheet tracks the following:

- Number of E-Mails Received
- Number of E-Mails Carryover (Previous Day)
- Number of E-Mails Completed
- Number of E-Mails Carryover (Present Day)

3.15. Scanning Procedures

The following rules pertain to scanning procedures:

- Operational documents are to be scanned weekly or as needed.
Accounting/Finance documents take priority and are to be scanned monthly or when received.

All Operational, Finance, and Accounting documents are scanned into the computer by document type, account number, and date, and the image is placed into the appropriate electronic file cabinet.

All certificates must be researched and validated before scanning and follow the same scanning procedures as Operational, Finance and Accounting documents.

Checks are to be scanned only if authorized by the Finance department, a supervisor, or a manager and follow the same scanning procedures for operational, finance and accounting documents.

All scanned images are reviewed and checked for accuracy by using a system check or self-checking after each scanned batch.

All scanned paper documents are placed in the appropriate shred bin until the authorized shredding company arrives on-site to shred documents monthly, unless the supervisor or manager instructs otherwise.

CSC personnel utilize online forms, which are accessed and stored in the scanning system.

Currently, document scanning occurs in a system independent of CSC system. In this independent system, the scanned documents can be retrieved for review as needed.

### 3.1. Scheduled tasks and Procedures

#### 3.16.1. Automatic Replenishment Recalculation Procedure (Auto Recalc)

On a quarterly basis, CSC Operations identifies accounts that automatically replenish more than three (3) times during a three (3) month period due to extensive toll usage. The account holder receives notification via mail of a change to the amount that is taken from their method of payment. Operations monitors this activity and consults with VDOT as necessary.

#### 3.16.1.1. Procedure

A backend process named “BP_ReplenishmentRecalculation” is run at a designated time after the end of a quarter to identify accounts that have been automatically replenished nine or more times within the prior three month period and have not opted out of the recalculation process. Accounts with the Replenishment Recalculation box unchecked in the Account Management screen’s Replenishment tab are exempt and will be skipped.

**Note:** The number of months to consider and the number of replenishments desired per month are both configurable in the database. The current values are 3 and 3.
Calculating the Proposed New Replenishment Amount
The proposed new replenishment amount is calculated in the following way:

1. Add the charges for the three (3) most recent full months.
2. Multiply the desired number of monthly replenishment transactions (3) by three (3).
3. Divide the number from Step 1 by the number from Step 2.
4. Round up to the nearest five dollars.

Operational Review
Authorized personnel generate the Replenishment Amount Adjustment Candidate Report to view the accounts that are candidates for the replenishment amount adjustment process

- Accounts that have exceeded the target number of replenishments and have not opted out of the recalculation process will be listed in the report.
- Outbound telephone calls will be made to the selected account holders to notify them in advance of the change. Accounts that replenish using ACH and accounts with replenishment adjustment amounts above a selected threshold will be considered for the call out program.
- CSRs explain the benefits of monthly auto replenishment to the customer.
- The decision to exclude selected accounts from the replenishment amount adjustment process can only be made by a supervisor.
- Auto replenishment amount can only be adjusted by a Supervisor, Lead, or designated CSR.
- If it is decided after reviewing this report that selected accounts are to be excluded from the replenishment amount adjustment process, the checkmark can be removed from the checkbox titled, “Allow replenishment amount recalculation” in the ccount anage en screen’s e enis en tab and the ‘BP_ReplenishmentRecalculation’ job can be re-run.
- After running the BP_ReplenishmentRecalculationCommit (see below) the checkmark can be replaced in the checkbox titled, “Allow replenishment amount recalculation” in the ccount anage en screen’s e enis en tab.

Running the BP_ReplenishmentRecalculationCommit job
1. Run the BP_ReplenishmentRecalculationCommit job to apply the changes to the accounts.
2. The BP_ReplenishmentRecalculationCommit job will find accounts that need to change.
3. The BP_ReplenishmentRecalculationCommit job will update the customer account with the new replenishment amounts and will update the Change Effective Date to the current date for each account adjusted.
4. ‘DF_ARRrecalculationDF’ is the job used to create a data feed to Questmark containing the customer name, address, and account number. An individual
communication event will be created for each account included in the auto replenishment recalculation account file. Questmark will send out the auto replenishment letter notification to each account in the data feed.

5. The new replenishment amount shows in the account's screen's e e t tab. Account History records will reflect the change.

If the auto replenishment letter is returned due to bad address, CSC will take every means to get a correct address to resend the letter to the customer. If an E-Mail address is on file, CSC will also attempt to contact the customer by E-Mail.

### 3.16.2. Inactive Accounts

A monthly report will be generated to identify accounts that have been inactive for a year and will be sent to Questmark. Questmark will create a notice for each applicable account and mail it. The notice will advise the patron to contact the CSC within a certain number of days or the account will be closed.

The account holder has 30 days to respond. If the customer does respond to keep the account open, the CSR places a Communication event in the applicable account which will keep the account open for another 12 months, even if a transponder transaction is not recorded within the subsequent 12 month period. If the customer does not respond within the determined time frame or responds by requesting their account be closed, the account will be placed into a Close Pending status. A fee of $25 will be deducted per outstanding transponder if the transponders are not returned. If there is no response from the patron and the funds needed to deduct the applicable Lost/Stolen fee are not available in the account balance, then at least one call must be placed to attempt to collect the fees due; otherwise, any remaining balance should be taken to cover part of the fee due and the account should be closed.

Accounts remain in a status until all transponders are returned. If there is a positive balance on the account after the transponders are returned, the account will be placed into the status. For accounts with either a zero balance or a negative balance, the account is moved to a status.

Questmark will provide E-Mail reports to the CSC Production Department listing the type and quantity of notice mailed. The frequency of that correspondence will be determined by the CSC.

### 3.16.3. Remittance of Unclaimed Property

Per the E-ZPass Virginia Customer Agreement, any account which remains inactive for twelve (12) months is subject to account closure. If that scenario happens and a positive account balance exists, the funds are treated as unclaimed property and forfeited to the Unclaimed Property within the Treasury Department of the Commonwealth of Virginia.
1. A report, similar to the one generated to identify Inactive Accounts (Section 3.16.2), will be generated on a quarterly basis to identify Inactive Accounts that are in a Closed Balance Pending status and with a positive account balance.

2. A script will then be initiated to adjust the available balance of each identified account to $0.00 with the adjustment reason, “Funds Remitted to the Commonwealth of VA for unclaimed property”. Subsequent to this step, the account is then closed per the Closed Account procedure (section 3.4.13).

3. The Finance Department will reconcile the total of the adjustments in Step 2 with the report in Step 1 to identify any possible discrepancies. Once the reconciliation is complete, the funds and patron information is submitted to the Commonwealth of Virginia, Treasury Department, Unclaimed Property Division via ACH Electronic Transfer.

3.16.3.1. Customer Service Response

Any patron inquiries concerning the account balance after the forfeiture are responded to promptly. Customers affected by this scenario are advised of forfeiture section within the Customer Agreement and the Unclaimed Property procedure. They are also advised of the applicable website and/or telephone number that can be used to claim the forfeited account balance.

If the customer’s inquiry is regarding the returning of a transponder, the CSR will research the account to identify if a Lost/Stolen fee as taken. If the Lost/Stolen fee was taken in the past twelve (12) months, the fee can be refunded.

3.16.4. Equipment/Furniture Inventory Verification

On an annual basis or as requested by VDOT, the Production manager and/or I.T. Manager sends the latest Furniture/Equipment Inventory list to each service center. Items on the list are $2500 or more in assessed value.

Each item on the list is visually verified and checked off in the “Verified By” column of the worksheet. The authorized Manager place his/her name next to each item verified in this column. The item, inventory number, serial number, and location of each item must be verified and any discrepancies are to be noted legibly on the worksheet.

If an item on the list has been disposed of, it is listed as “Disposed” in the “Verified By” column along with the date.

3.1. era iona e or ing
3.17.1. Productivity Reports: Phone Stats

The following sections outline general CSC operational and CSR productivity reporting. Most of these statistics are tracked daily and reviewed to identify broad trends and/or to monitor employee activity. This information, which is tracked daily, is then totaled for monthly statistical reporting that is prepared and sent to VDOT. See section 3.19 for information regarding the monthly reporting.

3.17.1.1. E-ZPass Virginia Phone Report

The Echopass system generates the E-ZPass Virginia Phone Report nightly. The report provides an array of information including the following:

- Total calls received
- Total calls received by CSR
- Average speed of answer
- Total calls abandoned
- Average abandoned time
- Average hold time
- Average talk time
- Service level %
- Longest call waiting

These statistics allow the CSC manager to monitor the call center performance against the performance standards VDOT has set. This information also allows the CSC manager to identify patterns of heavy call volume and staff accordingly. The stats also identify individual CSR productivity for performance evaluations.

3.17.1.2. IVR Report

Staff defines IVR system date parameters and report type to generate this report. The following reports contribute to collected data:

- Summary of Calls by Day
- Call Statistics by Half Hour
- Menus Accessed by Day (Report by Type)

Each report provides essential information regarding calls received by IVR, actions completed by IVR, and menu selections.

This report can be run manually as a monthly report as well.
3.17.2. Productivity Reports: Retail Center Stats

3.17.2.1. Productivity Report

This current report requires the user to change date parameters for requested data. The report provides information for all employees that have performed database transactions on a specific date. The information on the report includes the following:

- Accounts opened
- Closed Accounts
- Payments
- Account updates
- Transponders issued
- Adjustments

3.17.2.2. CSR Daily Activity Report

The CSRs complete this manual report nightly to help accurately gauge lobby activities. Relevant data may include the following:

- Transponders issued (by type)
- Accounts opened
- Transponders issued (by activity)
- Payments posted (by type)
- Customers serviced (by type—walk-in/drive-thru)

Activities performed are balanced against a CSR self-managed customer count (obtained by using manual counter) and journal transactions (reviewed by supervisor on duty) to obtain an accurate lobby customer count.

3.17.3. Productivity Reports: Inventory Stats

3.17.3.1. Daily Transponder Report

Staff personnel complete and submit this report. The report provides a breakdown of transponders received by the CSC. Transponder categories include the following:

- Processed from walk-ins
• Processed from mail
• Moved to Mark IV location
• Moved to Out of Warranty location
• Marked as Return To Inventory (RTI)
• Damaged

3.17.3.1. Transponder Replacement Program

The staff personnel track the transponder replacement program (TRP) orders and fulfillments daily and submit them at month end for report entry. Tracking differentiates between personal and commercial orders as well as online or phone submittals.

3.17.3.2. Transponder Tracking Sheets

Each tracking sheet containing applicable monthly transponder issues is separated and is not immediately filed by inventory staff. At month-end, all tracking sheets (pearl, blue, bumper, RTI) are submitted for count and verification. These totals are matched against previously obtained totals, which accurately track all transponder issues. Discrepancies are attributed to transponder transfers, which are tracked by the system as a transponder issue, but are not included in transponder tracking sheets.

3.17.3.3. Inventory Summary

Each service center provides a monthly summary of transponder movements following month-end reconciliation. Summary reports categorize transponder movements and specify incoming transponder statuses/locations, which include lost/stolen, returned to Mark IV, out of warranty, warehouse inventory, and service center inventory.

3.17.4. Productivity Reports: Other Stats

3.17.4.1. Incoming Mail

Mailroom or Lead CSR employees track and record daily the incoming mail on a mailroom tracking sheet. Incoming mail is tracked by the carrier that delivers it; i.e., Postal Service and express delivery carriers. Also, all information is separated by type. Categories include the following:

• Account update cards
• Returned Inventory (Transponders)
• Violation Appeals
• Payments (Cash, Checks, Credit Cards)
• Returned Mail

3.17.4.2. OUTGOING MAIL

Most outgoing mail is sent from the Clifton Forge service center. Mailroom personnel use a tracking sheet to record the number of items mailed each day, by carrier. Carriers include Postal Service (USPS), United Parcel Service (UPS), and Federal Express (FedEx). The number of transponders mailed each day is tracked separately by the Production Manager.

With much less quantity, the Retail service centers also have outgoing mail that is tracked daily. Outgoing mail for the Retail centers generally included account statements and payment receipts.

3.17.4.3. Drop Box

Drop boxes are located at each of the three (3) retail locations where customers can securely drop off transponders, payments, and/or any other correspondence. Items deposited in the drop boxes are collected and recorded daily.

3.17.4.4. E-Mail

Authorized personnel responsible for customer E-Mail record incoming and outgoing E-Mails daily on an E-Mail tracking sheet. The tracking sheet is submitted at month-end for verification and report entry.

3.1. Quality

This section describes Quality Control procedures.

3.18.1. Phone Quality

The quality manager and authorized Quality Department personnel monitor the daily phone calls answered by CSRs. The quantity of calls monitored is set to 1% of the total calls taken per month. The call center and retail service centers have a quality service level requirement of 95% each month. The calls are scored based on the following criteria and entered into a database for review and reporting.
• Identify the caller
• Identify reason/purpose of customer contact
• Friendliness/empathy
• Clear communication
• Ask questions
• Identify and explain solutions
• Policy/procedure/product knowledge
• Hold/wait time etiquette
• Fulfill the customer contact
• Customer service delivery
• Professionalism

The CSRs are critiqued individually to reinforce quality expectations and to identify instances where the expectations are met or exceeded, as well as point out areas of needed improvement.

3.18.2. **Transponder Auditing**

The Quality Department performs three monthly transponder audits to certify inventory integrity and ensure that all documentation required by VDOT is on file.

3.18.2.1. **Non-Revenue and Hybrid Transponders**

A monthly audit of the Non-Revenue and Hybrid Accounts is conducted, separate from each other, to find any new or closed accounts and locate any accounts with a dissimilar number of active transponders from the previous month. Written VDOT authorization is required for the creation of any new accounts or the addition of transponders to any account and kept on file in the Clifton Forge location. A monthly summary of current active non-revenue and hybrid accounts, active transponders, transponder variances from the previous month, and any outstanding required paperwork not yet on file is also maintained. The offices in Northern Virginia, Coleman, and Richmond send any received non-revenue or hybrid documentation to the Clifton Forge office.
3.18.2.2. Lost/Stolen/Damaged Transponders

A monthly audit of lost or stolen transponders is performed to discover any transponders that have been placed in the lost/stolen status since the previous month’s audit. A Lost/Stolen Form must be completed at the time any transponder is placed into a lost/stolen status. A review of the scanned documents is conducted to confirm that a Lost/Stolen Form is on file for every new transponder placed in that status.

3.18.3. VPS Image Review

The Quality Department audits 600 final image reviews and 600 plate identification reviews each month based on key performance requirements. The VPS department has a quality service requirement of 99.75% for both the Final Image Review and Plate Identification audit. The audit provides an independent assessment of the images that are either certified or rejected. All image judgments that differ from the original review are reported to the VPS supervisor.

3.18.3.1. Quarterly V-Toll Audit

A spreadsheet report is produced from VPS database via Crystal Reports that (for a defined date range) shows:

- Patron Account #
- Patron Account Type
- Customer Name
- V-Toll Amount
- V-Toll Posting Date/Time
- License Plate #

A heading example is shown in Figure 3.4.

![Figure 3.4](image)

- Audit clerk uses this report and accesses the CSC application.
- Access a 1% sample of accounts from this report, selecting `coun` under `ions`.
Select "Tag Transactions" as Search, use the Posting Date/Time entry on the crystal report to select the applicable Posting. Click

View the results, searching for the v-toll transaction that occurred on the same day as on the report.

Create new column on the crystal report, titled "Verification in CSC". Make an entry in this new column for every entry audited, noting whether the v-toll transaction posted to the CSC account.

Notify the VPS manager of any instances where the crystal report shows a v-toll transaction occurring but the transaction cannot be seen/verified in the CSC application.

Once complete, save the spreadsheet to the following shared folder, giving it the name V-toll audit_(date completed):  \172.16.201.9\qa\VPS\V-toll Audit

3.1 . liaison i

The CSC provides VDOT with a monthly report that includes statistics in the following operational areas. The data in this report assists in indicating any changes and trends that occur on a monthly basis.

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<td>Average walk-in volume by day for each location with monthly total</td>
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<td>CSC hours of operation</td>
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<td>Total incoming Mail by location</td>
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<td>Total outgoing Mail by location</td>
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<td>Total dropoff/FedEx mail by location</td>
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<td>Total checks received for the month</td>
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<td>Total customer E-Mail responded to</td>
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<td>Total web activity from CSC system</td>
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<td>Total payments received from CSC and Forte system</td>
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<td>Total VPS web payments and appeals</td>
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<td>Number of active transponders by style</td>
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<td>Number of transponders returned to inventory</td>
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<td>Number of outstanding returned transponders ready to be reissued</td>
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<td>Number of out of warranty transponders for the month</td>
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<td><strong>Active account balance</strong></td>
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<td><strong>Closed account balance</strong></td>
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<td><strong>Open account by method (phone, retail, or web)</strong></td>
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<td><strong>Number of accounts auto replenished by credit card, ACH, or manual</strong></td>
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<td><strong>Number of statements mailed for the month and quarter</strong></td>
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<td><strong>Number of complaints received</strong></td>
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<td><strong>Monthly customer compliment summary</strong></td>
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<td><strong>Number of toll disputes received</strong></td>
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<td><strong>Number of active employees by location</strong></td>
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<td><strong>Number of active employees by department</strong></td>
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<td><strong>Number of Faneuil and temporary employees</strong></td>
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<td><strong>Employee Retention Rate</strong></td>
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<td><strong>Total number of Virginia and away toll transactions by toll facility</strong></td>
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<td><strong>Total number of Virginia and away toll revenue by toll facility</strong></td>
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<td><strong>Total number of v-toll transaction by toll facility</strong></td>
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<td><strong>Total v-toll revenue by toll facility</strong></td>
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<td><strong>Total v-toll transaction fee by toll facility</strong></td>
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<td><strong>Total transponder transaction fee by toll facility</strong></td>
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<td><strong>Number of CSC phone calls monitored</strong></td>
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<td><strong>Quality service level % for CSC and VPS</strong></td>
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<td><strong>Number of CSC customer impacts</strong></td>
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<td><strong>Number of business impacts</strong></td>
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<td><strong>Number of professionalism impacts</strong></td>
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<td><strong>Number of perfect calls</strong></td>
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<td><strong>CSC CSR summary report</strong></td>
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<td><strong>Number of VPS plate identification audits performed</strong></td>
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<td><strong>Number of final image review audit performed</strong></td>
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<td><strong>Percentage of valid reasons</strong></td>
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<td><strong>VPS clerk summary report</strong></td>
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<td><strong>Statistics for Customer’s reason to call</strong></td>
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<td><strong>Total number of violation notices by toll facility</strong></td>
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<td><strong>Total summons issued by location</strong></td>
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<td><strong>Total number of images loaded by toll facility</strong></td>
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<td><strong>Total number of plate identification by toll facility</strong></td>
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<td><strong>Total number of DMV lookup by toll facility</strong></td>
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<td><strong>Total number of final image review by toll facility</strong></td>
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<td><strong>Total v-toll payments and transaction by toll facility</strong></td>
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<td><strong>Toll payments transaction by toll facility</strong></td>
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4. **FINANCE**

The Finance Department is responsible for overseeing the financial activity of the CSC and ensuring that the operational funds are properly recorded and reconciled. This process includes reconciliation and audit for funds transferred to each toll facility; funds transferred to and from IAG agencies; funds collected from patrons and deposited; funds collected from violations and deposited; and funds reimbursed to customers. The department also works to resolve any variances that are found in the reconciliation process, validates and/or authorizes invoices regarding expenses and operating costs, and performs budget analysis and advisement when necessary.

These procedures are designed to ensure reliable financial reporting, to be in compliance with the business rules defined by VDOT, and to follow Generally Accepted Accounting Principles (GAAP). They also safeguard the financial integrity of CSC operations and systems.

.1. **E-ZPass Virginia Funds**

To establish the proper flow of funds collected at the E-ZPass Virginia Customer Service Center (CSC) for prepaid tolls, the following accounts are used:

- VDOT Prepaid Account
E-ZPass Virginia has the following policies for customer funds, fees, and E-ZPass Virginia revenue:

- For the Clifton Forge location, tolls that are prepaid using cash are picked up and deposited every Thursday by a Brinks Courier representative. Checks are deposited through Wachovia’s remote deposit capture program. Cash and check payments received at the retail locations are deposited into the VDOT prepaid account daily no later than 2:00 pm.

- Credit card charges and debit card payments are processed and sent to Bank of America Merchant Services (BAMS) through the CSC and VPS systems. BAMS deposits the corresponding daily amounts into the VDOT prepaid account.

- AVI revenue is transferred from the VDOT prepaid account into the appropriate revenue account.

- Customer refunds are disbursed from the Faneuil CSC Customer Refund account weekly by a Faneuil corporate finance employee. The total amount of refunds is submitted to VDOT for payment to Faneuil.

- Fees—such as those for statements, lost/stolen tags, violations, returned checks and other fees— are reported to VDOT fiscal department each month.

- Adjustments to credit customers’ accounts for disputed charges are deducted from the amounts transferred into the appropriate revenue accounts/funds.

- Returned checks are deducted from the customer’s prepaid account on the CSC system. E-ZPass Virginia forwards to the VDOT accountant all relevant information; the accountant reconciles the VDOT Prepaid Account and adds the corresponding journal entries.

- Total transactions fees charged to each toll facility are deducted from their respective earned AVI revenue. These fees pay for the monthly expenditure invoice prepared by the CSC and other capital costs related to the E-ZPass Virginia operation. VDOT transfers money from the prepaid account into the Faneuil account to cover the invoice from the CSC.
The CSC calculates daily the total amount of MWAA revenue that the Greenway collects. This amount is deducted from the Greenway net transfer and is added to the MWAA net transfer.

Some roads require approval for any toll adjustments, the Finance department works with each roadway to properly reflect any needed adjustments.

4.2.1. Transfer of AVI Revenue

The financial staff at the CSC performs transfers of AVI revenue daily. Each toll facility’s AVI revenue earned for E-ZPass Virginia traffic, as well as away-agency tags on their roads, are transferred into their account daily from a VDOT bank account.

- Everyday, the financial staff generates a disbursement report that lists actual AVI revenue for transactions posted to the service center for each toll facility. It also includes Away-AVI revenue that has been posted within the same time frame.
- In addition to the disbursement report, most facilities fax their AVI Traffic Summary Report. Greenway sends theirs via e-mail and Powhite does not send a Traffic Summary Report.
- The Greenway sends an AVI Traffic Summary Report for the plaza lanes that collect revenue for the MWAA.
- Using the Excel spreadsheet, the financial staff enters the AVI transactions onto the tab labeled according to the date it was posted. The spreadsheet automatically calculates the total amount Greenway owes MWAA for AVI transactions. This tab of the spreadsheet is included in the package faxed to both the Greenway and MWAA as backup for the adjustment on the transfer.
- The Daily Transfer Information tab on the spreadsheet calculates the total amount of AVI revenue transferred to each toll facility by subtracting the transaction fee from the gross AVI revenue listed on the Disbursement Report, plus or minus any toll adjustments. For example,

  Gross AVI revenue listed on the Disbursement Report
  
  - Transaction fee
  - ± Any toll adjustments
  = Total amount of AVI revenue transferred to each toll facility

- The total revenue transfer to MWAA is the total AVI revenue earned, plus V-toll revenue, minus transaction fees, plus the MWAA revenue collected by Greenway, plus or minus any toll adjustments. For example,

  Total amount of AVI revenue earned
  
  - Transaction fees
  ± DTR revenue collected by Greenway
  ± Any toll adjustments
The total revenue transfer to Greenway is the total AVI revenue earned, minus transaction fees, minus revenue collected by the Greenway for the DTR, plus or minus any toll adjustments. For example,

Total amount of AVI revenue earned

- Transaction fees
- MWAA revenue collected by Greenway
± Any toll adjustments

= Total amount of revenue transferred to Greenway

The total revenue transfer to Coleman Bridge will be total AVI revenue earned, less transaction fees, plus or minus any toll adjustments.

The total revenue transfer to RMA is the total AVI revenue earned, plus or minus any toll adjustments. Currently transaction fees are not deducted, they are calculated and reported to VDOT. VDOT has a separate business arrangement with this location and collects the applicable fees directly based on the figures we provide. For example,

Total amount of AVI revenue earned

± Any toll adjustments

= Total amount of revenue transferred to RMA

The total revenue transfer to Powhite is the total AVI revenue earned, minus transaction fees, plus or minus any toll adjustments. For example,

Total amount of AVI revenue earned

- Transaction fees
± Any toll adjustments

= Total amount of revenue transferred to Powhite

The total revenue transfer to Chesapeake is the total AVI revenue earned, minus transaction fees, plus or minus any toll adjustments. For example,

Total amount of AVI revenue earned

- Transaction fees
± Any toll adjustments

= Total amount of revenue transferred to Chesapeake

The total revenue transfer to Pocahontas is the total AVI revenue earned, minus transaction fees, plus or minus any toll adjustments. For example,

Total amount of AVI revenue earned

- Transaction fees
± Any toll adjustments

= Total amount of revenue transferred to Pocahontas

The total revenue transfer to CBBT is the total AVI revenue earned, plus or minus any toll adjustments. Currently transaction fees are not deducted, they are calculated and reported to VDOT. VDOT has a separate business arrangement with
this location and collects the applicable fees directly based on the figures we provide. For example,

Total amount of AVI revenue earned

\[ \pm \text{Any toll adjustments} \]

\[ = \text{Total amount of revenue transferred to RMA} \]

- Adjustments made to customer accounts are deducted from the revenue transfer of the appropriate toll facilities monthly.
- Rejected away-agency transactions are deducted from the revenue transfer of the corresponding toll facilities monthly.
- Correction files for Virginia and away-agency transactions are deducted from the revenue transfer of the corresponding toll facility daily, if applicable.
- CSC V-toll fees are deducted from the revenue transfer of the corresponding toll facilities monthly.
- Wire transfer confirmations and supporting paperwork are emailed to each facility daily.
- Disbursement Reports and daily transfer information are filed by toll facility and by month.
- With the exception of Powhite, traffic summaries are received daily via fax or e-mail and are entered into the Airansers and Saisica or s spreadsheet. Each toll road has a separate tab within the spreadsheet. The Excel sheet calculates AVI percentages, violations percentages, and non-revenue percentages for each toll facility. It also offers daily and weekly averages, including weekends.
- In the Airansers and Saisica or s spreadsheet, the financial staff also compares the AVI transactions from the Disbursement Reports to the AVI transactions on the Traffic Summary Reports sent by each Virginia toll facility. Adding the disbursement transaction and all valid and manually posed exceptions and then subtracting them from the traffic summary calculates the variance. For example,

\[ \text{Disbursement transaction amounts} \]

\[ + \text{All valid and manually posed exceptions} \]

\[ - \text{Traffic summary amount} \]

\[ = \text{Variance} \]

4.2.2. Transfer of Violation Revenue

The financial staff at the CSC performs transfers of Violation revenue monthly. Each toll facility’s violations revenue collected by the CSC is transferred into their respective account monthly from a VDOT bank account.
Every day, the financial staff generates a disbursement report that lists the actual violation revenue collected by toll facility. Similar to the procedure for AVI revenue transfer, using one or ing o der isca ur o der PS rans er n or a ion S, the total amount of violation revenue transferred to each toll facility is calculated by subtracting the transaction fee from the gross violation revenue listed on the Disbursement Report, plus or minus any toll adjustments. For example,

\[
\text{Gross violation revenue listed on the Disbursement Report} - \text{Transaction fee} \pm \text{Any adjustments} = \text{Total amount of violation revenue transferred to each toll facility}
\]

**Note:** MWAA and RMA are exceptions to the calculation above. Transaction fees for these facilities are not subtracted from the gross violation revenue. VDOT bills these facilities separately on a monthly basis.

A monthly transaction report for unpaid/prepaid tolls is generated and funds are included with the disbursement of the violation revenue, according to toll facility specified in the comments.

### 3. invoicing or on  enses

Faneuil bills VDOT for the actual cost plus a fixed fee for running the customer service centers. Faneuil has the following policies for invoicing monthly expenses:

- Faneuil prepares an invoice once a month for a base fee cost plus a variable cost invoice for CSC and VPS in accordance with RFP#WLP-100.
- The VDOT invoices include items reimbursable to Faneuil in accordance with the contract.
- Faneuil prepares a Refund invoice monthly which includes funds that are refunded through CSC & VPC. Faneuil also supplies all supporting documentation for the refund bank account to VDOT.

### reconciling a enue

The financial staff at the CSC performs daily reconciliation and monthly transfers of away AVI revenue. The table below outlines the different reports used in this effort and in communication between the state agencies for reconciling electronic tolls that occur outside customers’ home states.
<table>
<thead>
<tr>
<th>P</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>- transaction file</strong></td>
<td>Daily file created to give away agencies all of the electronic toll transactions captured in the toll lanes of the home agency since the last Transaction File</td>
</tr>
<tr>
<td><strong>- transaction reconciliation file</strong></td>
<td>This file is created by the away agency in response to the Transaction File sent by the home agency. It contains the posting status of each transaction in the ICTX file, either acknowledging payment or rejecting payment.</td>
</tr>
<tr>
<td><strong>transaction reconciliation file</strong></td>
<td>Weekly report generated to compile all ICTX files within a specific time period and the aggregate posting status of the transactions. Given to away agencies for reconciliation. Includes the posting status of each transaction.</td>
</tr>
<tr>
<td><strong>weekly report</strong></td>
<td>Weekly report generated by the away agency that compiles all ICRX files within a specific time period. Given to the home agency to reconcile. Includes the posting status of each transaction.</td>
</tr>
<tr>
<td><strong>monthly report</strong></td>
<td>Monthly report generated to give away agencies notification of a correction to a previously sent IAG-2 Transaction Reconciliation Report.</td>
</tr>
<tr>
<td><strong>monthly report</strong></td>
<td>Monthly report sent from away agencies to give the home agency a posting status of any received IAG-3 Toll Correction Reconciliation Report from the home agency.</td>
</tr>
<tr>
<td><strong>is used to dispute a toll</strong></td>
<td>This file is created and sent to an away agency to dispute whether a toll previously reported on an ICRX Transactions Reconciliation File is legitimate/warranted.</td>
</tr>
<tr>
<td><strong>report</strong></td>
<td>This report indicates any Transaction Files and Transaction Correction Files that have not been reconciled. Generated as needed.</td>
</tr>
<tr>
<td><strong>report</strong></td>
<td>Monthly report that provides all transactions that were not posted to any account. The home agency is responsible for reimbursing the away agency for the toll amount. This report also is used to reconcile the NPST information on the IAG-2.</td>
</tr>
</tbody>
</table>

- E-ZPass Virginia and other IAG agencies exchange transaction files and reconciliation files daily. These are the ICTX and ICRX.
- The financial staff uses the IAG-2 and IAG-2R reports to reconcile the daily ICTX and ICRX files every week. This information is tied to the specific road Traffic Summary Report.
- The transaction totals from the daily ICTX and ICRX files are entered into the spreadsheets called **ue ro econci ia ion** and **ue o econci ia ion** along with the IAG-2 and IAG-2R reconciliation totals. Tabs are used within these spreadsheets to separate and denote the individual away toll agencies involved.
Each away-agency responds with transaction and reconciliation files that list posted transactions, rejected transactions, and non-posted transactions to their accounts. The results of their reconciliation should match the home agency’s total for what is owed and what is disbursed.

Monthly, the financial staff compiles all acknowledged reconciliation files from the month from both sides and any disputes from the month. This information is exchanged with each away-agency. Any discrepancies are researched and the wire amount is agreed upon. The other IAG reports listed in Table 4.1 are used to research any discrepancies.

One wire transfer is sent among agencies based on the difference between what is due to the agency and what is due from the agency.

Once the disbursements are sent via wire transfer, all wire transfer confirmations and supporting paperwork are transmitted to and from each agency.

.5. reconciling revenue

4.5.1. Reports

The Journal Report summarizes by CSR ID non-toll transactions posted to customer accounts the previous day.

The CSC Revenue Report summarizes by CSR ID non-toll transactions posted to customer accounts the previous day.

The following reports are also used to reconcile daily revenue:

- Batch Settlement Reports from the CSC system
- Interim Account Statement Report, generated from Wachovia
- Service Center Available Account Balance Report
- Service Center Snapshot Report
- Journal Summary Report
- Clerk Financial Activity Report
- Each clerk’s CSC Deposit Receipt

4.5.2. VPS Reports

Cash Out Status Report is used to assist the accounting staff in tracking the progress of cash-out at the end of the day.

General Ledger Activity Report provides a detailed listing of the financial activity of the specified general ledger accounts for the selected date or date range. The report provides the listing of every general ledger transaction meeting the selection criteria specified by
the CSR. It may be used to audit overall financial activity as well as verifying individual CSR activity as reflected on the Journal Report.

Revenue Report provides a summary listing of financial activity of all CSRs. The report lists the amounts by each CSR and totals for the specified period.

Transaction Type Report lists all the transactions occurring within the selected period for each transaction type.

The following reports are also used to reconcile daily VPC revenue:

- Journal Report (Summary and Detail)
- Facility Disbursement Summary Report

### 4.5.3. Daily Deposit

To process the daily deposit:

1. Finance or management staff removes from the safe each CSR moneybag deposited from the previous day.
2. Finance or management personnel remove, count, and verify the moneybag contents individually.
3. Information is entered onto reconciliation spreadsheets. Richmond, Northern Virginia, and Coleman email spreadsheets for their CSC to Clifton Forge and are compiled for bank reconciliation.
4. Information is verified against CSC and VPS Journal, CSC and VPS Revenue, and Pay Auth Reports.
5. The daily deposit is divided into cash and checks.
6. In the retail locations, cash and checks are compiled and taken to the bank.
7. The deposit is made daily and the Finance department confirms the amounts.

**Note:** Due to the small amount of cash and check payments received in the Clifton Forge location, cash deposits are picked up and deposited every Thursday by a Brinks Courier representative. Checks are deposited thru the Remote Capture Deposit program.

### 4.6.1. To Perform Daily Reconciliation

1. The following reports need to be generated and printed from CSC and VPC:
   - Journal Summary Report from CSC.
• From the CSC Journal Report - Print total pages for clerk 41 (Web) & clerk 104 (IVR).


• Disbursement IAG Authority Report from CSC; parameters should be set for Agency 010, facility-ALL.

• Cash Out Status Report from VPC

2. Verify totals against the CSR’s Staff Deposit Receipt.

3. Fill out deposit slip. (Retail locations only)

4. Enter deposit information from CSR’s Sales from CSC and CSR’s printed batch screen from VPC into a worksheet, on the tab. Using the email received from the other service centers, copy and paste their deposit information into the worksheet.

5. Sort information in order from lowest CSR number to highest.

6. From the Financial Activity Report from CSC and the journal pages from VPC, input all CSR totals into the worksheet. The result should be all zeros.

7. Save and print worksheet.

8. On the Cash worksheet, the credit card totals are reconciled to the information on the tab within the same workbook.

9. On the tab, manually enter the ACH replenishment amount and the ACH decline amount. These numbers are located on the tab within the same workbook; clerk #12.

10. On the Sales and Cash worksheets cash, checks, ACH, and credit card totals will reconcile to the information on the DD tab within the same workbook.

11. On the Sales and Payment worksheets, the credit card totals will reconcile to the information on the DD tab of the same spreadsheet.

12. On the Sales worksheet, the deposit amount for each location will auto-populate from the DD tab within the same workbook. Enter deposit amounts and deposit date from the Wachovia statement to the appropriate date.

13. Open the Sales folder. Get the Sales page from the journal. Enter in all debits and credits in the appropriate columns. Enter in all payments, refunds, and void into the appropriate columns as well as the Disbursement and Away Agency Posting.
14. From the Account Balance Summary and Sna s o reports, enter the totals in the appropriate tabs.

15. Open the ai redig ard eca tab on the ai ec spreadsheet. Verify that all credit card transfers reconcile to E-ZPass Virginia.


17. Deposits from the Retail locations are taken to the bank before 2:00 p.m. For the Clifton Forge location, cash deposits are picked up every Thursday by a Brinks representative.

18. Check payments are made daily through the Remote Deposit Capture program.

4.6.2. Bank Reconciliation

Daily bank statements are generated from Wachovia Web access. All debits and credits are tied to the following entries in reconciliation spreadsheets:

- Daily deposits
- Daily VA toll revenue transfers
- Sweep investments
- Expected credit card payments
- Credit card fees
- NSF checks
- Credit card chargeback and credit-backs
- IAG credit card equity payments and deposits
- IAG toll revenue payments and deposits
- VDOT refund invoice and monthly invoice

Any variances are researched, corrected if necessary, accounted for, and reported to VDOT. In the case of an NSF check, the customer is notified and the account is assessed any NSF-related fees.

4.6.3. System Balance Verification

Individual transactions affecting the customer prepaid balance and deposit balance from the journal are compiled and compared against the Service Center Snapshot and Service Center Available Account Balance Reports.

Any variances are researched and corrected.
The Finance department addresses charge-back issues that occur.

### Process Credit Card Disputes

**Note:**

1. Identify the account by searching customer’s name or credit card transaction on the ‘customer service’ tab in the CSC for the transaction date of the dispute. For VPC run the ‘credit card reconciliation detail’ report for the transaction date of the dispute.

2. Enter the information onto the **#erie a e ues arge ac spreadsheet**, located in the Retrievals/Chargeback folder. Ensure the credit card number on the case reads correct. The case will need to be checked through Merchant Explorer periodically for updates. Retrievals need to be worked with 3 business days of receipt.

3. MasterCard, Discover, and Visa disputes are worked through the Merchant Explorer software, along with chargebacks. AMEX chargebacks and retrievals are worked through the AMEX website. If a chargeback is reversed, the case is closed and the patron’s account may need to be adjusted, depending on the scenario. If Merchant Explorer denies our dispute, the chargeback will need to be adjusted through the appropriate system once the funds have been deducted from the VDOT account.

4. Scan documentation to the **arge ac folder** in the finance drive.

For VPC/CSC credit card disputes, enter the following information in the comment on the Daily Reconciliation spreadsheet; Wachovia Adjustments tab for the corresponding chargeback:

- CSC Account Number (if pertaining to a CSC account)
- Date chargeback was posted on account
- VN/VF Number
- If unpaid toll, enter “unpaid toll payment” in comment

1. For a CSC dispute, print the following:
   - Contacts and Account Status screens
   - Account Statement Report
   - **uo a ic e enis en screen** or CSR Journal (whichever is appropriate).

2. For a VPS dispute, print the following screens:
   - Violation document
   - Payment Screen

3. Explain the transaction with letters provided.

4. Include a copy of the Customer Agreement, if CSC dispute, and mark all sections that apply to the dispute.
5. For AMEX and DISCOVER, go through the website to create a fax cover sheet. Fax the cover sheet along with all supporting documentation to the number provided.

6. Arrange the paperwork in the following order:
   - Retrieval Request coversheet
   - Fax sheet and the reply
   - Dispute pages
   - Explanation
   - Customer Agreement
   - Account print screens
   - Any other applicable documentation

7. Scan documentation into the appropriate folders on the finance drive, MC/VS chargebacks, Discover chargebacks, Amex chargebacks, and wait for response.

4.7.1. Rejected Disputes

4.7.1.1. Processing Rejected Charges for CSC

1. Identify the account.
2. Go to **ions** on the customer’s main screen
3. Go to **d us en**.
4. Select **redi ard arge ac** as the **ransac ion e**
5. Enter the amount of the chargeback.
6. Place applicable notes in the **ransac ion o en s** field. Click **e** to proceed to the final verification screen. Pressing **inis** on the verification screen completes the transaction.
7. Print a **is or** screen, showing the adjustment.
8. Update the **erie a e ues** worksheet.
9. Re-scan case into the appropriate folder on the finance drive.
10. If a customer’s account balance is negative, contact the customer to inform him and advise him that he needs to make a payment on the account.

4.7.1.2. Processing Rejected Charges for VPS

1. Click on the **inancia a** and select ledger search.
2. Run query by plate number, jurisdiction, plate type, check number, ledger category, payment method, ledger source, entered user and date ranges. Select the payment that needs to be reversed.
3. Select **reverse - no reason**.
4. Identify the reversal reason.
5. In the **oes** section, enter the road name first, enter the dispute case number, **VN/VF** number, or enter “unpaid toll payment.”
6. Select the Reversal Type and save.

4.7.2. **Rejected CC Refunds**

4.7.2.1. **Processing a Rejected Refund for CSC**

1. Identify the account.
2. Go to **ions** on customer’s main screen.
3. Go to **d us en**.
4. Select **redi ard arge ac e ersa** as the **ransac ion e**.
5. Enter the chargeback amount.
6. Go to **d us en** again.
7. Select **e und ro a ance**. This transaction will appear on the **e und ro a ance e or** and a check will be issued and mailed to the address that appears on the account.
8. Place applicable notes in the **ransac ion o en s** field. Click **e** to proceed to the final verification screen. Pressing **inis** on the verification screen completes the transaction.
9. Print a **is or** screen, showing the adjustment.
10. Update the **e ri a e ues** worksheet and re-scan the case to the appropriate folder in the finance drive.

4.8.1. **Processing Returned Checks for VPS**

1. Click on the **inancia** tab and select **eder Searc**.
2. Run a query by plate number, jurisdiction, plate type, check number, ledger category, payment method, ledger source, or date to select the payment that needs to be reversed.
3. Select **e erse**.
4. Identify the reversal reason.
5. In the 'oes section, enter the road name first, enter VN/VF number, or “unpaid
toll payment.”

6. Select the 'ersa e and click Sa e.

4.8.2. Processing Returned Checks for CSC

1. Identify the account.
2. Go to ions on customer’s main screen.
3. Go to dus en s.
4. Select ec e urn for the adjustment type.
5. Place applicable notes in the ransac ion o en s field. Click e to
   proceed to the final verification screen. Pressing inis on the verification
   screen completes the transaction.
6. Go back into ions on customer’s screen.
7. Go to dus en s.
8. Select ec e urn ee for the adjustment type. This fee can only be applied if
   funds are available on the account. If funds are not available, leave the case open
   on the spreadsheet and apply fees once funds are available.
9. Enter 35. for the fee amount.
10. Place applicable notes in the ransac ion o en s field. Click e to
    proceed to the final verification screen. Pressing inis on the verification
    screen completes the transaction.

In the reconciliation folder, access the e urn ec folder. Enter the check
information onto the appropriate tab in the workbook.

For VPC/CSC returned checks, enter the following information in the comment on the
Daily Reconciliation spreadsheet; Wachovia Adjustments tab for the corresponding
returned check:

- CSC Account Number (if pertaining to a CSC account)
- Date check return fee was posted on account
- VN/VF Number
- If unpaid toll, enter “unpaid toll payment” in comment. If the unpaid toll met its match
  and the reversal was unable to be done through VPC, notate this in the comment.

.. ec e unds
Faneuil closes E-ZPass Virginia accounts at customer requests. The clerk in charge of refunds closes the account based on the information provided by the customer.

If the available balance in the account indicates that a refund is due to the customer, the clerk processes a credit card refund or an e und ro a anc transaction to clear the remaining balance from the account. CSRs will provide the Finance department the following documentation to expedite a refund check (refund checks are created and mailed from the Faneuil Corporate office):  osed ccoun e ues or us o ccoun e or or Screen from the CSC system, and a screenshot of the ccoun is or Screen from the CSC system. The refund is always generated via the method of the last payment shown in the account’s history. An alternate credit card can be used for this if requested by the patron.

If a tag is reported or marked lost/stolen, the customer is charged a lost/stolen fee. In the event that a customer calls to reactivate the tag or report it found, the fee is reversed. If the account is already closed, the patron will be refunded via the method of the last payment shown in the account’s history.

A designated CSC or VPS clerk runs the e und ro a anc for CSC and a e und e or for VPS to process the refund checks to the payees for the refund amounts and matches this information to the backup paperwork. A designated associate runs a crystal report for both CSC and VPC. A designated associate for VPC reviews the VPC report and forwards the spreadsheet to the Accounting department. The CSC crystal report is forwarded to the accounting department and matched to the report received from the designated associate for accuracy. The spreadsheets are forwarded by a Finance designated employee to the Fanueil Corporate office for a refund check to be generated and mailed.

An accounting clerk, who is not involved in the refund process, will reconcile the checking account monthly to the monthly bank statement. The accounting department will reconcile this check register monthly to ensure that no customer has received more than one refund.

.1 . e urns

When E-ZPass account holders have selected ACH as their primary automatic replenishment method and an attempt to replenish the account returns unsuccessful, the Finance Department uses the following process.

**Note:** After one (1) unsuccessful attempt to replenish an account via ACH, the checkbox labeled “Auto Replenishment in On” on the Replenishment tab in the CSC application is automatically unchecked. Also, a letter is generated and mailed to the patron sending notice that the attempt to replenish the account failed.

- Finance department personnel run the report from the CSC application called, ACH Bank Response Report daily. It indicates the accounts where an
ACH transaction attempt failed. This report is verified against the email totals that are sent from BOA daily. The report from the bank and the CSC reports should match. If they do not, the discrepancy is identified and a ticket is entered into SpiceWorks for resolution.

- Each account on the ACH Bank Response Report is reviewed to see if a backup credit card is listed on the account.
- If the customer does have a backup credit card on file, a credit card payment is attempted to replenish the account balance. The amount of the payment must equal the dollar amount listed in the Replenishment Amount field.
  - If the credit card payment is successful, a note is placed in the Communications section that states, “ACH rejected - Securing funds through backup CC”. The checkbox labeled “Auto Replenishment is ON” is then checked again.
  - If the credit card payment declines, a note is placed in the Communications section which states, “ACH Rejected - Tried to secure funds through backup CC - CC declined”. The checkbox labeled “Auto Replenishment is ON” will remain unchecked.
- If the customer does not have a backup credit card listed on the account, notes are placed in the Communications section which states, “ACH Rejected - Couldn’t make pmt. - No backup CC”. The checkbox labeled “Auto Replenishment is ON” will remain unchecked. An email is sent to the CSC Manager/Supervisor to have a CSR contact the patron and request the credit card information.

11.  In accordance with the procedure outlined in Section 3.16.3, the Finance Department will reconcile all adjustments to patron accounts where remaining account balances on Inactive Account are forfeited and deemed unclaimed property. The adjustments to the patron accounts will be identified by the adjustment reason, “Funds Remitted to the Commonwealth of VA for unclaimed property” and will be reconciled to a report created to identify accounts who meet the forfeiture criteria along with the corresponding positive account balance. Once the reconciliation is complete, the funds and applicable patron information is submitted to the Commonwealth of Virginia, Treasury Department, Unclaimed Property Division via ACH Electronic Transfer.

5.  INVENTORY OPERATIONS

5.1.  Transponder Issuance and Return and User Service Request

Customer service representatives (CSRs) must check out their allotment of transponders before the start of the transaction day. They must make this request to the Fulfillment
Supervisor. The CSR must check and agree with the number of transponders on the assignment sheet and then sign the sheet. CSRs can only issue transponders that are assigned to them.

CSRs must check in their allotment of transponders after the end of the transaction day. They must make this request to the inventory staff. The CSR must check and agree with the number of transponders on the assignment sheet and then sign the sheet. The Fulfillment Supervisor initials the sheet before locking up the transponders.

5.1.1. Daily Tag Inventory Procedure

5.1.1.1. To Inventory Tags used by CSRs

1. The Tag Fulfillment Supervisor opens the secure tag room and issues the daily tags to authorized CSRs. The Supervisor keeps track of all tags issued and reconciles the tag count at the end of the day.

2. CSRs must return the tags to the Fulfillment Supervisor with the completed tracking sheet if they are leaving for the day. Each CSR takes his/her box of remaining transponders back to the secured tag room and signs the log sheet.

3. The CSR provides a tag count tracking sheet to the Fulfillment Supervisor prior to finishing a shift.

4. At the end of the day, the tag Fulfillment Supervisor runs the Tag Inventory report for each CSR that had tags issued to them for the day. The Tag Inventory report is compared to the Tag Tracking sheet for each fulfillment CSR to ensure that these two reports match. Both reports show the customer accounts to which each transponder had been issued throughout the day. The two reports must reconcile. The Fulfillment Supervisor then runs a Tag Search report to verify that all remaining transponders assigned to a CSR are accounted for.

5.1.1.2. Tag Fulfillment Communications (Clifton Forge Service Center)

The fulfillment personnel in the Clifton Forge location maintain tag requests taken by phone CSRs. CSRs use the Communication functionality within the CSC WinClient application. To complete this function, the fulfillment CSR will check the Individual Communication assigned to them in the CSC system several times a day. The supervisor or lead will also consistently review these communications throughout the work day.

1. Selects **ndi idua** from the **unica ions assigned o a ro e e u i en S** option on the main menu. This opens the **ndi idua o unica ion Searc** screen.
2. Communications are sorted by date. Transponder requests have top priority followed by requests for mounting strips and other miscellaneous requests. Also, work is completed with the older requests being fulfilled first.

3. Assigns tags from fulfillment communications that appear on the screen. Comments placed within the request by the phone CSR will be viewed by the fulfillment CSR by highlighting the applicable communication, right-clicking the mouse, and selecting "Comments" from list that appears. Each communication will be checked for comments.

4. Right-clicks the mouse and selects "Close Communication" to close the communication.

5.1.1.3. Other Procedures on the Daily Procedure List

1. The Fulfillment Supervisor gathers all open communications assigned by the User Web and records the count on the daily work chart. The fulfillment staff fulfills open communications.

2. Inventory staff downloads all e-mail and processes the requests.

3. Mailroom staff opens and clears all tags returned in the mail. The mailroom returns inventory mail to the tag storeroom daily.

4. Process tags received from customers that walk in to the service center or use the drop box. The tag status is moved to the CSC location from the customer’s account by CSR. The tag is then moved to the appropriate location (Out of Warranty, Mark IV, RTI). See Step 6 for more detail.

5. Tags returned to CSC via any method—mail, drop-box, and walk-in— are moved from the account and assigned to the appropriate Service Center location.

6. Each day, the tag inventory specialist processes the returned tags by moving them from the location “Service Center” into the appropriate location based on tag age or other conditions. The locations include the following:

   - Service Center (Northern Virginia, Richmond, Coleman, or Clifton Forge): Tags that are still working, within warranty period, and are new technology G3. These are re-issued to CSRs to assign to customer accounts at some point. These tags are referred to as returned to inventory (RTI).

   - Out of Warranty: Tags with serial numbers aged to a point that warranty shall not be valid. This number is defined by the date shipped and further defined by Mark IV.

   - Return to Mark IV: Tags with dead batteries, or are inoperable, and are still under warranty defined by Mark IV. These consist of tags with a technology level of at least G3 and tags older than G3. Tags with technology older than G3 are separated from the tags that have at least G3 technology and shipped to Mark IV with the out-of-warranty tags.
Customer Recycle: These are tags that are returned to the Service Center that are still in warranty as defined by Mark IV. Returned tags, which are still in warranty, are moved to the Service Center (Northern Virginia, Richmond, Coleman, or Clifton Forge) location. If the returned tag(s) are operable, they can be reissued to another patron. Later, the tags are moved to either the Service Center, Return to Mark IV, Disposal, or Out of Warranty locations.

Although not a daily procedure, the inventory staff can move tags from ordered to warehouse when an order has been received. They are then moved from the warehouse location to a CSR to be used. When the transponders are added to the system and programmed, the inventory staff will ensure that the system reflects the current programming.

7. Transponders received in daily mail are separated into respective locations, counted, and logged.

8. Mail transponders to customers from new accounts, or additional tag requests. These are sent first class mail and are packed with an RF shield bag.

5.1.1.4. Daily Tag Inventory Report

The operation maintains all inventory types. This includes interior, exterior, and commercial transponders. The inventory staff tracks the use of inventory to ensure that the operation has enough transponders of each kind to meet the customer demand. The management staff has access to this information to ensure that the proper orders are placed. The Daily Tag Inventory Report is a report that assists in this process.

- **Open**

  1. Select **e or Selection** from the **e or s menu**.
  2. Select **a e or s** from the **a e or drop-down menu**.
  3. Select **a i a g n e o r e or** from the **e or menu**.
  4. Under **e or Parameters**, select:
     - The applicable CSR.
     - All tags for the range.
  5. Click **Search** to view the report.

The user can print the report or export it to a folder by selecting from icons above the report. The tag inventory manager will compare the CSC system to the CSR Tracking sheet.
Authorized inventory personnel are responsible for the transponder inventory and movement of transponders. Only specified tag inventory personnel have access to run the following report for tags in the Customer Recycle location within the CSC system:

1. Go to e or s in the CSC system and choose e or Se ec ion.
2. Select ag e or s under e or a egor .
3. Select ag n en or e ai e or from the e or menu.
4. Filter the report by tag number (sequence) or tag status, if applicable.
5. Select us o er ec e e as the status. The report displays all tags with that status.

Tags still in the Customer Recycle status after 14 days of issuing a replacement tag should be charged and processed as lost/stolen.

This process should be performed bimonthly.

5.2.1. Monthly Tag Management Responsibilities

5.2.1.1. Ordering Tags

The Production Supervisor in Clifton Forge initiates the ordering of transponders for all Virginia service centers. Based on the previous month’s inventory report of tags on hand, an order is placed with Mark IV at the beginning of each month when the inventory of transponders go below established thresholds. Transponders are ordered via fax. Receipt of the fax is sent via email to the Inventory Supervisor.

A reserve of the following types of tags in the Warehouse location in Clifton Forge is maintained.

- 10,000 Pearl tags
- 5,000 Blue tags
- 150 External (bumper) tags
- 150 Roof Mount tags

Inventory thresholds for the retail locations are proportionate to approximately 2 months worth of tag distribution for each center.

Tags, with the exception of roof-mount tags, are shipped from Mark IV to each location based on the specifications in the order. Roof-mount tags are shipped to Clifton Forge and disseminated to the other locations as needed.
Inventory all tags in the CSC immediately on the first day of the month. If a transponder is unaccounted for, research it to determine if the transponder was ever brought back to the service center.

Verify Return to Mark IV by checking the tag numbers in the boxes against the spreadsheet.

Put the boxes into cases for delivery to Mark IV.

Label the case with pre-printed address labels.

Copy the data for the month from the tag tester and convert it to Excel.

Copy the Mark IV spreadsheet to the Tester Comparison folder.

Balance the tag tester.

E-mail the tag tester data and the Return to Mark IV monthly comparison to Mark IV; Mark IV e-mails two RMA numbers for shipment (interior and bumper).

Calculate credits for the Return to Mark IV tags as specified by Mark IV:

- Multiply the original price of the tag times the number of weeks left on the warranty.
- Divide that number by the total number of weeks the tag is on warranty.
- After completing the month-end reports, save the reports on the Swap drive indexed by year.

Verify Out-of-Warranty tags by checking the tag numbers in the boxes against the spreadsheet.

Put the boxes into cases for pick-up. Pick-up for tag disposal vendor is done every quarter.

5.3. Service ended Procedure

5.3.1. Month End Responsibilities

At the end of each month, reconciliation of all transponders in the following locations occurs:

- Return to Mark IV
- Warehouse
- Service Center
- CSR
- Out of Warranty

Inventory personnel run Tag Inventory searches in the CSC for each aforementioned location and reconcile the search results to Tag Inventory spreadsheets, which get updated daily. Any variances are identified and resolved by this process.
5.4.1. General Tag Replacements Reasons

Customers return transponders to the service center for transponder replacement or malfunction.

Transponders are replaced in the following instances:

- Lost/stolen: The customer is charged a $25 lost/stolen fee for the original transponder and a new transponder is issued as a replacement. (Refer to Lost/Stolen/Damage Policy.) See Section 3 for more information on this procedure.

- Damaged: The customer is charged a $25 damage fee for a visibly damaged transponder. A new transponder is issued as a replacement (Refer to Lost/Stolen/Damage Policy.)

- Malfunctioning/defective: A malfunctioning/defective transponder is replaced at no charge to the customer. The Inventory Department returns in-warranty transponders that are non-functional, defective, and cannot be returned to the manufacturer. These are returned to Mark IV.

In-warranty transponders are those interior transponders less than five years old and exterior bumper mount transponders less than three years old.

5.4.1.1. Processing New Transponder Requests for a Malfunctioning Transponder

1. Ask the customer for his account number and enter the number provided. If the number matches an account, the account appears.

2. If the account is not found, verify the account number with the caller.

3. If the information still is not found, look up the customer’s account by transponder number, license plate number, name, credit card number, PIN, or phone number.

4. Ask for the customer’s four-digit PIN. If the customer has forgotten the PIN, ask for account-specific information to match the person with the account on-screen in the CSC system. Only the account holder may access account information.

5. Troubleshoot the tag problems to verify that the transponder malfunctions.

6. Review the account and transaction history.

7. Test the transponder and/or vehicle windshield.

Note: Windshield testing applies only to walk-in center CSRs.

8. Process a payment to cover any applicable fees.
5.4.1.2. Replacing the Transponder for Walk-in Center CSRs

1. Open the maintenance screen and select the correct transponder number.
2. Use the issue function to issue the new tag into the account. The original tag’s status is pending. If the account is on manual replenishment, all associated tag deposits are moved to the new transponder.
3. Use the move function to move the transponder to the CSC location.
4. Attach the Tag Replacement form to the transponder and forward the transponder to the Inventory department.
5. Add a comment to the account stating that tag #xxxxxx is replaced by tag #yyyyyy.

5.4.1.3. Returning a Malfunctioning Transponder to the CSC for Call-in Center CSRs

1. Alert the customer that if the CSC does not receive a transponder, the customer’s account is subject to the $25 lost/stolen fee.
2. Add a comment to the account noting a replacement request and notification of the $25 lost/stolen fee.
3. Forward tag replacement paperwork to the Inventory Department.
4. Communicate with the customer—explain the following points:
   - The activation process for the new transponder
   - Transponders will only be mailed to the address on file
   - Transponders mailed to the customer should be received within 7 - 14 business days

5.4.2. Active Tag Replacement Program

The CSC actively replaces transponders that are out of warranty through the Tag Replacement Program. The transponders that qualify for this are aged and out-of-warranty. Out-of-warranty transponders are those interior transponders at least eight years old and exterior bumper-mount transponders at least eight years old. These tags are replaced at no charge to the customer.

To replace a customer’s out-of-warranty tag, the CSC sends a letter to the customer to advise the customer of the tag replacement program.
Using the Tag Search function in the CSC system, the user can identify all tags within a configurable number range. This search discovers all tags that have a receive date indicating that they are near the end of their expected lifecycle for their particular type.

The Production Supervisor initiates correspondence to the customers who have these tags by:

1. Highlighting the applicable tags from the search results and right-clicking the mouse.
2. Selecting the appropriate option from the list that appears. This initializes the Targeted Communication Wizard.

A feature of this wizard will send the letters to Questmark in the form of a data feed where they are printed and mailed.

Additional criteria used to locate tags near the end of their lifecycle is based on the Date of Receipt, which is the date the tags were first entered into a warehouse location, and Date of First Issue, or the date a tag was first assigned to an active customer account.

5.4.3. Tag Replacement Program Procedures

When the customer responds to the tag replacement letter through the Website, email, or the phone, the fulfillment staff uses the following steps to conclude the process.

1. The Production Supervisor gathers all open communications via the CSRs or the Web. The communications are then assigned to Fulfillment clerks to process.
2. The Fulfillment staff opens the account and verifies class code changes and then re-classifies the replacement tag.
3. The Fulfillment staff enters all information from the request into the customer account.
4. The Fulfillment staff highlights the TRP tag, issues the new tag in the account and moves the TRP tag to Customer Replacement location. A check mark is placed at the top of the request after completing replacement. The communication is then closed after the request has been fulfilled.
5. If the staff cannot process the request, he/she calls the customer to update information on the account. If the staff cannot reach the customer, he/she sends the appropriate correspondence to the customer.
6. The Production Supervisor verifies that all requests are complete after all requests are processed.
A Tag Replacement notice is sent along with the replacement tag to the customer. The notice states which tag number(s) have been replaced and informs of the correct tag number(s) to send back to the service center. The form also states instructions to send the replaced tag(s) back and that the replaced tag(s) will be deactivated after 35 days.

If any replaced tag is not returned to any of the E-ZPass Virginia Service Centers within a month, a second letter is generated and mailed to the patron. The second letter is a reminder to return the replaced tag(s) or there will be a $25 lost/stolen fee assessed for each transponder.

If the tag(s) have not been returned for a period of a month after the second letter is generated, a $25 lost/stolen fee is assessed per transponder still outstanding.

**Process o reae Second o i ca ion**

1. Service Center personnel run and export a query from the Tag Search functionality in the CSC application with the following parameters:

2. Under **n en or n or a ion**, choose “Customer-Recycled” in the **oca ion** drop-down menu.

3. Under **us o er ag Information**, choose “Customer” in the **o ed ro oca ion** drop-down menu, choose “Customer-Replacement” in the **o ed o oca ion** drop-down menu.

4. Under **ae o o en**, the desired date range of the report is selected. Since this task is performed twice monthly, the date range consists of the either the first half of a month or the second half, depending on which is applicable.

5. Click **Searc**

6. The query results are sorted by the Activity Date/Time column and printed

7. Each E-ZPass Virginia account holder that appears on the report is sent a copy of their Customer Summary Report with the replaced tag highlighted and a reminder that the tag still needs to be returned.

8. Applicable notes are placed within the Recent Communications section of each account to document the mailing of their Customer Summary Report.

9. The system-generated report is then filed in a folder labeled by month.

**ar ing nre urned ags os S o en**

1. On a monthly basis, the reports from the previous month, filed in Step 9 above, are reviewed again.

2. Each account is reviewed again to see if any Customer-Replacements tags are still on the account and make sure the patron has not contacted a Service Center to inquire about the tag(s).

3. If a tag(s) is still on the account and there are no comments documenting the patron inquiring about the tag(s), the tag(s) is marked lost/stolen and a $25 fee is assessed to the account.

4. After the tag(s) is marked lost/stolen and a $25 fee has been processed, the tag(s) is revoked from the account to the Lost/Stolen location in the CSC application.
5. Comments are placed in the account, documenting which tag was marked lost/stolen and why the tag(s) was marked lost/stolen

Tags that have been received back to the Service Center:

1. All incoming tags are opened in our mailroom. Any paperwork is kept together with the tag(s).
2. The Mailroom clerk then verifies the customer returned the correct tag that was replaced.
3. The Mailroom clerk then revokes the tag from the account.
4. The Mailroom clerk then processes a Replacement/Return form in Images Works. The account number, date, customer name, and tag number are logged into this form.
5. The Mailroom staff sends all completed requests mail to the Scanning departments to scan into the database. All paperwork is initialed by mailroom clerk, dated and account is not already on there.

5.5. Authorized Inventory Personnel track the number of transponders to return to Mark IV each month. The Tag Inventory Report from the CSC system is used to reconcile this information. This report is manipulated to sort the tags by location. After sorting the report, the Inventory department can identify the tags with a Return to Mark IV or Out of Warranty location. The staff exports the report to an Excel spreadsheet, separating the Return to Mark IV tags from the Out of Warranty tags.

The staff then uses a series of Excel spreadsheets to reconcile the number of returned transponders. The staff compares the current month of returned tags to previous months' number of returned tags. This information is compared to the CSC system reporting to ensure that it reflects the accurate amount of returned transponders. This process also accounts for transponders returned at each CSC location.

5.6. Disposing of Tags

The following policies are in effect for tag disposal:

- Disposal of out-of-warranty and Mark IV tags happens quarterly.
- At the end of every month, tags for disposal are marked and stored.
- Coleman, Northern Virginia, and Richmond CSCs send the monthly report of the total number of tags for disposal to the inventory specialist. The report is then sent to the Quality Manager.

Note: Contact Intercon Solutions for pick-up. (Gloria Fahim) 708-756-9838. All pick-ups require lift gate and are inside.
5. **Using Ransomer Ranser e Ues s**

   **o u i rans onder rans er re ues s**

1. From the original account holder's account, right click on the tag and revoke the tag from the account. Move any tag deposits back to the balance associated with the tag(s) that will be transferred.

2. Under the Customer Service tab select tag search. Enter the tag number and then edit the tag to the proper location. Then assign the tag to yourself.

3. Make a Debit Other Adjustment to the original account to transfer the funds (if applicable) with a comment “Transferred $xx.xx from account # _______ to account # _______”

4. Make a Credit Other Adjustment to the receiving account for the corresponding funds with the same comment.

5. Under the Options Tab select Adjustments. Move a tag deposit from available balance for each tag that will be transferred.

6. On the tag screen on the account, right click and add the tag. If the acct is set up with ACH and a credit card as a backup then the tag(s) will not have a deposit. If so then right click on the tag that was added and change the tag deposit amount to $0.00. Next go to Options, then Adjustments and move the deposit back to the available balance.

7. If the account is not set up under ACH and a credit card as a backup then the deposit will stay on the account for the new tag(s).

8. Print a Customer Account record with the updated information for both accounts.

9. Forward Tag Transfer form and printed Customer Account records before and after the change to scanning for data retention.

5. **areouse ne or e or**

The Tag Inventory Report can be configured to show all tags assigned to a location. When the user selects one of the following warehouses from the **oca on** field, the report shows all tags assigned to that warehouse:

- Warehouse Clifton Forge
- Warehouse Coleman
- Warehouse Richmond
- Warehouse Northern Virginia
6. INTRODUCTION TO VIOLATION PROCESSING

As a primary tool, the operations staff uses the Faneuil Forté® Violation Processing System (VPS). The VPS monitors and enforces the correct use of electronic toll collection (ETC) and manual toll collection lanes by helping pursue and collect unpaid revenue and fees from individuals who either misuse the system or otherwise do not pay the appropriate tolls. This and subsequent chapters explain the processes that the staff uses both system-wide in the VPS and those performed manually outside of the system.

The primary objective of the CSC violations staff is to manage all violation processing in an accurate and timely manner according to the business rules defined by VDOT and its affiliated roadways. While business rules for processing violations are being developed, Faneuil will provide recommendations for maximizing the collections from violation events. The operation will disburse funds received from violation processing according to the defined business rules at least monthly.

To achieve this, the violations staff monitors the VPS through each of its workflow phases. The steps in the VPS workflow are a combination of automated, manual, and external processes. This includes receiving image data from the lanes, reviewing and identifying images, posting V-tolls to customers’ accounts for violation events, creating V-toll records for IAG license plate V-tolls, exchanging and identifying registered vehicle owners with the Department of Motor Vehicles (DMV), creating and printing notices, and resolving payments or disputes.

The procedures covered in the VPS-related chapters are outlined below:

- **Image Processing**: Chapter 7 summarizes how the VPS receives images. The image review process is described in detail. Information about the V-toll process is also included.
- **Processing**: Chapter 8 explains the process of exchanging information with a DMV. When the registered owner information is returned, the violation staff is responsible for the next processes. This section outlines these procedures and also covers the process by which violations print.
- **Mail Processing**: Although this is primarily a manual process, Chapter 9 defines the workflow for handling the violation-related incoming mail and explains the use of the VPS. The VPS provides a scanning function that is covered in the next section.
- **Mail Processing**: After violations are mailed to violators, some choose to dispute their responsibility for the event. Chapter 10 covers the dispute process. It includes flexible procedure options based on current business rules. This chapter also covers the functionality available to the CSC customer for disputing a violation on the Website. This section also covers creating evidence packages.
- **Payment Processing**: For violators that choose to pay their violation, Chapter 11 covers the procedures for posting and reconciling VPS funds. This section also includes information about the payment options for violators to make a payment on the Website and through the IVR.
- **Internet Flows**: Given that CSC supports both customer service and violations functions, the VPS has several components for researching violations-related questions. Chapter 12 covers these tools.
To maximize efficiencies, staff uses the CSC customer service and violations systems to provide timely and accurate responses to customer issues and inquires. Operations management staff is interested in effectively and efficiently managing all staffing resources, so the operation carries on both customer service and violation processing duties in several areas. Some exceptions to this are made primarily for security reasons, which will be explained in detail later in this section.

6.1.1. Violations Processing Responsibilities

To a certain extent, violation processing is the responsibility of all staff members. Table 6.1 illustrates the basic functional roles and their designated priorities. The operations manager and other department managers are responsible for balancing the tasks of each group to meet the operational needs and performance measurements.

<table>
<thead>
<tr>
<th>Role</th>
<th>S</th>
<th>P</th>
<th>P</th>
<th>S</th>
</tr>
</thead>
<tbody>
<tr>
<td>Customer Service Representative</td>
<td></td>
<td>Answer both CSC and VPC related questions.</td>
<td>Same as Primary.</td>
<td></td>
</tr>
<tr>
<td>Review Image</td>
<td></td>
<td>Review images.</td>
<td>Answer both CSC and VPC related questions.</td>
<td></td>
</tr>
<tr>
<td>Final Review of Violations and DMV Information</td>
<td></td>
<td>Final Review of violations returned from the DMV.</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>Customer Service Staff and Accounting Staff</td>
<td></td>
<td>Post both account and violation payments.</td>
<td>Same as Primary.</td>
<td></td>
</tr>
<tr>
<td>AccountingStaff</td>
<td></td>
<td>Adjust/Refund violations or account transactions.</td>
<td>Same as Primary.</td>
<td></td>
</tr>
<tr>
<td>a i</td>
<td>Process the incoming and outgoing correspondence for the CSC.</td>
<td>Process both violations and account mail.</td>
<td>Same as Primary.</td>
<td></td>
</tr>
<tr>
<td>------</td>
<td>-------------------------------------------------------------</td>
<td>------------------------------------------</td>
<td>-----------------</td>
<td></td>
</tr>
<tr>
<td>s u e</td>
<td>The production staff responsible for processing violation disputes.</td>
<td>Process violation disputes.</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>o c u</td>
<td>The production staff are responsible to scan CSC correspondence</td>
<td>Scan account and violation related documents.</td>
<td>Assist with Mail Processing.</td>
<td></td>
</tr>
<tr>
<td>e n</td>
<td>Scanning</td>
<td></td>
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</tr>
</tbody>
</table>

### . . e PS ic a i o n

The CSC uses the VPS software application to process violations. The VPS application requires users to log on and off and uses a unique user name and password.

### .3. c r o n   s

The acronyms in the following list are used in describing violations related operations.

- DMV  Department of Motor Vehicles
- OCR  Optical Character Recognition
- ROI  Region of Interest
- ROV  Registered Owner’s Vehicle
- VES  Violation Enforcement System
- VESC Violation Enforcement System Controller
- V-Toll  Video Toll
- VPS  Violation Processing System

### . . o g g i n g   n

1. To log on to the VPS application, first start the application. The Login screen appears, as shown in Figure 6.1:
2. Enter your user name as provided by the system administrator, and your password.

Note: Your password has to be at least eight (8) characters long. Special characters such as: $; @; #; %; &; and * may be used. However, you may not use spaces.

Note: The system also requires you to change your password every 45 days. You cannot use any of your past five passwords for login.

3. When you successfully log on, the Main Menu appears (Figure 6.2).
The VPS has configurable levels to ensure the proper security is set for each operational role.

Permission levels set by the system administrator determine your access level, so only the function tabs which you can access will appear on the main menu.

6.4.1. Logging Off

When you finish using the VPS application, click on the logout tab of the main menu (see Figure 6.3).

![Figure 6.3 Main Menu](image)

7. IMAGE REVIEW

Image review is the E-ZPass Virginia Customer Service Center (CSC) staff’s first step in violation processing. This chapter briefly describes the process by which the images are sent from the lanes. This chapter also explains the process for reviewing images in the VPS for quality and content. The V-toll process is described after the image review process.

1. er ie o ane unc ion

When a vehicle passes through a toll lane equipped with a violation enforcement system (VES) and the toll is not paid or not paid in full, in-lane devices trigger the violation. This information triggers cameras to capture pictures of the vehicle. The number of pictures taken is based on the camera equipment present.

After the image is captured, it is stored in the VES controller (VESC) and then sent to the VES host. Here, the image and transaction data is held until the scheduled upload to the VPS image server. When this upload occurs, the image and transaction information is sent. The image is then processed through the OCR server (optical character recognition). OCR is the process by which the system analyzes the image from each violation and pre-populates the license plate alphanumeric sequence in the license plate field. After the OCR process, images are available through the VPS application for image review processing. The OCR also assigns confidence levels to each violation record.

If there is a VDOT transponder read in the record, the transponder is checked again against the CSC database. If there is a valid match, the event becomes a V-toll and posts...
to the customer’s account. If there is not a valid match, the violation event is queued for image review.

### Image Denication Process

The operation staff reviews all of the images regardless of OCR confidence rating. To process images and identify the plates associated with violating vehicles, the user logs on to the VPS application. For the log on process, see Chapter 6.

- **Order Image Review**

1. Log on to the VPS and select the **IoA ions** tab. See Figure 7.1.

2. Select the **Plate Denication** option on the left margin of the screen. See Figure 7.2.

   ![Image Denication Process](image)

   *By selecting the **Plate Denication** the user can see the images ready for review. While in this screen, the user can identify images for further processing or reject them using the appropriate rejection code. When the user begins reviewing the image, the system shows the best image in the center in the **Sec ed age** viewer. See Figure 7.3.*
3. Review the quality and content of the image in the **Selected Image** viewer. To view the other images captured with this event, click on each picture and select the best image. To see additional images, use the scroll bars to the right of the image windows.

4. After selecting the best image, review the information in the **Plate** field. The OCR pre-populates its best estimate of the license plate characters.

5. To make corrections in the **Plate** field, highlight the information and type over it with the correct numbers and letters. Keep numbers and letters uniform; the application automatically capitalizes alpha characters. You can also use the cursor along with the delete button to delete one or all of the characters or select and overwrite them.

6. Then verify that the **Jurisdiction** field is correct. This field reflects the US state or Canadian province of the license plate’s origin. To change the jurisdiction, enter the two-letter abbreviation of the correct state or province.

7. For the **Plate Type** field, it is important to enter the correct plate type from the drop-down menu. Image review staff will receive a license plate desk reference guide for an example of plates and plate types. The Forte VPS application defaults the plate type to PAS for Virginia license plates. Clerks only change the plate type for Virginia license plates if the plate characters are all-numeric.
8. After reviewing the image and ensuring that the license plate identification is correct, review the other data in the **Identification Window**. (See Figure 7.4 for a detailed view.) This box provides the following additional information about the violation event:

- Violation date and time
- UO code or unusual occurrence—this code is associated with the reason for the violation.
- Toll due
- Toll paid
- Location
- Authority—this is the IAG authority code if a transponder was read at the time of the violation.
- Tag—this is the transponder number if one was read.
- Status
- Agency
- Confidence factors plate—this is the OCR confidence score when processing the license plate.
- Lane status—these are indicators that can be associated with information received in the violation record about the devices in the lane. They are programmed to change color if a part of the lane was not working at full capacity at the time of the violation. These include **Electronic Collection**, **Unusual Occurrence** and **Electronic Racing**. Lane status indicators are as follows:
  - Green—Passed violation filtering checks from the lanes and violation may be certified.
  - Yellow—Possible questionable transaction and unless instructed otherwise, this transaction should be rejected.
  - Red—Failed during violation filtering check; this violation should be rejected.

<table>
<thead>
<tr>
<th>Violation Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violation Date: 12/05/2006 01:26:26</td>
</tr>
<tr>
<td>UO Code: 2</td>
</tr>
<tr>
<td>Toll Due: $0.75</td>
</tr>
<tr>
<td>Toll Paid: $0.75</td>
</tr>
<tr>
<td>Location: 1</td>
</tr>
<tr>
<td>Authority: Tag</td>
</tr>
<tr>
<td>Confidences: Plate: 10</td>
</tr>
<tr>
<td>Lane Status:</td>
</tr>
</tbody>
</table>

VDOT may define specific business rules that instruct the operation to reject images if there is a factor in the **Identification Window** that indicates the violation may not be valid. For example, if a **Status** factor is red, it may require
violation rejection. If this is the case, the user rejects the image. For more on rejecting images see error reference source not found.

If there are no issues noted with the violations information, then the image can be certified. Certifying an image means saving it.

9. Click on the eri button in the lower right hand corner of the Select age window. See Figure 7.5 for details.

After clicking eri, the image is saved and queued to the next automated process. The screen then advances to the next image ready for plate identification.

7.2.1. Rejected Images

A user may choose to reject an image for various reasons. These include image quality, image content, or a business rule.

When an image is rejected because of the quality, typically something is wrong with the image that makes the license plate unidentifiable. Examples of this are an image that is too dark or is out of focus.

When an image is rejected for content, the image quality is fine but the user cannot identify the license plate because of the content or lack of content. Examples of this include an obstructed plate or no vehicle in the image.

When an image is rejected for a business rule, VDOT or its affiliated roadway has decided that certain types of vehicles, like state police vehicles or vehicles traveling at a
certain time of day, such as those defined by Va. Code 33.1-252 (Free use of toll facilities by certain state officers and employees; penalties.), have been granted a waiver for tolls.

7.2.2. Rejection Reasons

The VPS has rejection reasons that are available on the drop-down list on the **Plate** screen. Table 7.1 lists the image reject reasons.

<table>
<thead>
<tr>
<th>Image Reject Reason</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plate is dirty or in poor condition, or a trailer hitch or other object obstructs the image.</td>
<td>Plate is dirty or in poor condition, or a trailer hitch or other object obstructs the image.</td>
</tr>
<tr>
<td>No plate is visible or there is a temporary plate displayed on vehicle.</td>
<td>No plate is visible or there is a temporary plate displayed on vehicle.</td>
</tr>
<tr>
<td>Image is corrupted in some manner or merged with another image.</td>
<td>Image is corrupted in some manner or merged with another image.</td>
</tr>
<tr>
<td>Camera aim prevents recognition of plate.</td>
<td>Camera aim prevents recognition of plate.</td>
</tr>
<tr>
<td>The image is washed out, preventing recognition of the plate.</td>
<td>The image is washed out, preventing recognition of the plate.</td>
</tr>
<tr>
<td>The image is too dark or shadowed, preventing recognition of the plate.</td>
<td>The image is too dark or shadowed, preventing recognition of the plate.</td>
</tr>
<tr>
<td>There is no vehicle displayed.</td>
<td>There is no vehicle displayed.</td>
</tr>
<tr>
<td>There is a truck using the lane where only back camera is located.</td>
<td>There is a truck using the lane where only back camera is located.</td>
</tr>
<tr>
<td>US federal plate, non US, Canadian Plate, VDOT vehicle</td>
<td>US federal plate, non US, Canadian Plate, VDOT vehicle</td>
</tr>
<tr>
<td>Any vehicle with a light bar, i.e. Police, Fire, Ambulance</td>
<td>Any vehicle with a light bar, i.e. Police, Fire, Ambulance</td>
</tr>
<tr>
<td>Lane status indicators are yellow or red.</td>
<td>Lane status indicators are yellow or red.</td>
</tr>
<tr>
<td>The image is not legible, unable to review.</td>
<td>The image is not legible, unable to review.</td>
</tr>
</tbody>
</table>

The list of available image reject reasons is configurable by the VPS administrator. It is possible to add additional rejection reasons as needed. Faneuil will work with VDOT to determine the proper image rejection categories to best suit their needs.

In addition, image rejection reasons can be removed if they are no longer valid for image processing.
7.2.3. Rejecting an Image

Rejection of images happens during Image Review and Plate Identification. To reject an image the user needs to be in the *Plate Identification* screen.

![Plate Identification Screen](image)

1. When the user has reviewed all of the available images for a violation event and has determined that the license plate cannot be identified. The user must select an appropriate reject reason.

2. Below the *Select Age* window, the user clicks the *Reject Reason* drop-down box and selects the appropriate rejection reason. See Figure 7.7. The *Reject* button is enabled.

![Reject Reason Section](image)

3. The user clicks on the *Reject* button.
EXHIBIT M

TOLL AGREEMENT

[see attached]
AGREEMENT
By and between the
FEDERAL HIGHWAY ADMINISTRATION,
UNITED STATES DEPARTMENT OF TRANSPORTATION
AND
VIRGINIA DEPARTMENT OF TRANSPORTATION

THIS AGREEMENT, which shall become effective on the date of the last signatory to this Agreement, by and between the VIRGINIA DEPARTMENT OF TRANSPORTATION, an agency of the Commonwealth of Virginia, (hereinafter referred to as the "Department") and the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (hereinafter referred to as "FHWA"), hereby provides as follows:

WITNESSETH:

WHEREAS, the I-95 high occupancy toll (HOT) Lanes project limits are defined as the high occupancy vehicle (HOV) lanes from approximately two miles north of the Capital Beltway near Turkeycock Run, milepost 2.0, at the northern terminus, to Garrisonville Road (VA 610) near milepost 143.6 in Stafford County, at the southern terminus, which includes among other things, adding high occupancy toll lanes, which collectively, the Department refers to as the I-95 HOV/HOT Lanes project in Virginia (the "toll facility"); and

WHEREAS, the Springfield Interchange Phase VIII HOV connector ramps from I-95 and I-395 to and from the Capital Beltway will be converted into HOT ramps; (respectively, the "ramps"); and

WHEREAS, the Phase VIII HOV-only through lanes on the Capital Beltway through the Springfield Interchange will be converted into HOT lanes; (respectively, the "through lanes"); and

WHEREAS, the "toll facility", the "through lanes" and the "ramps" are hereafter collectively referred to as "The Project"; and

WHEREAS, Section 166(c) of Title 23, United States Code, as amended, permits tolls to be charged on HOV facilities, including HOV facilities on the Interstate System, to "High Occupancy Toll Vehicles" and "Low Emission and Energy Efficient Vehicles" for their use of such facilities, subject to the requirements of Section 129 of Title 23, United States Code; and

WHEREAS, Paragraph 3 of Section 129(a) of Title 23, United States Code, as amended, restricts the use of revenues as follows:
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By and between the
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United States Department of Transportation
AND
Virginia Department of Transportation
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(3) Limitation on Use of Revenues ... all toll revenues received from operation of the toll facility will be used first for debt service, for reasonable return on investment of any private person financing the project, and for the costs necessary for the proper operation and maintenance of the project, including reconstruction, resurfacing, restoration, and rehabilitation. If the State certifies annually that the project is being adequately maintained, the State may use any toll revenues in excess of amounts required under the preceding sentence for any purpose for which Federal funds may be obligated by a State under this title.

WHEREAS, Paragraph 3 of Section 166(c) of Title 23, United States Code, as amended, further restricts the use of revenues as follows:

(3) Excess Toll Revenues - If a State agency makes a certification under Section 129(a)(3) of Title 23, United States Code, with respect to toll revenues collected under paragraphs (4) and (5) of [Section 166(b) of Title 23, United States Code], the State, in the use of toll revenues under that sentence, shall give priority consideration to projects for developing alternatives to single occupancy vehicle travel and projects for improving highway safety.

NOW THEREFORE, the Department and FHWA hereby agree as follows:

1. The FHWA agrees that the Department may charge tolls on The Project, or authorize the Concessionaire or other private operator to charge tolls on The Project, in accordance with the provisions of this Agreement and Section 166 of Title 23, United States Code.

2. The Department shall have appropriate contractual arrangements in place with the Concessionaire and any other relevant private operator ensuring compliance with this Agreement, 23 United States Code 129, 23 United States Code 166, and all other Federal laws and requirements with respect to The Project.

3. The Department agrees that the toll revenues from the operation of The Project will be used first for debt service, for reasonable return on investment of any private person financing The Project, and for the costs necessary for the proper operation and maintenance of The Project, including reconstruction, resurfacing, restoration, and rehabilitation, as provided in paragraph 3 of Section 129(a) of Title 23, United States Code, as amended.
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United States Department of Transportation
And
Virginia Department of Transportation
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4. In accordance with Sections 129(a) and 166(c) of Title 23, United States Code, as amended, the Department hereby certifies that it can and will comply with the following requirements:

The Department agrees to certify annually that The Project is being adequately maintained. Upon such certification, the Department is entitled to use any toll revenues in excess of the amounts required under paragraph 3 above, as amended, for any purpose for which Federal funds may be obligated by a State under Title 23, United States Code, with priority given to projects for developing alternatives to single occupancy vehicle travel and projects for improving highway safety.

5. The Department agrees, upon reasonable notice, to make or cause to be made, all records pertaining to The Project subject to audit by the FHWA. The Department agrees to annually audit the records of The Project for compliance with the provisions of this Agreement and report the results thereof to the FHWA. In lieu of the Department performing said audit, a report of an independent auditor furnished to the FHWA, the Department, the Concessionaire and/or any other private operator may satisfy the requirements of this section. Additionally, in the event that excess revenues are used for other Title 23, United States Code, eligible projects, the Department will certify that priority was given to projects for developing alternatives to single occupancy vehicle travel and projects for improving highway safety as part of the annual audit report to be submitted to the FHWA.

6. The Department shall be responsible for the Concessionaire's and/or any other relevant private operator's compliance with the provisions of Section 166 of Title 23, United States Code, as amended, as well as all other applicable Federal laws, rules, and regulations.

7. That this Agreement will be prepared in duplicate originals so that each signatory will have an original Agreement and shall become effective on the date of the last signatory to this Agreement.
Agreement
By and between the
Federal Highway Administration,
United States Department of Transportation
And
Virginia Department of Transportation
Page Four

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed, the
day and year first written above.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION

BY: Gregory A. Whirley, Sr.
Commissioner of Highways

DATE: 2/29/12

FEDERAL HIGHWAY ADMINISTRATION
UNITED STATES DEPARTMENT OF TRANSPORTATION

BY: Jeffrey F. Paniati, P.E.
Executive Director

DATE: June 27, 2012
whether the violator is resolving his/her notice(s) by walking in to a retail center or by telephone.

b. To resolve all notices at the first level in alignment with the sinner to saint business rule, a customer v-toll dispute is processed as outlined in section 10.2.3.1.1.

c. To resolve notices at the Final Notice level in alignment with the sinner to saint business rule:

1. Calculate 50% of all applicable administrative fees and process a payment for that amount in the Forte application. Apply the payment amount strictly to administrative fees. This will leave a remaining balance that consists of the tolls due and outstanding administrative fees.

2. Process a customer v-toll dispute for the remaining balance [section 10.2.2 above]. This action will deduct the tolls due from the newly-opened customer account and dismiss the remaining administrative fees.

10.2.6. The Resolution Letters

After a dispute is processed, the related documents are produced and saved within the VPS. Each of these types of letters is available:

- Violation notices
- Dispute acceptance letters
- Dispute rejection letters

When each letter is created, each type of letter is saved in a daily PDF file sent to Questmark, the third-party print and mail vendor. Questmark tracks each document through the mailing process and sends an acknowledgement back file to the VPS, which automatically updates the status of the letter to “Mailed”. Other details of this process are discussed in Section 9.2.

10.2.6.1. Viewing Letters

Access to view these letters begins in the Violator etail screen. For instructions on accessing the Violator etail screen, refer to Section rror e rence source not ound. The following steps describe how to view these documents.

To view letters:

1. Starting from this screen as shown in Figure 10.43, click on the etters button.
The **letters** screen opens and shows all the related letters associated to the violation selected. See Figure 10.44.

To the right of the screen, there is a **View** link for each document. To view any document, click on the associated link.
10.2.7. Placing the violation on “Hold”

To process violation disputes received at the CSC, the violations production staff uses the VPS application. Each violation document is evaluated according to the defined business rule for that particular type of dispute reason. The staff uses the dispute screen for the majority of the processing.

1. To place a violation notice on hold, the user first must locate the violator party in the VPS application and access the Violator Detail Screen shown in Figure 10.45. The user then clicks on the **min old** button.

![Figure 10. Violator detail screen—min old button](image)

2. On the following screen, press the **dd** button.

![Doc ID Version Document Type Status Hold Type Hold Date Comments](image)

3. Select **ispute ending** from the “Hold Type” drop-down menu. Enter today’s date in the “Hold Date” field. Add applicable comments in the in the “Comments” field. Then, place a check in the checkbox to the left of the **oc I** for every document to be placed on hold and press the **a e** button.
4. The selected documents will remain on hold for 10 business days.

10.3. **Scanning**

Scanned documents are an important part of the dispute process and evidence package generation for violators. There are three primary steps associated with accessing scanned documents. These include:

- Scanning the documents
- Indexing the documents
- Viewing the documents

This section describes the processes for scanning documents mailed to the violation processing center (VPC). Violators can choose to dispute their violations by sending various forms of documentation to the VPC. The VPC staff performs the steps to scan and store document images to the VPS and link them to violators and violation documents in the VPS database.

10.3.1. **Scanning**

The Scan Station is a stand-alone application that interacts with a scanner and the Forte database. It lets a user scan one or more documents and save them to the VPS image server.

10.3.1.1. **The Scan Station**

To access the scanning program:

1. Click on the Scan Station icon on the workstation with the scanner (Figure 10.47). The **Connect** (the logon) screen appears as shown in Figure 10.48.
2. Enter the sign on information into the **N**, **E**, and **T** fields.

3. Click the **Connect** button.

4. The scanning main page opens. See Figure 10.49. The page includes a field to select the scan type from the drop-down list. These types are configurable. The scanner categorizes documents based on the scan types.

5. Scan a single document (Step 6) or multiple documents (Step 7).
When scanning a single document, place it in the scanning tray and select the correct scan type from the drop-down list and click the **can** button.

- After scanning the document, the system shows an image of the document. See Figure 10.50. The **core to ata ase** button is enabled below the image of the document.
To save to the database, click on the **Store to Database** button. This saves the image to the VPS image server in the category selected; the scanning system returns to the main page. After an image is stored, the category cannot be changed unless it is re-scanned.

7. When scanning *multiple* documents, place all of them in the scanning tray and select the correct scan type to associate with *all* of the documents from the drop-down list. Click the **can** button.

- When multiple documents are scanned, the system shows several at a time for review. See Figure 10.51. The **Store to Data ASE** button is enabled for each of the scanned documents below the document image.
To save an image to the database, click on the **save to database** button for each document to save.

8. If you want to save all of the documents on-screen, click on the **save all** button in the top right corner of the screen. This saves the images to the VPS image server in the category selected; the scanning system then goes to the next group of images or returns to the main page. After an image is stored the category cannot be changed unless it is re-scanned.

After scanning documents and storing them to the VPS image server and database, they must be indexed to a violator and document to be viewed within the VPS.

### 10.3.2. Indexing the Scanned Documents

In the VPS application, scanned images are sent to a scan indexing queue based on the scan type selected during the initial scanning process. Each of the queues are manually reviewed and indexed to violation documents. If an image cannot be properly indexed, it may be rejected. After indexing images to violation documents, they are viewable within the VPS application from the **violator case results** screen.

To index scanned documents:

1. Log on to the VPS. See Section 6.
2. Select **Customers** from the main menu. See Figure 10.52.

   Figure 10.  **Customers**

![Image of Customers screen]

3. Select **Scan Indexing** from the list of options in the left margin. See Figure 10.53.

   Figure 10.  **Scan Indexing**

![Image of Scan Indexing screen]

   The **Scan Indexing** screen appears as shown in Figure 10.54. Each of the scan type queues is listed with the corresponding quantity of documents.

   Figure 10.  **Scan Indexing**

![Image of Scan Indexing screen with queue list]

4. Click on one of the scan type queue description links. The **Scan Indexing** page opens. The first scanned document in this queue is shown. See Figure 10.55.

   Figure 10.  **Scan Indexing**

![Image of Scan Indexing page with first document shown]
5. Review the image and, if needed, click on the **large Image** button for a better picture.

6. To index the scanned image to a violator, enter a valid document ID and select **Verify Address**. The document ID can be scanned with a bar code reader or entered manually.

7. The violator address stored in the database appears and allows you to verify the scanned document. If the name and address are correct, select **Accept** to link the scanned document to the associated violator.
8. You may also click the **eject** button; this voids the scan document and advances to the next document.

After completing the scan type queue, the **can Indenting** screen returns.

### 10.3.3. Viewing Scanned Documents

Access to view scanned documents begins in the **Violator eetail** screen. For instructions on accessing the **Violator eetail** screen, refer to Section **error reference source not found**.

To view these documents:

1. Starting from the screen shown in Figure 10.56, click on the **canned ocs** button.

**Figure 10. Violator eetail screen**

The **canned ocs** screen appears. See Figure 10.57.
2. In the **Image** window, all scanned document types are listed and followed by the date they were scanned.

3. Click on the line item of the document to view.

4. Click on the **View** button. The specific scanned documents appear. This screen also lets you print a copy of the documents.

5. Click on the **Cancel** button to exit the screen.

**10. Evidence Packages**

The VPS system makes it easy to assemble evidence packages for a violator. The system takes several documents, including documents scanned into the system, and associates them with a violator. These documents are merged in one PDF document and can be printed. Table 10.2 lists the documents included in the evidence package.
Coer screen

Includes general information about the violator, including name, address, and an itemized list of the contents of the evidence package.

Notices

All notices that are a part of the violation transaction.

Violation istor eport

VPS processing and activity history for the violation transaction.

Correspondence

All scanned images of correspondence received by the VPC, associated with the violation transaction.

A representative identified by the operations manager will act as a violation witness in the event of a hearing or court case. This representative will bring the appropriate documentation and be available to attend the hearing or trial in a district or county where a participating toll road is located.

11. DISPUTE PROCESSING

The violation payments received at the E-ZPass Virginia Customer Service Center (CSC) post in the VPS and are reconciled. This section discusses the payment types, methods, and reconciliation process.

11.1. Violation aments

The CSC accepts the following types of payments:

- Cash
- Check
- Money order
- Credit cards

11.1.1. Payment Methods

The CSC offers several payment methods to violators. Table 11.1 lists the payment method with the payment type options for each method.

<table>
<thead>
<tr>
<th>al in pa ments</th>
<th>N</th>
<th>CC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cash, checks, money order, and credit cards</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
11.1.1.1. Walk-In Payments

Violators may pay a violation at a CSC walk in location. The staff in these locations has access to the VPS payment screen and is trained to handle the violations funds in addition to account funds.

Because the staff might need to make change for cash violation payments, they must sign out their cash drawer at the beginning of the shift and return the drawer at the end of the shift. The walk-in staff can take all payment types in-person.

11.1.1.2. Telephone Payments

A violator can make a telephone payment in the following two ways:

- Speaking with a CSC phone staff member: During business hours, the phone system prompts the caller to select his reason for calling. A violator can select to speak with a representative to make a payment on the violation. To pay a violation over the phone, the caller must use a credit card.

  Note: Phone representatives that post payments must complete a deposit at the end of their shifts.

- Accessing the IVR violation payment option: The phone system also offers the caller the option to go through the automated service and pay the violation. This is the only phone payment option available after business hours. This payment selection also requires a credit card.

11.1.1.3. Mail and Fax Payments

Mailed and faxed payments are first handled and counted by the production staff. When the payment processing staff receives the payments, they must verify the quantity sent from the mailroom. This ensures that payments are not lost in the transfer.
The payment processing staff is responsible for posting these payments in the VPS and completing deposits.

11.1.1.4. Website Payments

Violation payments made over the Website are posted by the violator. The Website prompts the violator to enter the violation number, payment amount, and the credit card number. The credit card processing is automatic and the violator receives a confirmation number when the transaction is complete.

11.1.1.5. COURT PAYMENTS

The VPS enables payments to be received from the court system. The information about this process is available as the configuration and exchange details are designed. It is anticipated that the violator will make payments for violations at a court office and information is sent to the VPS for updating the violation records.

11.1.2. Posting Payments

Prior to posting any payment to the VPS, the user must open a deposit batch. A deposit batch is where all the payments for the user on that business day are recorded.

11.1.2.1. OPENING A DEPOSIT BATCH

1. Log on to the VPS (see Section 6).
2. Select Financial from the main menu. See Figure 11.1.

3. Select atc entr from the list on the left margin as shown in Figure 11.2.
The system opens the **atc ntr** screen. This screen shows all batches that are open or need to be verified.

4. To add a new batch, click the **dd** button. See Figure 11.3.

The **atc ntr dd** screen appears. The **atc** field automatically populates a system-generated number. The **atc** field is a configurable list of batch options.

5. For processing payments, select the **ments atc es** and click the **ae** button.
The following are some restrictions on the atc ntr dd screen:

- A user may have only one batch open at a time.
- A user may only create a batch for his use.
- A batch must be open for a payment to be associated with it.
- A batch may only be used for payment processing the day it was created.
- Corrections to a payment within a batch are only allowed the same day of the payment and only if the batch is open.
- Users may close their own batches.
- Only users with the role of Supervisor/Finance Department may verify a batch.
- A user may close and edit batches other than his own when a supervisor needs to process a batch on behalf of other employees.

11.1.2.2. Payment Entry

To post a payment to a violation, the user must open the a ment ntr screen. This screen can be accessed in several ways including from the Violator earc esults screen, the Violator etails screen and, for those with permission, from the edger earc esults screen.

To access the a ment ntr screen from the Violator earc esults

1. Select the Customers tab from the main menu as shown in Figure 11.5.

   Figure 11. Financial a

2. Select Violator earc from the list in the left margin. See Figure 11.6

   Figure 11. Violator earcption

The Violator earc screen (Figure 11.7) displays.
3. Enter the document information and click the **Search** button. The system then returns the violation records based up on the search criteria. See Figure 11.8.
4. Click on the **Name** of the violator to retrieve the violation. The Violator **results** screen appears.

5. Select the **a ment** link on the line item of the violator that is making a payment. The a ment **ntr** screen opens, as shown in Figure 11.9.
6. Select the **source** and the **method** from the respective drop-down lists.

7. Enter the number of the check, money order or credit card number, if applicable.

8. Enter the payment amount in the next field. In the **amount** field, the user’s deposit batch number appears by default.

9. While in the **payment** screen, the user must select the way to post the payments. The user selects his preferred option from the **application method** list that includes **Violation**, **Document**, or **Violation**. These options are described in detail in the next sections.

### 11.1.2.3. Posting a Payment by Violator

**Violator** is the default choice on the **payment** screen (see Figure 11.10). If this is the option used, the system determines how to apply the payment to the open violations. The system uses information stored in the Debit Types table to perform this action.
The Debit Types table is a configurable list instructing the system what receivables (open violation amounts) to post payments to and in what order. For example, a violator owes $500.00 in violation tolls, fines, and fees and this violator sends a check for $125.00. When the payment is posted, the system applies all the funds to the toll amount first, then to the fees, and (if the other receivables have been paid in full) the balance of the payment is applied to the fees. When all the payment information is entered, the user clicks on the Continue button and the a ment ummar screen opens.

Because this is a configurable parameter, the accounting and operations manager works with VDOT to define the business rules and identify the situations in which the Payment by Violator function should be used.

11.1.2.4. POSTING A PAYMENT BY DOCUMENT

If the option of a ment ocument is selected on the a ment ntr screen, the elect ocument screen appears as shown in Figure 11.11.
In this screen, the system shows the **amount** and the **applied amount** in the middle of the screen. **ocumen** and blank fields under the **applied** heading to the right of the toll or fee present the user with a list of open violation amounts.

The user enters the amount to apply to each violation and each level. As the amounts are entered, the system calculates and shows the **applied amount**. Any amounts over the total amount due are considered an overpayment. When all the funds are applied, the user clicks the **Continue** button and the **amount summary** screen opens.

### 11.1.2.5. Posting a Payment by Violation

If the option of **amount Violation** is selected on the **amount ntr** screen, the **elect ocumen** screen appears as shown in Figure 11.12.
In this screen, the system shows the **amount mount** and the **applied mount** in the middle of the screen. The user is presented with a list of open violations (by violation number) and blank fields under the **applied** heading to the right of the toll or fee.

The user enters the amount to apply to each violation and each level. As the amounts are entered, the system calculates and shows the **applied mount**. Any amounts over the total amount due are considered an overpayment. When all the funds are applied, the user clicks on the **Continue** button and the **amount summar** screen opens.

**11.1.2.6. Payment Summary**

**a Violator, a document, and a Violation** screens open the **amount summar** screen as shown in Figure 11.13.
The use of the **a ment ummar** screen depends on whether the violator is a customer. The possibilities of the use of this screen are listed below. Each possibility has different processing steps.

- The violator is a CSC customer
- The violator is not a current CSC customer but wants to become one
- The violator is not a CSC customer and does not want to become one

If the violator does not want to be a customer (or if this option is not made available), the user clicks the **a e** button on the **a ment ummar** screen as in Figure 11.14.
11.1.2.7. Underpayments

If payment is received via mail or offered during a phone call or walk-in visit and the payment amount is less than the amount due, these payments are applied to the current balance in the following order:
1. Administrative Fees
2. NSF (non sufficient funds) - if applicable
3. Unpaid tolls

11.1.2.8. Three Day Rule

This rule addresses processing payments for violation notices during the “transition” period when the due date of First Notice is expiring and Final Notice is being created. There are instances when payment is received for the amount of the First Notice but Final Notice has already been created. Payment can now only be applied to Final Notice which contains a higher amount due to the more-punitive administrative fees.

- If a check is received for payment and the check is dated on or before the issue date of the Final Notice (VF or VFC), the payment will be applied to the Final Notice with the additional administrative fees being dismissed. If the check is dated after the issue date of the Final Notice, the business rule no longer applies and the payment will be applied as an underpayment.

- Violators can provide payment via credit card by mailing their credit card information to the service center. If the credit card payment is received
on or before the issue date of the Final Notice, payment can be processed for the amount due on the First Notice. Once payment has been processed for the original amount due, a supervisor must be notified to dismiss the additional admin fees. If the credit card payment is received after the issue date of the Final Notice, the business rule no longer applies and the payment will be applied as an underpayment.

- When a violator calls in/walks in to make payment on or before the issue date of Final Notice, payment can be processed for the amount due on the First Notice. If the payment is received after the issue date of the Final Notice, the business rule no longer applies and the payment will be applied as an underpayment. Once payment has been processed for the original amount due, a supervisor must be notified to dismiss the additional administrative fees.

11.1.2.9. Overpayment Processing Unapplied Payments

When posting an overpayment, the following criteria must apply:

- Payment received is for a violation that has been dismissed or paid in full
- No other violations events have been created for license plate number associated with payment.
- No other violation events have been created for party submitting payment.
- Party submitting payment does not have a CSC account

Access the *napplied a ment* screen through the *a ment* option on the *Financial* menu. Leave the *npaid oll a ment* and the *re paid oll a ment* box unchecked. See Figure 11.15.
Enter information provided by party into the appropriate fields. In the note section, enter "overpayment," VN/VF number (if available), enter "no other violations due at this time," enter "no CSC account."

If the overpayment is due from an unpaid toll, enter this information in the note section.

Once the overpayment is created, the record will appear on the end report.

11.1.2.10. Unpaid Toll Payment

The violation processing system can also process toll prepayments. If a patron is traveling on a VDOT roadway and does not have the money to pay the toll, he can stop at a toll facility to obtain an unpaid toll envelope.
The completed unpaid toll envelope will be forwarded to the Violations Department and violation clerks will enter these payments into the violation processing system. As the associated violations are loaded into the VPS, an unpaid tolls filter captures these violations. The unpaid toll amount is posted to the system and the violation is dismissed.

To enter unpaid toll payments:

1. Navigate to the Finance tab and click on the Unapplied Payments link.

2. Click the unpaid toll payment box and enter the information obtained from the patron on the unpaid toll envelope.
3. Click **a e**. The unpaid toll information will be entered into the unpaid toll filter. Any subsequent violation that matches the information causes the violation to be voided and the payment posted as an unapplied payment in the VES.

![Figure 11.18 unpaid toll payment](image)

**Figure 11.18  unpaid toll payment**

- **Unpaid Toll Payment**
  - Manual entered at VPC

Each entry must list the facility name first. Ex: DTR, Plaza 78, Lane 5, 05/23/08 18:01:10, 0.75, CSR Name.

In the **audit** section of **eports**, the transaction type report will report the following three categories of unpaid toll activity:

- **Unpaid Toll Match to a Violation** - Reports unpaid tolls that were matched to a violation by match date.
- **Unpaid Toll Payment** - Reports unpaid toll payments entered by payment date.
- **Unpaid Toll Payment Aged** - Reports unpaid toll payments that have not matched by payment date.

11. **eports**

At the end of the workday or shift, the user returns to the **atc ntr** screen (as described in Section **rror e rence source not ound**). The user looks for his entry in the list of batches. See Figure 11.19.
11.2.1. Closing a Deposit

The user clicks on the **Close** link of the batch line entry in the **atc ntr** screen. The **atc ntr Close** screen appears. See Figure 11.20.

1. Enter the count and amounts for the cash, check, and money order payments. The system automatically populates the credit card counts and amounts.
2. After entering all the payment information, click on the **calculate** button. This function calculates the total deposit amount entered and computes the difference between the batch amount and the system amount. The result is the variance amount.

- If there is no variance, click the **add** button and the status of the batch changes to **add to Veri**.
- If there is a variance, the **add** screen appears.

### 11.2.1.1. Batch Out of Synch

If there is a variance on the **add** Close screen and **add** is selected, the **add** screen appears. See Figure 11.21.

![Figure 11.1 add screen](image)

The **add** screen gives the user three options:

- Enter a note related to the batch variance and select **Continue** to save the batch with a variance. The batch status changes to **Closed** and the associated reason code is **add**.
- Select **Cancel** to exit the close process without saving any of the data entered. The batch status remains open and returns to the previous screen.
- Select **continue** to keep the batch open, save the data entered, and return to the **add** screen. At this point, the supervisor will investigate the batch variance.
When the user has completed his corrections, he clicks a e. The batch can then be closed and is ready to verify.

11.2.2. Verifying a Deposit

The batch verification checks the amounts of the payments entered during the batch close process prior to making a bank deposit. A supervisor/accounting staff does this after a clerk has closed his deposit. The system does not allow the same user to both close and verify the same deposit.

To verify a deposit, the supervisor/accounting staff navigates to the atc ntr screen. He selects from the list a deposit to verify. Those deposits that are ready to verify show a Veri link in the far right column. See Figure 11.23.

When the supervisor/accounting staff clicks on this, the atc ntr Veri screen appears. See Figure 11.24.
In this screen, the supervisor/accounting staff is considered the closer. The supervisor recounts the cash, checks, and money orders received and enters the count and amounts for each in the appropriate fields. Clicking the **recalculate** button calculates the difference between the **atc mount** and the **Closer mount**; this dollar amount is the **Variance**. If a variance is found, the supervisor/accounting staff can save the batch with the variance or click on the **Cancel** button and return to the **atc ntr** screen.

Because batches are in a closed state at the time of verification, the VPS does not allow them to be edited at the verification stage. Any variance associated with a batch is assumed to be valid. If it is necessary to edit a payment associated with a batch after the batch has been closed, the payment must be reversed.

### 12. CUSTOMER SERVICE

The key to handling most violation-related customer service inquiries is **violation research**. The Violation Processing System (VPS) is equipped with several ways to research a violation. This functionality also includes methods of locating violation details from other inquiries.

To understand violation research options, it is helpful to see how the system screens are related. Figure 12.1 shows the flow of the **Customer** screen.
Some of the functionality linked to the Customer screen has been covered in previous chapters; this chapter makes reference to the previous material.

To access the Customer screen, log on to the VPS (see Chapter 6) and select the Customers tab from the main menu. See Figure 12.2.

You can select from a list of four screen options on the left margin. See Figure 12.3.
These options include the following:

- **Violation earc** (See Section error error source not ound.)
- **Violator earc** (See Section error error source not ound.)
- **ocument eturns** (See Section 9.1.2)
- **can Inde ing** (See Section 10.3.2)

Screen use and function is covered in the sections noted above.

1 .1. Violation earc

The **Violation earc** screen provides various ways to search on violation information. See Figure 12.4.
Enter the details into the fields and click on the **earc** button. The **Violation earc esults** screen appears. See Figure 12.5 for an example.

Figure 1. Violation earc esults cr een

From the **Violation earc esults** screen, you can view the information related to each violation that matched the search criteria. Customer account information is returned only if the violator has a CSC account. The screen provides links to view both the details of a specific violation and to view the associated images.

### 12.1.1. Violation Details

From the **Violation earc esults** screen, click on a number in the **Vio** column. The **Violation etails** screen appears. See Figure 12.6.
On the **Violation details** screen, you can see the violation transaction information, the vehicle detail information (not a separate screen), and any CSC-related information.

The screen also lets you see the violation image by clicking on the **View Image** button or see the history of the violation by clicking on the **istor** button.

### 12.1.1.1. Viewing the Violation Image

Selecting the **View Image** button opens the **Image** screen as seen in Figure 12.7.
The screen lets you choose which images you want to see. To view an image, select a description in the Image window. Click the Cancel button to exit the current screen and the previous screen reappears.

12.1.1.2. Viewing the Violation History

Select the histor button on the Violation details screen (shown previously in Figure 12.6 Violation Details Screen) to open a sequential history of violation processing. The general Violation histor screen, shown in Figure 12.8, includes the violation ID, plate, jurisdiction, plate type, violation status, reason code, date created, and individual or process that created the entry in the VPS.
The Violation **istor** screen is used to check personnel performance. If errors are detected in processing, the individual can be identified through this screen. The person can then be re-trained to ensure proper processing occurs in the future. The Violation **istor** screen provides several links to other historical details about the violation. These include: queue entries, name/address change history, and DMV history.

12.1.1.2.1. **Queue Entries**

The Violation **istor** screen provides a link to a history of system processes that the violation went through. Access this screen by clicking on the **ueue ntries** link at the top of the screen. The **ueue ntries** screen appears as shown in Figure 12.9.

![Figure 12.9](image-url)

12.1.1.2.2. **Name/Address Change History**

The Violation **istor** screen provides a link to the history changes with the name and address of the violation. Access this screen by clicking on the **Name ddress** link at the top of the screen. The **Name ddress** screen appears as shown in Figure 12.10.
12.1.1.2.3. DMV HISTORY

The Violation istor screen provides a link to the information returned from the DMV. Access this screen by clicking on the V link at the top of the screen. The V istor screen appears as shown in Figure 12.11.

Figure 12.11 Violator earc

Note: The link shown in this example is changed to V for VDOT.

1. Violator earc

The Violator earc screen provides various ways of searching on violation information. See Figure 12.12.
Enter the details into the fields and click on the earc button. The Violator earc results screen appears. See Figure 12.13.
From the Violator earc esults screen, you can view the information related to each violator that matched the search criteria. The screen provides links to view both the details of a specific violator and to access the Violation a ment screen. Clicking on the name of a violator opens the Violator etails screen.

12.2.1. Violator Details

The user can access the Violator etails screen by selecting a name from the Violator earc esults screen (Figure 12.14). This screen returns details on document identification numbers and versions, status, reason, document issue date, last ledger date, and the balance amount.
From the **Violator details** screen, a CSR can find details related to the violator’s violations. Some of this functionality is described in other sections of this manual. The screen options with corresponding section references are listed below:

- Review details of documents issued to the violator (See Section **error reference source not found**.)
- Change the Address of the violator (See Section **error reference source not found**.)
- Process a violator dispute (See Section 10.1)
- Review violator violation notices and letters (See Section 10.2.4)
- View scanned documents from the violator (See Section 10.3)
- Place a document on administrative hold (See Section **error reference source not found**.)
- View or add notes (See Section 9.1.21)
- View or process financial data (See Section 11.1)
- Cancel and return to the previous screen
12.2.2. Document Details

You can access the Document Details screen by clicking on a specific document number link in the document column in the Violator Details screen. The Document Details screen shows information for the document selected including the following:

- Document identification number
- Document version
- Document type
- Document status
- Reason for the current status
- Document creation date
- Date the document was mailed
- Payment due date

The Document Details screen example is shown in Figure 12.15.

![Figure 12.15 Document Details Screen](image)

The Document Details screen provides links to other information, including the option to view the notice and the Document History screen.

- If you click on the View Notice button, the screen shows a picture of the notice issued to the violator.

- If you click on the History button, the screen shows the Document History screen, which shows the details of the document creation. See Figure 12.16.
12.2.3. Address and Contact Changes

The Violator detail screen provides the option to change the violator’s address. To make the changes, select the edit link at the top of the screen. This opens the Change address screen shown in Figure 12.17.

Figure 1.1 Document Istor cren
Enters the new information into the appropriate fields and click the **save** button to update the information. If the address changes, subsequent violations are addressed with the new contact information; previous violations are not affected.

Business rules define when it is appropriate to use this process to change the address of a violator that is not the result of returned mail with a forwarding address.

### 12.2.4. Administrative Hold

Start the process of placing a document in Administrative Hold status by clicking the **admin old** button on the Violator details screen. The **administrative old** screen appears. See Figure 12.18.

![Figure 1.18 administrative old screen](image)

In this screen, you can see all the documents currently in administrative hold status. You can Add, Remove All, or Cancel and return to the Violator details screen.

- If you click on the **emo e ll** button, the system removes the hold on all documents currently on hold. The documents return to their status prior to being on hold and the system adds any administrative fees that would have applied when the document was on hold.

- If you click on the **dd** button, the **admin old dd** screen appears. See Figure 12.19.
In the **dmin old dd** screen, select the hold type from the drop-down list, enter the hold date, and enter a comment if desired. The system provides a list of documents associated with the violator that can be placed on hold. Select one by clicking in the checkbox and then clicking the **a e** button.

### 1.3. Customer V toll process or C s

**Note:** Phone and Retail CSRs process manual v-tolls (Customer V-Tolls) for E-ZPass Virginia patrons only.

Beginning April 1, 2009, telephone and Retail CSRs process customer v-tolls differently than the process outlined in Section 10.2.2. The purpose of separate processes is to accurately reflect what v-tolls are being processed as customer service activity and what v-tolls are being processed as the result of disputes being mailed in. The procedure for processing E-ZPass Virginia patron disputes is as follows:

#### 12.3.1. Preliminary Work

Before completing any Customer V-Toll for an E-ZPass Virginia patron, the CSR needs to check the following three things:

- Check the account to make certain there are enough funds to cover the sum of all events that will be v-tolled. If there are not enough funds available, a payment must be processed prior to v-tolling.

- Check to see if the vehicle listed on the violation notice is listed on the patron’s account. If the vehicle is not on the account, investigate with the customer as to the reason the vehicle is not on the account and resolve. The Customer V-Toll dispute process will add the vehicle to the patron’s account if it is not currently listed.
Check the account in the CSC application to see if transactions occurred that match the violation events on the violation notice (duplicate transactions).

12.3.2. **Procedure**

1. Search the VPS application by either Document ID or Plate Number. The following screen will appear:

   **Figure 1.0 Vearc eults**

   ![Screen Shot](image)

   **Table:**
   - **Current Doc Escalation Level:** All
   - **Facility:** All
   - **Doc ID**
     - VTOL001234
     - VTOL001235
   - **Version:** 1
   - **Facility:** N/A
   - **Status:** Hold
   - **Reason:** Notice Dismissed
   - **Issue Date:** 04/01/2009
   - **Last Ledger Date:** 09/30/2009
   - **Balance:** $51.00

2. Click on “VToll Charges” in the Financial drop down menu (see above). The following screen will appear:
"Manually Entered at VPC" will be default for the dispute source. Enter the patron’s E-ZPass Virginia account number in the patron account field. Make sure “010 - Smart Tag Virginia” is selected from the transponder drop-down menu.

***CRITICAL*** Do not enter any information into the transponder number field, even if the patron offers it.

3. Enter the applicable toll facility abbreviation (DTR, PW, CB, RMA), patron’s E-ZPass account number, any applicable note about the account status that may have led to the violation notice, the date, and the CSR’s initials in the Notes field.

4. Click the Continue button at the bottom of the screen. The following screen will appear:
5. Click in the box beside each violation event to be v-tolled; then click on continue (see above).

6. The screen above is a verification screen that allows you to double-check your work before processing the v-toll. Click to process the v-toll.

7. For follow-up, after the v-toll has been processed, go back into the Notes section and add the same notes placed when processing the v-toll (this can be copied and pasted). The customer’s account should also be noted.
8. Click the **dd** button.

9. Then complete the next screen by selecting “Customer Service” as the **annotation** field, typing (or pasting) the notes into the **Note** field, and choosing the applicable Document ID from the **Violation document** dropdown menu. (see below).

10. Click **a e**. The procedure is complete.
13. DOCUMENT SCANNING

13.1. Document Scanning Process

Each day the mailroom sorts all mail by type. Violation disputes are grouped together and delivered to authorized scanning personnel within the Violations department. Documents are sorted into categories for the scanning process by dispute type. Mail items that are smaller than 8 ½ inches by 11 inches will be taped to an 8 ½-inch by 11-inch blank page prior to scanning and placed with other associated documents to be scanned.

13.2. Using VPC Document Scanning Stem

13.2.1. Scan System Overview

This section describes the processes for scanning documents that are mailed to the Violation Processing Center (VPC). Violators may choose to dispute their violations by sending various forms of documentation to the VPC. The VPC staff performs the steps to scan and store document images to the VPS and link them to violators and violation documents in the Forte database.

The Scan Station is a stand-alone application that interacts with a scanner and the Forte® database. It allows an operator to scan one or more documents and save them to the VPS Image Server. The image files are then uploaded on the Image Server directory and appropriate entries are made in Forte VPS® database tables and scan queues.

In the VPS application, scanned images from the queues are manually reviewed and indexed to violators and documents. If an image cannot be properly indexed, it may be rejected. Once images have been indexed to violators they are viewable within the VPS application from the Scanned Docs button on the Violator Details page.

13.2.2. The Scanning Station

Scan Station allows the scanning of one or more documents and saving them to the Image Server. When the document images are stored to the Image Server, queue entries are created in the Forte VPS® database for processing and indexing the scanned images from the Customers tab can Indexing submenu item.

To start the scan station application, double-click on the Scanning Station icon (located on the desktop of the Scan Station system). The scan station icon used to start the application is shown below in Figure 13.1.
Once the icon is selected, the Scanning Station Logon box appears, as illustrated in Figure 13.2 below. The Username and Password fields require user input; the Database field is pre-populated with the value from an .ini file. Only authorized Violations department personnel have access to log into the scanning system.

### 13.2.3. Scan Types

The VPS supports multiple scan types that the VPS system administrator maintains. Examples of supported scan types include:

- **Bill of Sale**— required documentation for sold vehicle disputes
- **Correspondence**— any other correspondence received related to a violation/document
- **Death Certificate/ Notice of Incapacity**— proof of a Violator that is deceased
- **Lease Agreement**— agreement with a leasing company
- **Police Report of Theft**— required documentation for stolen vehicle disputes
- **Rental Agreement**— agreement with a rental company

Scan type can be configured to use a separate queue, or multiple scan types can use the same queue. The examples below assume each scan type has been configured to a
separate queue. Scan types appear in the drop-down menu on the Scan Station application main page.

### 13.2.4. Process for Scanning and Categorizing Documents

The scanner categorizes documents based on the configured scan types. Each defined scan type is displayed in the scanning window, allowing you to categorize documents as they are scanned in. The VPS scan indexing process reads entries from the scan queues and indexes scanned images to documents and violators in the VPS database.

It is possible to scan in multiple documents, as described in the next section. The steps below describe the process for scanning documents one at a time.

#### 13.2.4.1. Scanning and Storing Individual Documents

The scanning of individual documents consists of the following steps:

1. Place the document in the scanner tray.
2. Categorize the document by selecting a scan type from the drop-down menu on the Scan Station main page. Figure 13.3 provides an illustration of the Scanning Station main page prior to scanning.

![Figure 13.3 Scanning Station main page prior to scanning](image)
3. Click the **can** button to scan the document. The scanned document now appears in the window. An example is illustrated in Figure 13.4.

   ![Figure 13. scanned document is displayed in can tab age](image)

4. If the scan is acceptable, proceed to step 5. Otherwise, if the scan did not turn out correctly (for example, if the document was not properly placed in the scan system) click the close box of the **canned documents** window. Select **es** when prompted to confirm closing of the document. Repeat step 1 to continue scanning. Figure 13.5 illustrates the **Con irm Closing document** window.
5. Select **store to ata ase** to store an image of the document to the Forte Image Store. The following actions occur:

- The image file is uploaded to the Image Store directory
- A record is placed in the IMAGE and SCAN_DOCUMENT tables. The selected scan type is stored in the SCAN_DOCUMENT table entry. Until the document is indexed to a violator (this step occurs in the VPS application) the document remains unassociated to a violator.
- An entry is placed in the appropriate scan queue. The contents of this queue are viewed within the VPS application during the (manual) scan indexing process.
- The **store to ata ase** option is disabled in the Scan Station main page. The document cannot be stored again without first being re-scanned. Figure 13.6 illustrates the Scan Station page after an image has been stored to the database.
6. Select the close box located in the right hand corner of the **canned documents** window. Repeat step 2 to scan another document.

7. If there are no additional documents to scan, select **File/Close** within the Scanning Station main window to end the scanning application.

### 13.2.4.2. Scanning and Storing Multiple Documents

The Scan Station allows multiple documents to be scanned. Documents should be grouped by scan type prior to placing them on the Scan Station tray. This is necessary because everything in the tray will be categorized as one scan type (see step 2 below).

**o scan and store multiple documents**

1. Place the documents in the scanner tray.

2. Categorize the documents by selecting a scan type from the drop-down menu on the Scan Station main page. Figure 13.3 provides an illustration.
of the Scanning Station main page prior to scanning. The selected scan type will be applied to all the documents being scanned.

3. Click the **can** button to scan the documents. The scanned documents now appear in the window. This is illustrated in Figure 13.4.

4. Store each image to the Forte Image Store. The group of images may be stored simultaneously or individually.
   - To store the entire group at once, select the **tore all** button. After each image has been stored, the **tore to ata ase** button located at the bottom of the frame of each individual image is disabled. If an image was previously stored individually, it will not be stored again by the **tore ll** action.
   - To store individual images within the group, click on the image frame and select ‘ **tore to ata ase**’. The ‘**Store to Database**’ button associated to the selected image is now disabled.

**Figure 13. canning ultiple ocuments**
13.2.5. Accessing Scanned Documents in Forté

Once documents have been scanned and stored to the VPS Image Server and database, they must be indexed to a violator and document to be viewed within the VPS. The Scan Indexing Queue Selection and Scan Indexing Image Review pages are used to index scanned documents. This process is described in the following sections.

13.2.5.1. Indexing Scanned Documents

The Scan Indexing link on the Customer Service menu opens the Scan Indexing Queue Selection page and is the starting point of the indexing process. This page, illustrated in Figure 13.8, lists the number of entries in each of the configured scan queues. Entries for each of the queues are created when documents are scanned in at the Scan Station. You can search for a specific queue by entering a queue description and selecting Search.

The entries in the **Queue Description** column are links to the **Scan Indexing Image Review** page, which allows you to associate, or index, scanned images to documents.

![Figure 13.8 Scan Indexing Queue Selection Page](image)

13.2.5.2. SCAN INDEXING IMAGE REVIEW PAGE

The **Scan Indexing Image Review** page, illustrated in Figure 13.9, opens when the user selects the hyperlink in the **Queue Description** column on the **Scan Indexing** page. The next entry for the selected queue is retrieved and its associated image
is displayed. The **can be** field indicates the scan type currently under review, and the **can ate** field defaults to the date the document was scanned.

**Figure 13.9 Scan Indexing Image**
13.2.5.3. INDEXING A SCANNED IMAGE TO A VIOLATOR

The steps to index a scanned document displayed on the Scan Indexing Review page to a violator are listed below.

1. Enter a valid document ID for the violator to which the scanned image will be associated and then select **Verify address**. The violator address stored in the database appears.

2. If needed, select **Large Image** button to view a larger version of the scanned image in a separate browser window.

3. Evaluate the name and address on the screen and make the appropriate selection. Your choices are:
   a. Select **Accept** if the name and address are correct. The scanned document is now linked to the associated violator and appears in the **canned document** section of the **Customers** menu. If there are no additional entries in the queue, you are returned to the **can Inde ing** page and receive a message stating, “**There are no more entries in the queue.**” Otherwise, the next queue entry appears for review. Repeat step 1 to continue indexing scanned images.

   b. Select **Reject** if the name and address on-screen are not correct. The queue entry is routed to the Reject Queue and the next queue entry is displayed. If there are no more entries to review you are returned to the **can Inde ing** page and receive a message indicating the queue is empty.

   c. Select **Cancel** to end the indexing process and return to the **can Inde ing** page.

14. COURT PROCESS

1.1 Court review

When the criteria established by VDOT has been met qualifying a violation event for escalation to a summons, a series of documents will be generated, printed and mailed in accordance with VDOT business rules and those established by Fairfax, Loudoun, Chesterfield, City of Richmond, and Gloucester County Courts. These business rules were established in accordance with the law set forth in the Code of Virginia.

When any individual person has three or more unpaid violation records per court jurisdiction in the VDOT violation processing system that have remained unresolved for 14 days after the issuance of a Final Notice or Customer Final Notice, a Summons will be generated and sent to that person. When a Summons is generated, the violation will be set to a status of Summons Created in the VDOT Violation Processing System. After
the Summons is generated, all disputes, appeals and payments will be handled by the Court to whom the offense is assigned. The VDOT VPS will have the capability of reporting the number of violation records that have been set to the status of Summons Created.

The Summons must be mailed to the defendant at the defendant’s address provided by the DMV. An original summons package containing the Summons, Certificate of Posted Mailing Service and Certificate of Affidavit is also generated and made part of the evidence package. These documents must be provided to both the court and the processor service officer. In order for a case to be properly adjudicated, an authorized officer must serve the summons or post it for service at the violator’s place of residence. If service officer is not able to provide service, the court may not be able to adjudicate the case.

1 . .Court summons

As court dockets will allow, associates will select summons to be escalated to court and will generate summons documents. The courts have indicated that only one violation event can be permitted per summons. Once a summons has been generated, the Service Center will no longer accept payments or process disputes. Summons amounts will include: civil penalty admin fee, toll, and any other charges. At the hearing, the judge will also apply court charges.

The rules governing civil penalties are as follows:
- 1st offense $50 civil penalty
- 2nd offense $150 civil penalty
- 3rd offense $250 civil penalty
- 4th offense $500 civil penalty

Figure 14-1 is the template used in VPS to create the summons documents
14.2.1. Creating Summons from the VPS

Associates access the Court screens of the VPS by selecting the Customers tab from the main menu. By clicking on the Court link in the left-hand toolbar, a drop down list will appear. From the drop-down list that appears, the associate selects Summons.
At the top of the screen, click on the **Court**. A dialog box with a drop down menu will appear allowing user to search violations eligible for summons by court jurisdiction.

The system will return all violation records associated with parties who have reached eligibility for a summons to be mailed by court. These records will include those parties who have sufficient open violations to be eligible for that court, plus those violations in charged status that are associated with notices that are in summons generated status.

If the user does not select a court location, the Search will return all violation records associated with parties who have reached eligibility for a summons for all court jurisdictions.
The user selects a violation event to generate a summons for by placing a check mark in the box to the left of the violator’s name. Optimally, an associate will place check marks next to all violation events for the same party, as long as the allotted docket space provided by the court isn’t exceeded.

Under the Offense Level column, the user must select the level of offense by using the drop-down menu provided. The numerical value selected in this field assigns the amount of civil penalty that will appear on the summons template. Section 14.2 details the dollar amounts assigned to each offense level.

The associate also must populate the Court Date and Court Time fields on this screen. The values placed in these fields will populate in the applicable fields within the summons document. Each court jurisdiction provides the dates and times that cases will be heard in their courtroom.

Once these steps are completed, the user clicks on the Generate Summons button. The VPS application creates the summons documents for the events selected.
14.2.2. Hearing Search

The Hearing Search screen allows a user to search created summons documents by Court, Court Date, License Plate Number, Summons ID, and/or Violation ID.

The VPS application returns the search results with columns for Defendant's Name, Court Name, Court Date, Document ID, Violation ID, and Summons ID. The values that appear under the column for Summons ID are hyperlinks. When a user clicks on the hyperlink, a copy of that summons document will open in PDF format. From the PDF that appears, a user can print the summons and/or save it, if desired.

Prior to court, a user will generate evidence packages from the VPS that accompany the Litigation Specialists to court. On the Hearing Search screen, a user creates the evidence package by placing a check in the checkbox to the left of the violation event desired. Multiple selections can be made at one time. The user then selects the Generate Evidence Package.
Package button at the bottom of the screen. A composite PDF file will be created and will include the following data:

By party:

- All notices sent associated with the violation selected
- Correspondence associated with the party
- All scanned documents
- A report showing the DMV information, source and date it was acquired by party.

By violation:

- All images associated with the violation selected
- Certificate of Mailing
- Certificate of Affidavit
- Summons

14.2.3. Summons Documents

The Summons Documents screen enables the user to print all documents necessary for mailing:

- Summons
- Certificate of Mailing
- Certificate of Affidavit
- Mailing Page

The defendant is mailed a copy of each summons pertaining to him/her only. The applicable Clerk of Court is mailed a copy of each summons and the corresponding Certificate of Mailing and Certificate of Affidavit. Packages containing summons
documents with the corresponding Certificate of Mailing and Certificate of Affidavit documents are mailed to the applicable process server (generally the Sheriff’s office in the county where the defendant resides). The appropriate law enforcement officer within that office/department is responsible for serving the summons at the defendant’s residence.

14.2.4. Court Disposition

After court, the Litigation Specialist will enter the court disposition in the Court Disposition screen. The user can access the Court Disposition screen from the Customer Tab of the main menu by selecting Court and then Court Disposition. A search criteria entry screen will be returned in which the user will enter one or more of the following search criteria, Court, date range, Plate Number, Case Status, Last Name or Facility.

Figure 1.1 Court Disposition
If the user selects status Open or Continued, violation records that appear in the results screen will be in referred to court status. In referred to court status it will not be possible to enter payments or disputes to the violation.

**Court Disposition:**

1. **Guilty** – Status will change to “paid by court” and violation will be closed and marked for the purge process as paid.
2. **Not Guilty** – Status will be “closed” with the reason code of “dismissed by court”
3. **Collections** – Status will be “collections” ledger will remain open and future payment posting will be enabled.
4. **Continued** – Status will remain in “referred to court” status. In this case the expert witness will mark the date and time provided by the court clerk into a log and will prepare an evidence package for the summons on the new date scheduled by the court.

In the Court Disposition screen the user will have the ability to place a check mark in the box associated with the violation and enter a disposition of Guilty, not Guilty, Collections or Continued by selecting one of the four options from the drop down pick list. The user will also enter the civil penalty imposed by the court.
When all dispositions are entered, the user will select the Save Disposition button and all of the disposition statuses will be updated.

If the user selects a status of Guilty or Not Guilty, violation records that appear in the results screen will not be updatable.

If the user does not select a status, or selects a disposition status Collections, violation records that appear in the results screen will be updatable.
14.2.5. Court Forms

The Court Forms screen gives users access to the following blank court forms in PDF format:

- Certificate of Affidavit
- Certificate of Mailing Postal Service
- Court Summons

The forms can be edited electronically and either saved or printed. When exiting the forms, a user cannot save changes to the templates.

1.3. Reports

The user may select a detailed or summary report by selecting Summons Detail Report or Summons Summary Report from Audit Reports in the Reports tab. The system will create a report showing all dispositions and the potential funds due to VDOT from the court. The amount will include all tolls, admin fees and potential civil penalties based on the original offense level on the summons that was sent. The report will be created in PDF format and can be printed or saved by the user.

The following report criteria will be available:
- Facility (or All)
- Court
- Date range (corresponding to either hearing date or disposition date)
- Disposition

Figure 1.3 - Summons Detail Report Criteria
The detail report will show the disposition and amount due for each summons.

The summary report will provide disposition counts by disposition type and amount to be collected summarized by day.
### Figure 1. Summonses Summary Report

<table>
<thead>
<tr>
<th>FACILITY</th>
<th>COURT DATE</th>
<th>DISPOSITION</th>
<th>COUNT</th>
<th>VIOLATION AMOUNT ($)</th>
<th>CIVIL PENALTY ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DTR</td>
<td>08/03/2009</td>
<td>Collections</td>
<td>55</td>
<td>1,359.00</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Guilty</td>
<td>16</td>
<td>411.00</td>
<td>4,500.00</td>
</tr>
<tr>
<td></td>
<td>08/04/2009</td>
<td>Collections</td>
<td>53</td>
<td>1,610.00</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Guilty</td>
<td>23</td>
<td>850.00</td>
<td>1,150.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Summonses Created</td>
<td>114</td>
<td>2,371.00</td>
<td>39,190.00</td>
</tr>
<tr>
<td></td>
<td>08/05/2009</td>
<td>Collections</td>
<td>50</td>
<td>1,250.00</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Summonses Created</td>
<td>146</td>
<td>3,746.00</td>
<td>40,300.00</td>
</tr>
<tr>
<td></td>
<td>08/17/2009</td>
<td>Collections</td>
<td>11</td>
<td>282.50</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Summonses Created</td>
<td>150</td>
<td>2,647.00</td>
<td>72,500.00</td>
</tr>
<tr>
<td></td>
<td>05/15/2009</td>
<td>Collections</td>
<td>55</td>
<td>1,413.00</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Not Guilty</td>
<td>0</td>
<td>231.00</td>
<td>0.00</td>
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<td></td>
<td></td>
<td>Summonses Created</td>
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<td>2,265.00</td>
<td>30,200.00</td>
</tr>
<tr>
<td></td>
<td>05/19/2009</td>
<td>Collections</td>
<td>22</td>
<td>565.00</td>
<td>0.00</td>
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<td></td>
<td></td>
<td>Summonses Created</td>
<td>193</td>
<td>4,959.00</td>
<td>88,300.00</td>
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<tr>
<td><strong>Fairfax County Court DISPOSITIONS</strong></td>
<td></td>
<td></td>
<td>1,124</td>
<td>28,027.00</td>
<td>525,510.00</td>
</tr>
<tr>
<td>DTR DISPOSITIONS</td>
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<td></td>
<td>1,124</td>
<td>28,027.00</td>
<td>525,510.00</td>
</tr>
<tr>
<td>PFW</td>
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<td>Continued</td>
<td>23</td>
<td>630.00</td>
<td>0.00</td>
</tr>
<tr>
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<td>08/17/2009</td>
<td>Summonses Created</td>
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<td>1,523.00</td>
<td>20,300.00</td>
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<tr>
<td></td>
<td>08/25/2009</td>
<td>Guilty</td>
<td>6</td>
<td>100.00</td>
<td>1,300.00</td>
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<tr>
<td></td>
<td></td>
<td>Summonses Created</td>
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<td>12,500.00</td>
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<td><strong>Chesapeake County Court DISPOSITIONS</strong></td>
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<td>2,755.00</td>
<td>44,800.00</td>
</tr>
<tr>
<td>PFW DISPOSITIONS</td>
<td></td>
<td></td>
<td>144</td>
<td>2,755.00</td>
<td>44,800.00</td>
</tr>
</tbody>
</table>
14.4.1. Fairfax County and Chesterfield County Court Jurisdictions

In the Fairfax County and Chesterfield Court jurisdictions, a detailed process has been adopted to allow violators to settle their legal matter prior to trial. The Litigation Specialist will meet with the Defendant to advise them of the options to either reach an agreement prior to trial or have the case heard before a Judge.

If an agreement is reached, the Defendant must plead guilty to some, but not all, violations, based on the number of outstanding unpaid toll violations he/she has. The remaining unpaid toll violations are dismissed without prejudice. The following table represents the current scale used for negotiations.

<table>
<thead>
<tr>
<th>Defendant will agree to</th>
</tr>
</thead>
<tbody>
<tr>
<td>Admit guilt to two (2) counts, with an amount owed: $324.00 plus the unpaid tolls</td>
</tr>
<tr>
<td>Admit guilt to three (3) counts, with an amount owed: $661.00 plus the unpaid tolls</td>
</tr>
<tr>
<td>Admit guilt to four (4) counts, with an amount owed: $1,248.00 plus the unpaid tolls</td>
</tr>
<tr>
<td>Admit guilt to five (5) counts, with an amount owed: $1,835.00 plus the unpaid tolls</td>
</tr>
<tr>
<td>Admit guilt to six (6) counts, with an amount owed: $2,422.00 plus the unpaid tolls</td>
</tr>
<tr>
<td>Admit guilt to seven (7) counts, with an amount owed: $3,009.00 plus the unpaid tolls</td>
</tr>
<tr>
<td>Admit guilt to eight (8) counts, with an amount owed: $3,596.00 plus the unpaid tolls</td>
</tr>
<tr>
<td>Admit guilt to nine (9) counts, with an amount owed: $4,183.00 plus the unpaid tolls</td>
</tr>
<tr>
<td>Admit guilt to ten (10) counts, with an amount owed: $4,770.00 plus the unpaid tolls</td>
</tr>
</tbody>
</table>
Note: After 48 violations, for every additional 6 violations or increment thereof, an additional guilty plea is entered. For each additional guilty plea entered, the amount owed will increase by $587.00 plus the unpaid tolls amount.

In the event that an agreement based on the aforementioned scale cannot be reached, the Litigation Specialist will then request a trial date.

14.4.2. If a Negotiated Settlement is Reached

The Litigation Specialist provides authorized Violations personnel with a list of defendants that agreed to a pre-court negotiated settlement. The Defendant is directed to call the Customer Service Center to pay the settlement. Authorized Violation Department personnel change the disposition of the violations to “Collections”, which allows the user to apply payments towards the violations in the VPS application. Once the status of all applicable violations have been changed to “Collections”, the pre-court negotiated settlement payment amount is applied in the VPS application.

14.4.3. Other Court Jurisdictions

At this time, other court jurisdictions do not require a pre-court verbal negotiation process. If that culture changes, processes will be explored in conjunction with the applicable court jurisdiction and with the Virginia Department of Transportation.

15. VIOLATION DATA PURGE

1.1. Review

In compliance with Section 46.2-819.1 of the Code of Virginia (also referred to as House Bill 1000 or HB1000), all information collected and created related to toll violations must be purged within 30 days after the collection and reconciliation of unpaid tolls, administrative fees, and/or civil penalties. When a violator has paid all violation tolls, fees, civil penalties and court costs all data related to their violation records will qualify for purging.

- Photographs
- Microphotographs
- Electronic Images
- Other photo-enforcement system data
  - Violation data and license plate information
  - DMV records
Scanned documents
- Notices, citations, receipts, letters contained in the VPS
- Dispute records
- Payment records
- Violation history

In the VPS application, violation event and violation document information is retained after the purge process is executed. However, the violator’s name is updated to “PURGED PARTY” and the license plate number is updated to “PURGE” across all jurisdictions. The violators address is erased and purged.

**Figure 1. urged ecord ample**

<table>
<thead>
<tr>
<th>Violator</th>
<th>Name: PURGED PARTY</th>
<th>Plate: PURGE-VA</th>
<th>Address:</th>
</tr>
</thead>
</table>

15.2.1. Purge Process Steps

*Note:* The purge process is initiated on designated weekends to avoid disruption of normal day-to-day business.

1. All VPS processes are stopped
2. A stored procedure flags violation records at a party level that qualify to be purged.
3. A purge job is executed to delete flagged records using various other stored procedures. A central data purge process, which is executed manually, will go thru a predefined list of table names to find and overwrite or delete the flagged records in the defined order according to the dependencies of the data tables.

15.2.2. **Paper Documentation and Emails**

In addition to the purge of information within the VPS application, information outside the application is also purged. This includes:

- Hard copies of any violation notices, dispute letters, summons documents, evidence packages, and any miscellaneous papers, i.e. printed emails, are placed in shred bins and ultimately destroyed.
- Emails that contain violator information or attachments with violator information are deleted.

15.2.3. **Archive Process**

In order to ensure that purged data is removed from archive tapes the following process will be used. Two sets of tapes are used on a weekly rotation cycle. Depending on the cycle, purged data could remain on backup tapes up to two weeks after a purge has been made.

1. Full back-ups are over written weekly
2. Off site tapes are reused and overwritten the following week.

1.3. **1000 Purge Report**

The HB1000 Purge Party Report is used to identify party and document information affected by the most recent purge execution. To achieve this, the report queries the 1000 purge log which gets populated with party names and document numbers affected by the purge process. Each time the purge process is executed, parties and documents affected by the last purge get overwritten in this log by the parties and documents affected by the current purge.

To access this report, a user needs to go to the Reports tab and select Audit Reports from the menu in the left-hand margin. The user then chooses HB1000 Purge Party Report from the Choose a Report drop-down menu and clicks the View button at the bottom of the screen.
This report is used to audit the VPS application to ensure party name, license plate, and address information has been purged along with the associated images captured at the toll lanes. Associates also use this report to remove paper copies of disputes and/or payments from the file cabinets as described in section 15.2.1.1.

APPENDIX A CSC SYSTEM REPORTS

A.1. AVAILABLE SYSTEM REPORTS

<table>
<thead>
<tr>
<th>Account Reports</th>
<th>Customer Account Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Account Statement</td>
<td>Account Statement</td>
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<tr>
<td>Quarterly Statement</td>
<td>Quarterly Statement</td>
</tr>
<tr>
<td>Account Status Summary Report</td>
<td>Account Status Summary Report</td>
</tr>
<tr>
<td>Account Type Summary (Customer Snapshot Report)</td>
<td>Account Type Summary (Customer Snapshot Report)</td>
</tr>
<tr>
<td>Account Activity (Service Center Account Balance Report)</td>
<td>Account Activity (Service Center Account Balance Report)</td>
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</tr>
<tr>
<td>I G Non oll eports</td>
<td>IAG-1N - Inter-CSC Non-Toll Settlement Report</td>
</tr>
<tr>
<td>I G Non oll eports</td>
<td>IAG-2N - Inter-CSC Non-Toll Transaction Reconciliation Report</td>
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<tr>
<td>I G Non oll eports</td>
<td>IAG-3N - Inter-CSC Non-Toll Correction Reconciliation Report</td>
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<tr>
<td>I G Non oll eports</td>
<td>IAG-6N - Inter-CSC Disputed Non-Toll &amp; Adjustments Report</td>
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<tr>
<td>I G Non oll eports</td>
<td>IAG-7N - Inter-CSC Rejected Non-Toll Transaction Report</td>
</tr>
<tr>
<td>I G Non oll eports</td>
<td>IAG-8N - Inter-CSC Rejected Non-Toll Corrections Report</td>
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<td>I G Non oll eports</td>
<td>IAG-14N - Inter-CSC Non-toll Credit Charge Back Report</td>
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<td>I G Non oll eports</td>
<td>IAG-15N - Inter-CSC Declined Non-Toll Transactions Report</td>
</tr>
<tr>
<td>I G Non oll eports</td>
<td>IAG-16N - Inter-CSC Non-Toll Aggregate Funds Report</td>
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<tr>
<td>I G Facilit perator eports</td>
<td>FO-1 Facility Operator Period Transaction Summary Report</td>
</tr>
<tr>
<td>I G Facilit perator eports</td>
<td>FO-2 Facility Operator Period Correction Summary Report</td>
</tr>
<tr>
<td>I G Facilit perator eports</td>
<td>FO-3 Facility Operator Transaction Reconciliation Report</td>
</tr>
<tr>
<td>I G Facilit perator eports</td>
<td>FO-4 Facility Operator Correction Reconciliation Report</td>
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<tr>
<td>udit eports</td>
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<td>udit eports</td>
<td>Account Fees/Adjustments (Transactions Report)</td>
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<td>Journal</td>
</tr>
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<td>udit eports</td>
<td>Account Payment/Refunds (Transactions Report)</td>
</tr>
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<td>Credit Card Transaction Detail (Transactions Report)</td>
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<td>Communications and File Transfer (Auto Replenishment Summary)</td>
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<tr>
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<td>Credit Card Re-Bill and Declines Report</td>
</tr>
<tr>
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<td>Expired Credit Card Report</td>
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<tr>
<td>eplenis ment eports</td>
<td>ACH Bank Response Report</td>
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<td>Tag History (Tag Status History Report)</td>
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<tr>
<td>ag eports</td>
<td>Tag Inventory Summary (Tag Inventory Report)</td>
</tr>
<tr>
<td>ag eports</td>
<td>Daily Tag Inventory Report</td>
</tr>
</tbody>
</table>
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EXHIBIT L

FORM OF VIOLATIONS PROCESSING SERVICES AGREEMENT

This VIOLATIONS PROCESSING SERVICES AGREEMENT (this “Agreement”) is made and entered into this 31st day of July 2012, by and between the VIRGINIA DEPARTMENT OF TRANSPORTATION (“VDOT”) and 95 EXPRESS LANES LLC, a Delaware limited liability company (the “Participant”).

RECITALS

WHEREAS, the Participant will operate the I-95 HOV/HOT Lanes Project (the “Facility”); and

WHEREAS, in connection with the Participant’s operation of the Facility, the Participant desires to contract with VDOT to obtain certain violation processing services.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, VDOT and the Participant, intending to be legally bound, hereby agree as follows:

ARTICLE 1 – DEFINITIONS

Section 1.1 The terms set forth below will have the meanings set forth adjacent to them.

Comprehensive Agreement means a comprehensive agreement, if any, relating to the Facility between VDOT and Participant pursuant to the Virginia Public-Private Transportation Act.

Facility means the I-95 HOV/HOT Lanes Project in Northern Virginia as described in Exhibit B-1 to the Comprehensive Agreement.

Facility System means a violation enforcement system at the Facility.

Participant means 95 Express Lanes LLC, a Delaware limited liability company.

VDOT means the Virginia Department of Transportation.

Violations Processing Center means a facility established to provide the Violations Processing Services, including all necessary or convenient data and communication lines, office supplies, equipment and personnel.

Violations Processing Effective Date means the date on which VDOT commences providing the Violations Processing Services to Participant.
Violations Processing Services means the services identified in Exhibit A.

VPS Provider means a third-party provider of Violations Processing Services to VDOT.

ARTICLE 2 – VIOLATIONS PROCESSING SERVICES

Section 2.1 Provision of Violations Processing Services. VDOT agrees to provide the Violations Processing Services to the Participant for the Facility beginning as of the Violations Processing Effective Date, by delivery of notice by VDOT to the Participant that VDOT is prepared to provide the Violations Processing Services, subject to the terms of this Agreement, including, but not limited to the Business Rules and Procedures set forth in Exhibit B and the Fee Schedule and Payment Provisions set forth in Exhibit C. VDOT may contract with one or more private companies for the provision of such Violations Processing Services.

Section 2.2 Violations Processing Centers. Subject to the limitations of and in accordance with the Business Rules and Procedures, VDOT shall establish, maintain, administer and operate (or cause the establishment, maintenance, administration and operation of) one or more Violations Processing Centers. VDOT will provide reasonable advance notice to the Participant of any planned changes to the Violations Processing Center location, its operations and/or service requirements that affect the Participant and will, with good faith cooperation, seek the Participant’s comments on any such changes and incorporate mutually agreeable proposals;

Section 2.3 Toll Violations Records. VDOT shall maintain or cause to be maintained a record of all toll violations processed under this Agreement, including fees, charges and penalties for such toll violations, notices, collections, enforcement requests sent to a third party (such as a collection agency or law enforcement agency), administrative dispositions of such toll violations, correspondence relating to toll violation enforcement, and the outcome or resolution of such toll violations, all in accordance with the Business Rules and Procedures. VDOT shall handle, store and dispose of, or cause to be handled, stored, and disposed of violation images and data, in compliance with applicable laws, including Virginia Code §§ 46.2-819.1 et seq., and the records retention and destruction provisions of the Business Rules and Procedures. To the extent permitted by applicable law, all such records shall be available for audit and inspection by the Participant during normal business hours and upon reasonable notice.

Section 2.4 Performance of Violations Processing Services. VDOT shall perform itself or shall use commercially reasonable efforts to cause the VPS Provider to perform the Violations Processing Services in accordance with this Agreement. If the Participant gives VDOT a written notice stating that the VPS Provider is not performing its duties and obligations, and specifying the reasons, VDOT shall promptly give the VPS Provider notice to such effect and request appropriate action. VDOT shall apprise the Participant of all decisions relating to any such situation and seek and take into consideration the Participant’s advice and input relating to any such matters. The Participant acknowledges and agrees that the VPS Provider has the discretion to pursue or not to pursue violations by initiation of legal proceedings, as provided by the Business Rules and Procedures. VDOT shall promptly notify the Participant of such events or conditions that are anticipated to materially affect the provision of Violations Processing Services under this Agreement, including with respect to amendments or
changes to or matters under the E-ZPass Operations Interagency Agreement and the E-ZPass Reciprocity Agreement.

Section 2.5 Additional Plazas and Lanes. The parties acknowledge that this Agreement provides only for Violations Processing Services in respect of the Facility. Violations Processing Services for additional facilities may be added pursuant to mutual written agreement.

Section 2.6 VDOT Standard of Care. VDOT will exercise due care and diligence in providing Violations Processing Services, planning and implementing modifications, upgrades and associated testing of its Violations Processing system at levels which are reasonable given the schedule, scope and budget for such system. However, VDOT expressly disclaims any and all liability for, and provides no guarantee against, system failures, interruptions or other malfunctions. While precautions will be taken by VDOT to help mitigate the risk of occurrence of such adverse impacts, VDOT shall not be financially responsible for the occurrence of any adverse impact to the Participant or other third parties.

Section 2.7 Relationship to ETC Agreement. Violations Processing Services hereunder shall not constitute “ETC Services” under and as defined in the Electronic Toll Collection Agreement between the Participant and VDOT.

ARTICLE 3 – PARTICIPANT

Section 3.1 Participant Policies and Operating Procedures. The Participant’s policies and operating procedures that affect the Violations Processing Services are subject to the review and reasonable approval of VDOT; provided, however that such approval shall not be subject to any deemed approval provisions of a Comprehensive Agreement. To the extent that any of the Participant’s policies and operating procedures affects the operations of the Violations Processing Center, VDOT and the Participant shall engage in good faith discussions regarding the implementation of such policies and procedures. Should the Participant’s policies and operating procedures or any revisions thereto result in any increase in VDOT’s cost of providing the Violations Processing Services, VDOT shall immediately provide the Participant with notice of such cost increases. The Participant shall reimburse VDOT for VDOT’s associated direct costs within 30 days after VDOT provides the Participant written notice thereof. Such written notice shall include adequate and detailed documentation of the costs.

ARTICLE 4 – FACILITY SYSTEM

Section 4.1 Facility System.

(a) In order for VDOT to provide Violations Processing Services, the Participant shall provide, install, maintain and operate at its Facility a Facility System, which shall be compatible with VDOT’s system for the requested services in accordance with Exhibit A, and shall be capable of capturing a video image of a license plate, and other pertinent information of a vehicle that does not pay the proper toll amount, and shall provide violation processing capabilities consistent with the further requirements of this Agreement. The Participant shall
provide and install all equipment, components, hardware, software, cabling, and any other materials and services required for this function. VDOT and/or the VPS Provider shall provide data formats, documentation, interface requirements and any other necessary design information, including updates and modifications, to the Participant in a timely manner and at no additional cost to the Participant other than as noted in the Fee Schedule and Payment Provisions set forth in Exhibit C.

(b) The Participant shall be responsible for ensuring that the Facility System provides transaction data in the format required by VDOT. The Participant’s Facility System shall be capable of capturing a violation transaction, consisting of transaction data and license plate images for each vehicle that does not pay the proper toll either manually or electronically. The captured image shall be associated with the correct transaction and sent to the Violations Processing Center for processing. No image captured by the Facility System shall include the face of any person in the vehicle after the image has been prepared for processing in accordance with applicable law and a Comprehensive Agreement, if any. The license plate number and state shall be readable to a clerk during review on a violation processing workstation monitor.

(c) Should the Participant’s Facility System send erroneous data that increases VDOT’s cost of providing the Violations Processing Services, VDOT shall immediately provide the Participant with notice of such cost increases. The Participant shall reimburse VDOT for VDOT’s associated direct costs within 30 days after VDOT shall have given the Participant written notice. Such written notice shall include adequate and detailed documentation of such costs.

Section 4.2 Testing Procedures and Results.

(a) The Participant will be responsible for any and all system maintenance, changes, modifications or upgrades to its Facility System. All changes, modifications or upgrades to any of the Participant’s Facility equipment or other system modifications shall be compatible with VDOT’s operations and otherwise satisfy the requirements of this Agreement. Either party shall notify the other in writing at least 90 days in advance of any changes or modification to such party’s violations processing system equipment that may affect the other’s system, equipment, provision of services or operations in any material respect.

(b) VDOT or its representatives will participate in acceptance testing and must approve testing of upgrades or other modifications to the Participant’s Facility System for the selected services from Exhibit A that will interface with VDOT’s system, prior to processing of live violations through the Violations Processing Center. VDOT shall give the Participant advance notice of VDOT’s testing of upgrades or other modifications to VDOT’s violations processing system, including a successor to the then-current VPS Provider or Violations Processing Center, and shall allow the Participant or its representatives an opportunity to participate in such testing.

Section 4.3 Modifications. In the event either party proposes upgrades or modifications, such party will provide proposed test schedules and scripts for such upgrades or other modifications to the other party and the VPS Provider at least 60 days in advance of testing. In the case of upgrades or modifications to the Participant’s Facility System, VDOT
may require additional tests to be undertaken at the Participant’s expense in order to confirm the accuracy and reliability in all aspects of the processing of violations. Copies of test results shall promptly be made available to the other party and the VPS Provider.

Section 4.4 System Performance. Both the Participant and VDOT shall report to the other within two (2) business days any system failure or degradation that may affect Violations Processing Services. In the event that the Participant is unable to send transactions for periods in excess of two (2) business days, the Participant must notify the manager of the Violations Processing Center prior to sending any backlogged violations transactions. If the Violations Processing Center is unable to process violation transactions for the Participant for any period in excess of 24 hours, VDOT shall notify the Participant within two (2) business days of such occurrence.

Section 4.5 Disputed Transactions. Disputed transactions shall be resolved as set forth in the Business Rules and Procedures.

ARTICLE 5 – MAINTENANCE

Section 5.1 Participant Responsibility. The Participant shall be responsible for the maintenance, repair and operation of all necessary lane and computer equipment for its Facility System through and including its host computer to ensure that it performs hereunder and in accordance with the Business Rules and Procedures. In no event shall VDOT have any liability to the Participant for any losses suffered due to equipment failure or error in the Participant’s Facility System from the lane level through the Participant’s host computer. If VDOT gives the Participant a written notice stating that the Facility System is not operating in accordance with this Agreement or the Business Rules and Procedures, and specifying the reasons, the Participant shall promptly initiate appropriate corrective action. The Participant shall include VDOT in all decisions relating to any such situation. The Participant shall notify VDOT of all changes in the Facility Systems that can reasonably be anticipated to affect VDOT or its provision of Violations Processing Services under this Agreement.

Section 5.2 VDOT Responsibility. VDOT shall be responsible for the maintenance, repair and operation of its Violations Processing system commencing from (but excluding) the Participant’s host router and extending through and including telephone lines, routers, black boxes within the Violations Processing Center.

ARTICLE 6 – PAYMENT TERMS

Section 6.1 Payment Terms. The Participant agrees to compensate VDOT for Violations Processing Services, by paying to VDOT the fees and charges set forth in Exhibit C (as amended from time to time) that are applicable to the services requested by the Participant in accordance with Section 2.1. The parties acknowledge that Exhibit C contains a non-refundable initial set-up payment, in addition to ongoing transaction fees and charges. VDOT reserves the right to amend Exhibit C to revise, from time to time, the charges and fees for providing Violations Processing Services under this Agreement, which revisions shall take effect on such date as established by VDOT, but in no event before the expiration of 60 days from the delivery
of notice of the revised charges and fees to the Participant. VDOT shall invoice the Participant on a monthly basis for the Violations Processing Services in accordance with Exhibit C. The Participant agrees to remit payment to VDOT within 30 days of delivery of each such invoice.

**ARTICLE 7 – TERM**

**Section 7.1 Term.** The term of this Agreement shall commence upon the date of this Agreement, and shall terminate on that date which is the earlier to occur of:

(a) June 30, 2013, subject to automatic renewal for successive one year extensions, unless and until terminated by written notice delivered by either party to the other party at least 120 days prior to the end of the then current term; or

(b) the effective date on which this Agreement is terminated by either party, as specified by delivery of written notice to the other party.

**ARTICLE 8 – OPERATIONS**

**Section 8.1 Termination of VPS Operations.** VDOT shall notify the Participant of VDOT’s intention to terminate its existing agreements with VPS Providers, its operations of its Violations Processing Center, and/or the provision of Violations Processing Services at least 120 days prior to undertaking same, absent exigent circumstances, in which latter case, VDOT shall provide Participant such prompt notice as practicable under the circumstances.

**Section 8.2 Business Rules and Procedures.** VDOT shall establish, maintain and amend, from time to time, the Business Rules and Procedures for Violations Processing Services. The current Business Rules and Procedures are annexed to this Agreement as Exhibit B. Any anticipated amendments shall be presented by VDOT and discussed at liaison meetings. VDOT will, in good faith cooperation, try to accommodate changes proposed by the Participant. However, VDOT has sole authority to amend the Business Rules and Procedures, which amendments shall take effect on the date established by VDOT, but no sooner than the expiration of 90 days after delivery of written notice of the amendments to the Participant.

**Section 8.3 Liaison and Meetings.** Participant and VDOT each agree to meet with each other and VPS Providers to coordinate the administration and performance of this Agreement with each other and to conduct periodic meetings and liaison sessions to ensure the efficient provision of Violations Processing Services and the resolution of disputes that may arise under this Agreement.

**ARTICLE 9 – DISPUTE RESOLUTION**

**Section 9.1 Dispute Resolution Generally.** VDOT and the Participant will each exercise their best efforts to mutually resolve any dispute that may arise between them through good faith negotiations between the Authorized VDOT Representative and Authorized Participant Representative.
Section 9.2 Dispute Resolution Pursuant to a Comprehensive Agreement. If VDOT and the Participant have entered into a comprehensive agreement pursuant to the Virginia Public-Private Transportation Act which requires their respective entry into this Agreement, then the provisions of Section 9.1 shall not apply and the parties agree to resolve any disputes which arise between them under this Agreement pursuant to the dispute resolution provisions of such comprehensive agreement.

ARTICLE 10 - DEFAULT

Section 10.1 Events of Default; Cure; Termination.

(a) A failure by either VDOT or Participant to fulfill their respective material responsibilities and obligations set forth herein will give rise to an event of default, respectively. Following the provision of notice of default by the non-defaulting party to the defaulting party, and the failure to cure the event of default within the period agreed upon pursuant to Section 10.1(b), the Agreement may be terminated in accordance with Section 10.1(c).

(b) If an event of default occurs pursuant to Section 10.1(a), the defaulting party shall have 60 days to cure such default; provided, however, that the 60-day cure period may be extended by mutual agreement.

(c) Following expiration of the cure period, unless such cure period is extended by mutual agreement, the non-defaulting party will have the right to terminate this Agreement by notice thereof to the defaulting party.

(d) The Participant acknowledges and agrees that its sole remedy in the event of a default by VDOT shall be to terminate this Agreement in accordance with the terms hereof. VDOT shall incur no liability to the Participant for any actual or purported failure to properly maintain, repair or operate its Violations Processing system and the Violations Processing Center or otherwise provide Violations Processing Services hereunder. However, in the event of a default that arises by reason of the failure of a VPS Provider to perform its contractual obligations to VDOT and VDOT is able to recover damages from that VPS Provider with respect to such failure, VDOT shall remit to the Participant such portion of the recovered damages as VDOT determines in its sole judgment to be appropriate and shall advise the Participant of the rationale for its determination.

(e) Except as otherwise expressly provided by this Agreement, neither party shall have any liability to the other party for consequential damages.
ARTICLE 11 - MISCELLANEOUS

Section 11.1  Waivers, Modifications and Amendments. No waiver, modification, or amendment of any term, condition or provision of this Agreement will be valid or of any force or effect unless made in writing and signed by both VDOT and the Participant. The effect of any such change will be limited to the extent specified and agreed to by VDOT and the Participant, as evidenced by signatures of duly appointed officers of each of the parties.

Section 11.2  Captions. Captions, headings, cover pages and tables of contents contained in this agreement are inserted for convenience of reference only and in no way define, limit or prescribe the scope, intent or meaning of any provisions of this Agreement. All appendices, exhibits, or schedules attached hereto are hereby incorporated herein and made a part of this Agreement.

Section 11.3  Notices. All notices will be in writing and will be delivered personally, by telecopy, or by registered or certified mail, return receipt requested, addressed as follows:

<table>
<thead>
<tr>
<th>Participant Mailing Address</th>
<th>VDOT Mailing Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>95 Express Lanes LLC</td>
<td>Virginia Department of Transportation</td>
</tr>
<tr>
<td>6440 General Green Way</td>
<td>1401 East Broad Street</td>
</tr>
<tr>
<td>Alexandria, Virginia 22312</td>
<td>Richmond, Virginia 23219</td>
</tr>
<tr>
<td>Attention: President</td>
<td>Attention: Commissioner of Highways</td>
</tr>
<tr>
<td>Facsimile: (571) 419-6101</td>
<td>Telecopier: 804-780-6250</td>
</tr>
</tbody>
</table>

Section 11.4  Entire Agreement. This Agreement constitutes the entire agreement between VDOT and the Participant concerning the subject matter hereof and supersedes all prior negotiations, representations, and agreements about them, either oral or written; provided, however that the provisions of a Comprehensive Agreement, if any, shall prevail in the event such provisions conflict with the terms of this Agreement.

Section 11.5  Force Majeure/Emergency. In case by reason of force majeure, either party will be rendered unable wholly or in part to carry out its obligations under this Agreement, then, provided such party will give notice and full particulars of such force majeure in writing to the other within a reasonable time after occurrence of the event or cause relied on, the obligations of such party so far as they are affected by such force majeure, will be suspended during the continuance of the inability then claimed, which will include a reasonable time for the removal of the effect thereof, and such party will endeavor to remove or overcome such inability with all reasonable dispatch. Any time period specified herein for the performance by such party of an obligation will be appropriately adjusted and extended without the necessity for any amendment to this Agreement if a force majeure event occurs.

Section 11.6  Assignment. Participant may not assign its rights and obligations under this Agreement except with the prior written consent of VDOT.
Section 11.7 Governing Law and Venue. This Agreement shall be governed and construed in accordance with the laws of the Commonwealth of Virginia. All litigation between the parties arising out of or pertaining to this Agreement or its breach will be filed, heard and decided in the Circuit Court for the City of Richmond, Virginia, Division I, which will have exclusive jurisdiction and venue.

Section 11.8. Counterparts. This Agreement may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

[Signature Page Follows]
IN WITNESS THEREOF, this Agreement has been entered into as of the first date set forth above, by the duly authorized officers of the parties hereto.

PARTICIPANT

By: _________________________________
Name: _______________________________
Title: ________________________________

VIRGINIA DEPARTMENT OF TRANSPORTATION

By: _________________________________
Name: Laura Farmer
Title: Director of Financial Planning
Exhibit A

Violations Processing Services

Violations Processing Services shall include each of the following services if the box adjacent to any such service has been checked:

☐ Providing a manual image review of images and data transmitted from the Participant for the Facility.

☐ Rejecting violation transactions that fail to meet appropriate criteria including image quality, valid transaction data, and front license plate image for tractor/trailer combinations.

☐ Identifying and communicating systematic issues with violation quality to the Participant.

☐ Processing requests from the Participant for specific violations dismissals due to equipment or other issues.

☐ Posting the transaction to the appropriate account for images associated with valid EZ-Pass accounts by transponder, license plate or vehicle owner name and address.

☐ Obtaining from the appropriate Department of Motor Vehicles or third party data provider the name and address of the owner associated with the recorded license plate number of each violating vehicle.

☐ Issuing by mail to such individual or entity one or more toll violation notices according to Exhibit B.

☐ Quality control on the accuracy and appearance of notices.

☐ Escalating unpaid violations and amounts due according to Exhibit B and issuing follow up notices.

☐ Imposing and collecting fees and tolls for toll violations, and waiving or crediting such fees and tolls.

☐ Providing customer service to support violation resolution via the web, in person service centers and telephone.

☐ Processing disputes for leased and rental vehicles and assigning violations to the driver of the vehicle.

☐ Providing monthly financial and processing reports of all amounts received, in respect to Participant’s Facility for the Participant to audit violation activity.

☐ For unpaid violations meeting necessary criteria, as defined by the Participant, issuing summons by mail and by delivery to the appropriate sheriff and attending court hearings with the necessary evidentiary information.
Recording and communication to the Participant the disposition of any court hearings.

Working with the Participant on an ad-hoc basis to provide information to identify and allow the Participant to pursue egregious violators.

This scope of services may be modified in writing periodically to reflect funding constraints, modified business processes and new activities that are identified as beneficial to the Violation Processing System.
Exhibit B

Business Rules and Procedures

[see attached]
## Revision History

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<td>Version 1.0</td>
<td>March 2008</td>
<td>All</td>
<td>Initial release</td>
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<td>7.2</td>
<td>Add 4\textsuperscript{th} offences level $500</td>
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<td>Clean up revisions to incorporate modifications agreed to in meetings with VDOT</td>
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<td>2.2, 2.6, 2.9</td>
<td>Clarification on Lane Filtering and DMV Lookup; update to violation payment processing; new VDOT business rule for legacy violation write-off</td>
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<td>Change to Final Image Review Certify Criteria; one-time customer v-toll courtesy for E-ZPass patrons who receive violation notices.</td>
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1 Introduction

This document defines the business rules governing violation processing for the Virginia E-ZPass Customer Service and Violations Processing Center (the “Service Center”). The business rules were developed using several guidelines consisting of VDOT RFP 137-RO (and addenda) and § 46.2-819.1. of the Code of Virginia. As business rules are modified or newly introduced, this document will be updated following the same process used to update the Virginia E-ZPass Service Center Operations Manual. Rules which do not apply to Open Road Tolling, e.g., AVI-only transactions, are marked with an asterisk.

The document is organized into sections as follows:

1. Violation Filtering
2. Queue Processing
3. Violation Notice Processing
4. Dispute Processing
5. Payment Processing
6. Court Processing
7. Purging Violation Data
8. Write off Threshold
2 Violation Processing Business Rules

2.1 Lane Level

Violations are assigned unusual occurrence ("UO") codes based upon the type of transaction. As image files are loaded into the VPS for processing, the loader will consider these UO codes to determine how the violation record will proceed. The rules associated with applicable UO codes are defined as follows:

2.1.1 Run Through

No transponder is read and no payment is collected. These violations are transmitted to the Service Center for processing after clearing the violation filtering process. Run through’s can occur in any type of lane, e.g., attended or full-service lanes, exact change or E-ZPass lanes.

2.1.2 Insufficient Funds Transaction*

This occurs when a collector provides the patron with an unpaid toll receipt indicating the patron did not have money to pay. The collector provides instructions on how to send payment to the Service Center. The payment will be matched with the unpaid toll if received within the configured period of time (10 days) and the violation will be dismissed. This functionality must be configured at the lane level where a flag is set in the tag file indicating that an insufficient funds transaction occurred. Insufficient funds transactions may only occur in full-service lanes operated by a toll collector.

2.1.3 Partial Payment

Patron deposited an amount lower than the expected toll in the coin basket (these violations are filtered, e.g., are not sent to the Service Center for processing). Partial payment transactions only occur when a payment is made in a lane equipped with an automated coin machine.

2.1.4 Insufficient Funds Transponder

Patron’s transponder was read in the lane but the account to which the transponder was assigned is in an insufficient status. The violation record will proceed to the Service Center where it will be held for 5 days, during which time the Service Center will attempt to post the transaction to the account, if not successful the record will continue to be processed as a violation. An insufficient funds transponder transaction may occur in any AVI-equipped lane.

2.1.5 Class Mismatch

This occurs when a transponder read indicates a class that is different from the class assigned by the lane. The fare provided by the lane is posted to the customer account and image loader ignores the UO code and does not load this transaction as a violation. Class mismatches may occur in any AVI-equipped lane.
2.2 Violation Filtering (VF)*

VF will examine every transaction generated by the lane controllers. The transactions that VF will use will come from the lane controllers and flow into a Transaction File Manager (TFM) that will run on the VES Host. When VF sees a violation transaction, it stores a record of the violation in a designated database table that resides on the VES Host. VF examines each subsequent transaction message to determine if the transaction indicates that the patron may have attempted to pay the toll. If such a reason is found, VF marks the violation record with a code number indicating that the violation should be filtered from the normal violation process. The data VF creates and writes to database will be used as part of the process that sends the evidence packages to the Violation Processing System (VPS). Each evidence package containing violation image and data that arrives at the VES Host will be stored in a database table. Records of images that are assigned a filter reason code other than violation will not be sent to VPS, these will be retained on the VES Host for 6 months. VF looks for the following subsequent events:

2.2.1 ACM Failure

A patron may have attempted to pay the toll with coins before the lane controller was aware that the ACM was disabled.

2.2.2 AVI System Failure

A patron may have attempted to pay the toll with an AVI tag before the lane controller was aware that the AVI system was disabled.

2.2.3 VCS System Failure

When the status of any critical device (IDRIS, loop, light curtain, treadle) is reported by the lane, VF filters out the violations up to a configurable amount of time or transactions.

2.2.4 Resync Rules

VF will filter out transactions with a specific resync value.

2.2.5 Excessive Violations

A patron may have attempted to pay the toll during a time that either the ACM or AVI is disabled, but either the lane controller is not yet aware of the problem, or the system is disabled in a way that is not detectable. Examples of the latter are the AVI antenna is tilted away from the road or the coin basket is obstructed. The lane declares an excessive violations condition if there are X consecutive violations and clears the condition after Y consecutive normal transactions. The values of X and Y are dependent on the lane type. For AVI only lanes, the value of X is 6 and the value of Y is 10. For ACM and MLT lanes, the value of X is 2 and the value of Y is 5.
2.2.6 ACM Duration Event

Patron behavior in an ACM lane will be filtered out if the ACM detects coins and the vehicle leaves the lane before all coins were counted.

2.2.7 Lane Restart

The lane may have been rebooting when the patron attempted to pay the toll, so the lane controller did not register the toll.

2.2.8 Lane Closure

The lane may have been in an unstable state prior to closing, so if the lane is closed, the system assumes no violations in this mode will be captured.

2.2.9 Start/Stop Degraded Mode

VF can be configured to filter out transactions for a set time before the lane declares a Start degraded mode. This event is usually followed by a Stop degraded mode message once the lane recovers and VF can continue to filter a set amount of vehicles or time after this event occurs.

2.2.10 ACM Over-Payment

VF will look back 5 transactions to forgive the latest violation if one existed.

2.2.11 ACM Lane Update

VF will look back 5 transactions to forgive the latest violation if one existed.

2.2.12 Heartbeat Transaction

VF checks for all questionable violation transactions that have all flags set to Y and declares those valid violation transactions. Any questionable transactions (all flags are not set to Y) that are more than 4 hours old (default value) are declared inconclusive violation transactions and are filtered out.

2.2.13 Rejected Coin Transaction

VF will filter out all rejected coin transactions.

2.3 Queue Processing

The violation processing system utilizes automated processing of queues to move violations in and out of various statuses. Many business rules are configured within the queue processing procedures. Business rules are also applied in manually processed queues. Queue processing begins with image loader and ends with notice generation. Queue processing business rules include.
2.3.1 OCR Confidence Levels

The system is set to route 100% of all qualifying violations to plate ID regardless of the OCR confidence level.

2.3.2 Insufficient Transponder Check

At image loader if a transponder is found in the tag file, the system will check the Service Center account to see if the account has sufficient funds to post a v-toll. If it does, the violation record will be rejected and a v-toll will post to the account. If it fails to post it will proceed to v-toll retry queue.

2.3.3 Plate Identification

This is a manual queue.

2.3.3.1 Certification

To certify a violation record the license plate characters must be clear and unobstructed and the plate jurisdiction must be readable.

2.3.3.2 Rejection

From time to time associates are instructed by VDOT to reject violation records at certain plazas and lanes. This is only done with direction from VDOT.

Standard reject rules are:
- Reject if plate characters are obstructed or not clear
- Reject if plate jurisdiction is not readable
- Reject if no front shot is available and license plate is on a trailer being pulled by a tractor
- Reject Emergency Vehicle Plates (Fire, Ambulance, EMS and State Police Vehicle)

2.3.4 License Plate V-toll Check

After plate ID, the system will check the plate characters and jurisdiction entered against the license plate database for EZ-Pass Virginia first. If an account is found and is sufficient, a v-toll will post to the account and the violation will be dismissed. If an account is not found, the violation will go next to the IAG license plate database. If a match is found the violation will be dismissed and the v-toll information will be collected for transmission to the away agency. If a valid account is found in the EZ-Pass VA license plate database but the account is in insufficient status, the violation record will proceed to the v-toll retry queue.

2.3.5 V-toll Retry

When insufficient at plate check or transponder check it is not able to post a v-toll, the violation record will remain in a holding queue and will try to post the v-toll each day for five consecutive days. If it fails to post on the sixth day the violation will proceed on as a valid violation.
2.3.6 Unpaid Toll Check*

Violations that have been flagged as insufficient funds at the lane (UOcode9 unpaid toll transaction) will proceed to the unpaid toll queue. After plate ID the violation will be held in the unpaid toll queue awaiting a payment match. If after 10 days no match is found the violation will proceed on as a valid violation.

2.3.7 Sampler Queue

The sampler queue is used as a quality assurance review for selected associates. Selected associates are set up so a percentage of the violation records that are reviewed at plate ID will be re-routed back through plate ID for a second review. Re-reviewed records are scored by percentage if they are re-identified differently by the second reviewer.

2.3.8 DMV Records Processing

Virginia, Pennsylvania and Maryland license plates are routed directly to their state’s DMV for owner information. License plates for most other states (some are excluded) are routed to LES (a contracted vendor) for processing.

2.3.8.1 DMV Cache

Once a response is returned from the DMV with the owner information, that record is saved in cache for a configurable amount of time. If subsequent violations occur for a license plate, the Violation Processing System will look for a match in the DMV cache before corresponding to the applicable DMV. The current expiration time parameter for owner information in the cache is 60 days.

2.3.9 Plate Confirmation

This is a manually processed queue. Plate confirmation queue contains plates that were returned unknown by the DMV processor. Associates review this queue and correct any information that may have not been entered correctly. The re-identified record will be routed back to plate check queue if the plate information was changed or to registration pending queue. This is for the first look-up only. The next time that plate receives a no-match the plate will go to registration pending. Registration pending plates will be retried 5 times and if no match is found the record will age out.

2.3.10 New Party

This is a manually processed queue. When the DMV returns a record that is similar, but not the same for an existing party in the system, the associate processing this queue will link or un-link the new record to the existing party record. The business rules that are applied will link a party with a name and address that is similar to the existing party and un-link the party if the name and address is clearly not the same. Records will not age out of this queue if unprocessed.
2.3.11 DMV Pending

DMV Pending queue is an automated queue. Records that are not returned by the DMV will remain in this queue and will be picked up each time the DMV records are processed to the DMV processor. If no, response record is returned after 90 days, the record will age out of the queue.

2.3.12 Pre-Classify and Classify

The pre-classify and classify queues will determine if a party has previously been qualified within the violation processing system as a violator. The business rule that is applied is as follows:

The first violation for a party will wait 90 days for a second violation to occur. If a second violation does not occur within 90 days the first violation will be dismissed. After the party has achieved 2 violations within 90 days from that point forward each new violation occurring will be held until the next processing day then will proceed to Classify for processing into the Final Review manual queue. The reason the violations are held for a day are so that multiple violations (up to 20) for that day will be issued on one notice. If one party violates 21 times in a day a second notice will be issued.

2.3.13 Final Review Certify Criteria

Final review is a manual queue process. VDOT has specific requirements regarding the quality of the image that is selected for the violation notice. The business rule governing this is that the image must be a recognizable image of the vehicle (preferably in color). The intent of the quality control is to provide reasonable assurance that the recipient of the notice will be able to recognize their vehicle. This image must be readable to the extent that we can recognize the vehicle and identify the plate characters. If the plate characters are not perfectly clear or we cannot recognize more than four (4) of the characters we can certify as long as we have an ROI image that is clearly from the same vehicle with an irrefutable image of the plate characters. If a suitable image is not available within the group of images on file for the notice, we will send the entire group of images to reclassify.

2.3.14 Final Review Reclassify Criteria

When a violation notice is sent to reclassify it will stay in the classify queue until another qualifying violation for an existing party enters the system. The system will link the party to the records in classify and send the package of records back to final review for processing. Reclassified violations will age out after 180 days if no new violation record enters the system.

2.3.15 Final Review Reject Criteria

Business rules for rejecting violation records at final review are:

- Reject toll facility vehicle violations
- Reject US Government vehicles violations
- Reject if DMV information does not match image (eg: if DMV returns a vehicle make that does not match the image)
2.3.16 Document Generation

When a document is generated to the print outsource file, there will be a 3 day offset to the issue date to allow for printing and mailing time.

2.3.17 Filters 1 and 2

Currently Filter 1 and Filter 2 are being used to filter toll collector violations. Toll collector plates are provided by the Facility Operators on an ad hoc basis. Any request for filtering in Filter 1 or Filter 2 must come directly from VDOT or a Toll Collection Facility Manager/Director.

2.4 Violation Notice Processing

2.4.1 Toll Violator Notice (TVN) and TVN Customer (TVNC)

Business rules related to toll violation notices are as follows:
1. Dispute or payment must be made within 30 days
2. Amount due will be one administration fee and all tolls associated with the violation events itemized on the notice
3. Toll violation notice will contain all violation events for the party occurring within a 24 hour period up to 20 violation events.

2.4.2 Final Notice (FN) and FN Customer (FNC)

If the toll violation notices is not resolved within 30 days of notice issuance date, it will automatically escalate to final notice status.

Business rules related to final notices are as follows:
1. Dispute or payment must be made within 14 days or all open violations on the notice will be subject to a summons being generated.
2. Amount due will be one administration fee for each violation escalated all tolls associated with the violation events itemized on the notice.
3. Final notice will include all violations from the original notice that have not been paid or dismissed.

2.5 Dispute Processing

2.5.1 Ad hoc

An ad hoc dispute is one that does not fit into any other designated dispute category. The business rule governing ad hoc disputes is that it will be escalated to the facility operator for a ruling prior to being accepted or rejected.
2.5.2 Leased Rental

The business rule governing leased rental disputes is that the appellant must provide a lease or rental contract or copy to the Service Center via mail. If the violations occurred during the contract period, the violations will be reassigned to the renter or lessee and the rental agency or lessor’s violation notice will be dismissed. If the contract is not provided or if the violations occurred outside of the contract period the dispute will be rejected.

2.5.3 Customer Dispute

Consistent with VDOT’s intention we try to be customer friendly when dealing with customers who receive violation notices. The degree to which leniency is applied depends upon the general criteria outlined below:

2.5.3.1 E-ZPass Virginia Customers

An E-ZPass Virginia customer may enter their dispute as follows:

- **Walk in or call the Service Center providing their account information.** As a one-time courtesy, the dispute will be processed and if the account is in good status the appeal will be accepted and v-tolls for the violations will be posted to the customer’s account. Subsequent violation notices received by an E-ZPass patron will be upheld and not v-tolled to his/her account. If the account is not in good standing the appeal will be rejected. Associate handling the call will inform the customer that the account must first be funded to process a dispute.

- **Enter a dispute via the Web.** The dispute will be processed and if the account is in good status the dispute will be accepted and v-tolls for the violations will be posted to the customer’s account. If the account is not in good standing the appeal will be rejected. Customer will be advised to contact the Service Center for assistance.

- **Mail dispute to Service Center for processing.** As a one-time courtesy, the dispute will be processed and if the plate information entered matches the away agency license plate data, the violation notice will be dismissed and v-tolls will be processed to the away agency. Subsequent violation notices received by an E-ZPass patron will be upheld and not v-tolled to his/her account. If a match is not found the dispute will be rejected. Customer will be advised via a dispute rejection letter.

2.5.3.2 IAG Customer Dispute

Customers from away agencies are required to mail an account statement to the Service Center since account information is not readily available. These IAG customer disputes are processed as follows:

- **Mail dispute (including statement) to the Service Center.** As a one-time courtesy, the dispute will be processed and if the plate information entered matches the away agency license plate data, the violation notice will be dismissed and v-tolls will be processed to the away agency. Subsequent violation notices received by an E-ZPass patron will be upheld and not v-tolled to his/her account. If a match is not found the dispute will be rejected and the customer will be notified via mail.

2.5.4 Sold Vehicle

Dispute must be mailed to the Service Center. Dispute must be accompanied with a signed vehicle title or receipt of sale as record of vehicle sale. If the violations on the notice occurred after the vehicle was sold
this dispute will be accepted and the notice will be closed. If the violations did not occur after the vehicle was sold or no proof of sale is provided the dispute will be rejected.

2.5.5 Stolen Vehicle

Dispute must be mailed to the Service Center. Dispute must be accompanied with a police report or copy. If the violations on the notice occurred after the vehicle was stolen this dispute will be accepted and the notice will be closed. If the violations did not occur after the vehicle was stolen or no police report is provided the dispute will be rejected.

2.5.6 Sinner to Saint

If a violator contacts the Service Center and wishes to open an account, the associate has the authority to provide amnesty for the violations that have occurred as follows:

- 1st Notice - Advise the violator to open an account with sufficient funds to cover cumulative tolls on the violation notice(s) and waive the $25.00 administrative fee.
- Final Notice - Advise the violator to open an account with sufficient funds to cover cumulative tolls and 50% of the administrative fees on the violation notice(s), and waive the remaining 50% of the administrative fees.
- After the account has been opened, process the customer dispute causing notice to be closed and v-tolls and administrative fees, if applicable, to post to the newly opened customer account.

2.5.7 Returned Mail

When violation notices are returned to the Service Center they are processed according to the following business rules:

- If the returned mail has a forwarding address, the associated will enter the postal service provided address and reissue the document. The document will be reissued with a new document issue date.
- If the returned mail does not have a forwarding address, the document will be put on administrative hold for a configurable period of time (currently 999 days).

2.6 Payment Processing

2.6.1 Payment Methods and Locations

Customers are provided with numerous opportunities to pay violation notices:

2.6.1.1 Payment Methods

The following are the payment methods accepted for violation payments.

- Cash (walk in locations only)
- Visa, Master Card, American Express, Discover
- Check


- Money Order

### 2.6.1.2 Payment Locations

The following are the payment locations available for violation payments:

- Walk-in locations (Gloucester Point, Herndon, Richmond)
- Phone or Mail (Clifton Forge)
- Credit Card (All locations including Web)

### 2.6.1.3 Underpayments

If payment is received via mail or offered during a phone call or walk-in visit and the payment amount is less than the amount due, these payments are applied to the current balance in the following order:

1. Administrative Fees
2. NSF (non sufficient funds) – *if applicable*
3. Unpaid tolls

### 2.6.1.4 Three Day Rule

This rule addresses processing payments for violation notices during the “transition” period when the due date of First Notice is expiring and Final Notice is being created. There are instances when payment is received for the amount of the First Notice but Final Notice has already been created. Payment can now only be applied to Final Notice which contains a higher amount due to the more-punitive administrative fees.

- If a check is received for payment and the check is dated on or before the issue date of the Final Notice (VF or VFC), the payment will be applied to the Final Notice with the additional administrative fees being dismissed. If the check is dated after the issue date of the Final Notice, the business rule no longer applies and the payment will be applied as an underpayment.
- Violators can provide payment via credit card by mailing their credit card information to the service center. If the credit card payment is received on or before the issue date of the Final Notice, payment can be processed for the amount due on the First Notice. Once payment has been processed for the original amount due, a supervisor must be notified to dismiss the additional admin fees. If the credit card payment is received after the issue date of the Final Notice, the business rule no longer applies and the payment will be applied as an underpayment.
- When a violator calls in/walks in to make payment on or before the issue date of Final Notice, payment can be processed for the amount due on the First Notice. If the payment is received after the issue date of the Final Notice, the business rule no longer applies and the payment will be applied as an underpayment. Once payment has been processed for the original amount due, a supervisor must be notified to dismiss the additional admin fees.

If this scenario occurs, notify your Senior CSR or Supervisor so they can appropriately dismiss the applicable fees.
2.6.2 Unpaid Tolls*

Unpaid tolls must be received at the Service Center for posting within 10 days of the unpaid toll receipt being issued. If payment is not received the record will proceed in the workflow as a violation. Only unpaid toll payments matching a transaction from the lane will be reported on the facility disbursement report.

2.6.3 Prepaid Tolls

Prepaid tolls are accepted in the Service Center. If it is possible to find the violation and reject it the Service Center will attempt to do so. The payment will be posted regardless of whether a corresponding violation was found or not. Prepaid tolls will not be reported on the facility disbursement report.

2.6.4 Refunds

Violation overpayments due to actual overpayments or payments for violations that have been dismissed are processed as refunds 30 days after the payment was posted.

2.6.5 Returned Checks

Checks for violation payments that are returned for insufficient funds or closed account are assessed a fee of $35. The returned check fee is added to the total amount due on the violation notice which will be reopened and escalated according to the document escalation rules.

2.6.6 Credit Card Disputes

No fee is assessed on violation payments for credit card disputes.

2.7 Court Processing

Court processing is a combination of automated and manual processes and business rules are applied both by the system and by associates processing the court data.

2.7.1 Qualification Criteria

In order to qualify for a summons the following business rules govern:

- The party has had 3 or more unpaid tolls per facility
- The party has failed to pay or successfully dispute their violations for a period greater than 45 days

2.7.2 Summons

Summons will be queued up as violations meet the criteria for summons processing. As court dockets will allow, associates will select summons to be escalated to court and will generate summons documents. One summons will be generated for each violation record. Once a summons has been generated, the Service Center will no longer be able to post a payment or process a dispute. Summons amounts will
include: civil penalty admin fee, toll, and any other charges. At the hearing the judge will also apply court charges.

Rules governing civil penalties are as follows:

- 1\textsuperscript{st} offence $50 civil penalty
- 2\textsuperscript{nd} offence $150 civil penalty
- 3\textsuperscript{rd} offence $250 civil penalty
- 4\textsuperscript{th} offence $500 civil penalty

### 2.7.3 Mailing

- Summons will be mailed directly to the violator from the Service Center
- Two copies of the summons will be sent to the service processor along with a certificate of posted mailing. The service processor will serve the summons and forward certificate of posted mailing to the court when that has occurred.
- Summons will be organized by court date/court location they will be sent to the court where case will be heard.

### 2.7.4 Service

In order for a case to be properly adjudicated, an authorized officer must serve the summons or post it for service at the violator’s place of residence. If service officer is not able to provide service, the court may not be able to adjudicate the case.

### 2.7.5 Court

Each court will be provided with an electronic file and also a paper copy of all summonses for each day’s docket(s). Court will communicate with Service Center when cases are rescheduled or prepaid.

### 2.7.6 Evidence Package

Court Specialist will prepare evidence packages for each case and bring them to the court on the day of the hearing. Court Specialist will be on hand to assist the judge with any questions or provide evidence package as requested.

### 2.7.7 Court Scheduling

The Service Center will work directly with the clerk of court in each location to identify available court docket time and fill them with toll violation cases.

### 2.7.8 Court Dispositions

Court Specialist will enter court disposition determined by the adjudicating judge at the hearing. The following business rules govern summons dispositions:

- Guilty – violation will be closed in the VPS and payment will be received by the court
- Not Guilty – violation will be closed
- Collections – violation was not able to be adjudicated so violation will remain open in the VPS and can be processed further via payment made to the Service Center or through a third party collection agency
- Continued – Judge leaves open with new hearing date.

### 2.8 Purging Violation Data

Each month, a process will run to purge violation records pursuant to § 46.2-819.1. of the Code of Virginia. The business rules governing violation purging are as follows:

- Paid in full violations – When all violations associated with a party are paid in full all violation records will be purged.
- Dismissed in full violations – When all violations associated with a party are dismissed in full all violation records will be purged.
- Paid by Court disposition violations – Cases marked as Guilty as a result of a hearing will not be purged unless or until it can be verified that amounts due have been paid in full and the payments have been reconciled.

### 2.9 Write-off Threshold

On April 1, 2009, VDOT determined violation notices that meet all of the following criteria are to be written off and not researched for purposes of escalation to Final Notice or Summons:

- Violation notices with an Issue Date of September 24, 2007 or earlier,
- The outstanding balance of the violation notices are equal to or less than $5.00,
- The violation notices are in an Admin Hold, Partially Paid, or Partially Dismissed status
Fee Schedule and Payment Provisions

A. Fee Schedule.

This preliminary fee schedule is subject to change as provided in Part B of this Exhibit C. Once the actual rates are established they will be reviewed and reset annually based on actual experience and operating costs, as provided in Part B of this Exhibit C. Fees will be assessed according to the following activities undertaken by the Violation Processing Center:

- **V1** – a transaction fee for each violation received by the central system;
- **V2** – a transaction fee for each manual dispute processed by the central system;
- **V4** – a processing fee assessed for each DMV Look-up performed by VDOT where DMV data is returned successfully;
- **V5** – a transaction fee for each violation payment processed;
- **V6** – a transaction fee for each violation administrative fee payment processed;
- **V8** – a fee as a percentage of the value of violation payments processed (This percentage will be based on the average credit card and other financial transaction processing fees per violation dollar processed).
- **V9** – actual costs incurred in pursuit of violations subsequent to mailing a final notice including costs to issue summons and attend court hearings or pursue unpaid violations via collections. The ceiling on these costs will be agreed in advance with the Participant.

<table>
<thead>
<tr>
<th>Fee</th>
<th>Unit</th>
<th>Value</th>
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</thead>
<tbody>
<tr>
<td>V1</td>
<td>Per Violations Image Loaded</td>
<td>[ ]</td>
</tr>
<tr>
<td>V2</td>
<td>Per Manual Dispute</td>
<td>[ ]</td>
</tr>
<tr>
<td>V4</td>
<td>Per DMV Look-up by VDOT where DMV data is returned successfully</td>
<td>[ ]</td>
</tr>
<tr>
<td>V5</td>
<td>Per Notice</td>
<td>[ ]</td>
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<tr>
<td>V6</td>
<td>Per Payment</td>
<td>[ ]</td>
</tr>
<tr>
<td>V8</td>
<td>Percentage Fee</td>
<td>[ ]</td>
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<tr>
<td>V9</td>
<td>Actual costs incurred on behalf of Participant</td>
<td>Tracked monthly</td>
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</table>

Fees are progressive. By way of example, a violation that is cleared by manual dispute would have $[•] netted against the toll; a violation that proceeds through collection at the Violations Processing Center after a single notice would be assessed $[•]. Operators will also be invoiced monthly fee of [•]% of payments processed.
In addition, the Participant shall pay VDOT an initial set-up fee that will be negotiated between the parties prior to the provision of any services pursuant to the Agreement.

B. Payment Provisions.

The foregoing costs and fees are preliminary and subject to change as provided below in connection with VDOT’s annual review of the costs of providing Violations Processing Services.

Costs and fees under the Violations Processing Agreement shall cover the Participant’s share of the costs of providing Violations Processing Services. VDOT shall review and, if appropriate, establish revised costs and fees on an annual basis and use its best efforts to provide notice thereof by April 1\textsuperscript{st} in any year (for purposes of meeting the Participant’s budget preparation cycle), and in any case provide not less than 60 days notice of any proposed amendment and modification thereof and the effective or implementation date of any such revised costs and fees.

The Participant shall pay all such costs and fees, as provided in the Violations Processing Agreement.
EXHIBIT S

KNOWN GEOTECHNICAL CONDITIONS

[see attached]
The table below identifies documents that contain geotechnical information for the I-95/I-395 corridor. These documents have been provided to the Concessionaire by the Department or have been provided to the Department by the Concessionaire during the development phase of the Project.

<table>
<thead>
<tr>
<th>Doc. Number</th>
<th>Title/Description</th>
<th>Descriptor 1</th>
<th>Descriptor 2</th>
<th>Dated</th>
<th>Amends</th>
<th>Electronic File Name</th>
<th>Author</th>
<th>Addressee</th>
<th>Comments</th>
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## Exhibit S – Known Geotechnical Conditions

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<th>Doc. Number</th>
<th>Title/Description</th>
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<th>Descriptor 2</th>
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<th>Author</th>
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<th>Addressee</th>
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<td>Evaluation of Presence of Acid Sulfate Soils</td>
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<td>Pile Driving Noise Emission Reduction Recommendations</td>
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### Exhibit S – Known Geotechnical Conditions

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S-12
### Exhibit S – Known Geotechnical Conditions

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## Exhibit S – Known Geotechnical Conditions

### EXECUTION VERSION

**JULY 31, 2012**

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<td>Final MOM Structures Mtg 110419 (w attach)</td>
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<td>Discusses the proposed methods to connect new MSE walls to existing walls for ramp widening</td>
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S-16
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<td>Memorandum provides a summary of approach for designing new and widened pavement. VDOT's concurrence is required.</td>
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EXHIBIT N

PUBLIC FUNDS AMOUNT PAYMENT TERMS

Section 1  Deposit of Initial Public Funds Amount

(a)  The Department will deposit or will cause to be deposited $94 million into the VDOT Funding Account held by the GARVEE Trustee on or before the Financial Close Date, constituting the parties’ pre-Financial Close estimate of the Initial Public Funds Amount.

(b)  If the provisions of Section 7.03(b) of the Agreement results in an increase to the Initial Public Funds Amount, the Department will deposit such additional amounts into the VDOT Funding Account within 90 Days of the Financial Close Date. If the provisions of Section 7.03(b) of the Agreement results in a decrease to the Initial Public Funds Amount, the parties will provide written notice to the GARVEE Trustee to make available to or to the order of the Department such amount from the VDOT Funding Account within 10 Days after the Financial Close Date.

(c)  Funds on deposit in the VDOT Funding Account, including earned interest, will be the property of the Department until such funds and any earned interest are disbursed to the PABs Trustee. In the event the Agreement is terminated for any reason before disbursement of all of the funds in the VDOT Funding Account, the GARVEE Trustee will make available to or to the order of the Department the funds remaining in the VDOT Funding Account within 10 Days of the effective date of termination of the Agreement.

(d)  Any interest earned on the balance of the VDOT Funding Account will be eligible for disbursement to the Concessionaire in accordance with this Exhibit N.

Section 2  Deposit of Department TIFIA Protection Amount

The Department will pay the Department TIFIA Protection Amount at the times and in the amounts set forth in Section 7.07 of the Agreement.

Section 3  Disbursement Request

The Concessionaire will submit a request (“Disbursement Request”) to the Department at a frequency not to exceed once every month of an Agreement Year. The Concessionaire will submit each Disbursement Request no earlier than three Days following the end of each calendar month from the Financial Close Date. The Disbursement Request will be comprised of a certificate (“Disbursement Request Certificate”) signed by the Authorized Representative of the Concessionaire, in the form attached as Attachment 1, and the following information attached thereto:

(a)  Department assigned contract number and title;
(b)  Invoice number (numbered consecutively starting with “1”);
(c)  Period covered by the Disbursement Request;
(d) Progress report on the activities performed during the period covered by the Disbursement Request;
(e) Amount requested in the Disbursement Request;
(f) Detailed list of costs incurred that will be funded with the amount requested in the Disbursement Request, including invoices and other documentation supporting such costs;
(g) Cumulative disbursements made to date;
(h) Certificate of lien and claim waiver, in the case of the Design-Build Contractor, in the form attached as Exhibit B or Exhibit D to the Design-Build Contract, as applicable, signed by the Design-Build Contractor with respect to Work performed by the Design-Build Contractor for which payment was received under the previous Disbursement Request, or, in the case of another Prime Contractor, substantially in the form attached as Attachment 2, signed by each Prime Contractor performing Work for which payment was received under the previous Disbursement Request;
(i) Affidavit submitted by each Prime Contractor certifying that Davis-Bacon wages for which payment was received under the previous Disbursement Request have been paid in accordance with the Federal Requirements, Exhibit AA of the Agreement; and
(j) Letter signed by the Concessionaire certifying that the amounts requested under the Disbursement Request are eligible for reimbursement from federal-aid funds, including funds constituting proceeds of GARVEE bonds or other bonds secured by federal-aid funds, pursuant to applicable Law.

Section 4 Review and Approval of Disbursement Request; Payment By the GARVEE Trustee

(a) The Department and the Concessionaire acknowledge and agree that: (i) the Disbursement Request is a submission requiring an Approval for purposes of Section 10.05 of the Comprehensive Agreement; and (ii) the "deemed approval" provisions of Section 10.05(e) of the Comprehensive Agreement do not apply to a Disbursement Request submitted pursuant to Section 3.

(b) Within seven Days after approval by the Department of a Disbursement Request in compliance with Section 3, the Department will provide written authorization to the GARVEE Trustee to disburse funds from the VDOT Funding Account to the Department for the amount approved by the Department. Following disbursement to the Department by the GARVEE Trustee of the amount approved by the Department, the Department will pay such amount to or to the order of the Concessionaire within such seven-Day period.

(c) If the Department determines that any portion of the Disbursement Request is not eligible for funding pursuant hereto, the Department may disapprove the requested funds corresponding to such portion of the Disbursement Request. The Department will notify the Concessionaire for the reasons of such disapproval, and provide written authorization to the GARVEE Trustee to disburse funds from the VDOT Funding Account to the Department to pay undisputed amounts to the Concessionaire within seven Days after the Department approves the undisputed amounts. Any such disapproved amounts will be available in a subsequent Disbursement Request if the reasons for disapproval are satisfied.
(d) In the event that the mobilization payment is to be paid out of the Public Funds Amount, it will be paid in accordance with the provisions below in lieu of the provisions set forth in Section 3.

(i) Upon issuance of the earlier of an LNTP pursuant to Section 8.02 of the Agreement or notice to proceed pursuant to Section 8.03 of the Agreement, the Concessionaire may submit to the Department an invoice for 50% of the mobilization payment. Within 27 Days of receipt of such invoice, the Department will provide written authorization to the GARVEE Trustee to disburse 50% of the mobilization payment from the VDOT Funding Account to the Department. Following disbursement to the Department by the GARVEE Trustee of such amount, the Department will pay such amount to the Concessionaire within such 27-Day period.

(ii) Beginning on the month following receipt of payment of the first 50% of the mobilization payment, the Concessionaire may submit to the Department an invoice for the remaining 50% of the mobilization payment. Within 27 Days after receipt of such invoice, the Department will provide written authorization to the GARVEE Trustee to disburse the remaining 50% of the mobilization payment from the VDOT Funding Account to the Department. Following disbursement to the Department by the GARVEE Trustee of such amount, the Department will pay such amount to the Concessionaire within such 27-Day period.

Within 90 days of receiving the mobilization payment, the Concessionaire will provide documentation supporting the investment and expenditure of those funds to include:

(A) Records on how the mobilization payment has been invested to include the dollar amounts and balances, investments owned (including the purchase and sale prices of such investments), and earnings on those funds;

(B) Detailed list of expenses paid including invoices and other documentation supporting such costs;

(C) Letter signed by the Concessionaire certifying that the expenditures are eligible for reimbursement from federal-aid funds, including funds constituting proceeds of GARVEE bonds or other bonds secured by federal-aid funds, pursuant to applicable Law.

In the event that the mobilization payment has not been spent within 120 days, the Department will have the right to have the funds returned and disbursed according to the normal request process described in Section 4.

Section 5 No Waiver

No approvals by the Department, or payments or disbursements by the GARVEE Trustee, will be construed as an acceptance of any Work that is not in accordance with the requirements of the Agreement.
Section 6  Accounting of Payments Received

No later than 180 Days from the Final Acceptance Date (or the Substantial Completion Date, but only if none of the Public Funds Amount is used to pay costs incurred after the Substantial Completion Date), the Concessionaire will provide a final accounting to the Department, documenting the use of the Public Funds Amount.

Section 7  Definitions

Capitalized terms used but not otherwise defined in this Exhibit N have the respective meanings set forth in Exhibit A to the Agreement. In addition, the following terms have the meanings specified below:

Indenture means the Master Trust Indenture between the Commonwealth Transportation Board and the GARVEE Trustee, as the same may be supplemented from time to time in connection with the issuance of GARVEE Bonds, the proceeds of which are used to fund a portion of the Public Funds Amount.

Prime Contractors means the Design-Build Contractor and any other Contractors performing the Work that has a direct Contract with the Concessionaire.
Attachment 1

DISBURSEMENT REQUEST CERTIFICATE

In order to induce the Department to provide written authorization to disburse funds from the VDOT Funding Account as requested by this Disbursement Request, the Concessionaire hereby certifies and represents to the Department as follows:

(a) The information contained in the documents attached hereto is true, complete and correct in all material respects.

(b) The Work associated with this Disbursement Request has been performed and furnished in compliance with the requirements of the Agreement.

(c) The amount specified in the Disbursement Request has been computed in accordance with, and is due and payable under, the terms and conditions of the Agreement, has not been the subject of any previous Disbursement Request (unless disputed or rejected for payment) and is not the subject of any pending Disbursement Request from the Concessionaire.

(d) As of the date of this Disbursement Request, neither the Design-Build Contractor nor any other Contractor performing the Work that has a direct Contract with the Concessionaire (collectively, “Prime Contractors”) for which payment is sought under the Disbursement Request is barred or suspended from providing goods or services to any Governmental Authority. Except for any specific Contractor listed as barred or suspended in an attachment to this Disbursement Request Certificate, each Contractor who has a direct Contract with the Prime Contractors has certified in its respective invoice to the applicable Prime Contractor that such Contractor is not barred or suspended from providing goods or services to any Governmental Authority, and to the Concessionaire's knowledge, no such Contractor has been so barred or suspended.

(e) As of the date of this Disbursement Request, the Concessionaire has paid the Prime Contractors the amount previously disbursed to the Concessionaire on account of the Work performed by the Prime Contractors, in accordance with the terms and conditions of its Contracts with such Prime Contractors.

Unless otherwise indicated, capitalized terms used herein shall have the meanings set forth in the Comprehensive Agreement.

95 Express Lanes LLC,
a Delaware limited liability company

By: ___________________________
Name: ___________________________
Title: ___________________________
Date: ___________________________
EXECUTION VERSION – JULY 31, 2012

By: __________________________
Name: __________________________
Title: __________________________
Date: ____________________________
Attachment 2

FORM OF PRIME CONTRACTOR'S INTERIM LIEN AND CLAIM WAIVER

INTERIM LIEN AND CLAIM WAIVER

COMMONWEALTH OF VIRGINIA

COUNTY OF

TO WHOM IT MAY CONCERN:

The undersigned is the [__ Title___] of [_______________________], a [_______] (“Prime Contractor”), which has contracted to furnish [________] services in connection with the I-95 HOV/HOT Lanes Project, located in the Commonwealth of Virginia, pursuant to that certain [________], dated as of [__________], 2012 (the “Agreement”), with 95 Express Lanes LLC, a Delaware limited liability company, as concessionaire (“Concessionaire”). Capitalized terms used herein that are not otherwise defined herein have the respective meanings set forth in the Agreement.

For and in consideration of the payment of $ __________, the undersigned, on behalf of Prime Contractor, DOES, SUBJECT TO THE RECEIPT OF SUCH PAYMENT, HEREBY WAIVE AND RELEASE:

Any and all liens, security interests, encumbrances and other claims in the nature of mechanics', labor or materialmen's liens or other similar liens with respect to and on the Project, the Project Right of Way and any and all interests and estates therein, and all improvements and materials placed on the Project Right of Way and the moneys, funds or other consideration due or to become due from Concessionaire, in each case on account of the Work performed to the date hereof by or on behalf of Prime Contractor for the Project, excepting only the following pending matters (none, if blank):

______________.

and DOES HEREBY CERTIFY THAT:

There are no liens, security interests, encumbrances and other claims in the nature of mechanics', labor or materialmen's liens or other similar liens, arising out of or in connection with the performance by Prime Contractor or any of the Subcontractors of the Work performed under the Agreement, known to exist at the date of this certification, except for the following matters (none, if blank):

_________________________; all bills due and payable with respect to the Work performed to the date hereof under the Agreement have been paid and there is no known basis for filing of any liens, security interests, encumbrances or other claims in the nature of mechanics', labor or
materialmen's liens or other similar liens arising out of or in connection with the performance by Prime Contractor or any of the Subcontractors of the Work under the Agreement; and releases, assignments and waivers from all Subcontractors that would otherwise have had the right to place a lien or encumbrance with respect to and on the Project, the Project Right of Way and any and all interests and estates therein, and all improvements and materials placed on the Project Right of Way, for all services done and materials furnished to the date hereof have been obtained in such a form as to constitute an effective defense against the assertion of all such liens and encumbrances under the laws of the Commonwealth of Virginia, if and to the extent required under the Agreement.

The Commonwealth of Virginia may rely on the statements made in this Waiver and is a third party beneficiary thereof.

Signed this ____ day of ___________.

PRIME CONTRACTOR

By: __________________________
Name: 
Title: [Authorized Representative]

Subscribed and sworn to before me this ____ day of 20____.

___________________________
Notary Public in and for said County and State
FORM OF PRIME CONTRACTOR’S FINAL LIEN AND CLAIM WAIVER

FINAL LIEN AND CLAIM WAIVER – PRIME CONTRACTOR

COMMONWEALTH OF VIRGINIA )
COUNTY OF )

TO WHOM IT MAY CONCERN:

The undersigned is the [__ Title__] of [_______________________], a [_____] ("Prime Contractor"), which has contracted to furnish [_____] services in connection with the I-95 HOV/HOT Lanes Project, located in the Commonwealth of Virginia, pursuant to that certain [___________], dated as of [___________], 2012 (the “Agreement”), with 95 Express Lanes LLC, a Delaware limited liability company, as concessionaire (“Concessionaire”). Capitalized terms used herein that are not otherwise defined herein have the respective meanings set forth in the Agreement.

The undersigned, on behalf of Prime Contractor, DOES HEREBY WAIVE AND RELEASE:

Any and all claims, liens, security interests, or encumbrances in the nature of mechanics', labor or materialmen's liens or otherwise, with respect to and on the Project, the Project Right of Way and any and all interests and estates therein, and all improvements and materials placed on the Project Right of Way, in each case on account of the Work performed by or on behalf of Prime Contractor for the Project;

and DOES HEREBY CERTIFY THAT:

There are no claims, liens, security interests or encumbrances in the nature of mechanics', labor or materialmen's liens or claims or otherwise, arising out of or in connection with, the performance by Prime Contractor or any of the Subcontractors of the Work performed under the Agreement, the Project, the Project Right of Way and any and all interests and estates herein and all improvements and materials placed on the Project Right of Way, outstanding or known to exist at the date of this certification; all bills with respect to the Work to be performed under the Agreement have been paid (except for $__________ withheld by Concessionaire pursuant to Section [__] of the Agreement and disputed amounts for additional work equal to $_______), and there is no known basis for filing of any claims, liens, security interests or encumbrances in the nature of mechanics', labor or materialmen's liens or claims or otherwise arising out of or in connection with the performance by Prime Contractor or any of the Subcontractors of the Work under the Agreement; and releases, assignments and waivers from all Subcontractors that would otherwise have had the right to place a lien or encumbrance with respect to and on the Project, the Project Right of Way and any and all interests and estates therein, and all improvements and materials placed on the Project Right of Way,
for all services done and materials furnished have been obtained in such a form as to constitute an effective defense against the assertion of all such liens and claims under the laws of the Commonwealth of Virginia.

The Commonwealth of Virginia may rely on this Waiver and is a third party beneficiary thereof.

Signed this ____ day of 20______.

PRIME CONTRACTOR

By: __________________________
Name: _________________________
Title: [Authorized Representative]

Subscribed and sworn to before me this ____ day of 20_____.

___________________________
Notary Public in and for said County and State
EXHIBIT R

FORM OF DIRECT AGREEMENT

This AGREEMENT RELATING TO THE I-95 HOV/HOT LANES PROJECT (this “Agreement”) is made and entered into as of July 31, 2012 by and among the VIRGINIA DEPARTMENT OF TRANSPORTATION (the “Department”), an agency of the Commonwealth of Virginia (the “State”), the address of which Department is 1401 East Broad Street, Richmond, Virginia 23219; 95 EXPRESS LANES LLC, a Delaware limited liability company (the “Concessionaire”) whose address is 6440 General Green Way, Alexandria, Virginia 22312; and U.S. BANK NATIONAL ASSOCIATION, as agent for the Lenders in accordance with the terms of the Initial Project Financing Agreements (the “Collateral Agent”), whose address is 1021 East Cary Street, Suite 1850, Richmond, Virginia 23219.

RECITALS

WHEREAS, the Department and the Concessionaire have entered into a Comprehensive Agreement Relating to the I-95 HOV/HOT Lanes Project (the “Project”), dated as of July 31, 2012 (the “Comprehensive Agreement”), pursuant to which the Department has granted a permit to the Concessionaire, which includes (i) the right and obligation to develop, design, finance, construct, operate and maintain the Project and (ii) the right to establish, impose, charge, collect, use and enforce payment of tolls and related charges;

WHEREAS, the provision of Concessionaire Debt to the Concessionaire is conditioned upon the Department providing the Lenders with certain assurances (as more particularly set forth in this Agreement) regarding the Lenders’ rights in the event of a default by the Concessionaire under the Comprehensive Agreement or the Project Financing Agreements; and

AGREEMENT

NOW, THEREFORE, in consideration of the covenants contained herein and for other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows.

ARTICLE 1.
DEFINITIONS, CONTRACT DOCUMENTS AND ORDER OF PRECEDENCE

Section 1.01 Definitions

Capitalized terms used but not otherwise defined in this Agreement have the respective meanings set forth in Exhibit A to the Comprehensive Agreement. In addition, the following terms have the meanings specified below:

Bankruptcy Related Default means a Concessionaire Default that arises pursuant to Section 19.01(i) or (j) of the Comprehensive Agreement.

Collateral Agent Notice has the meaning given to it in Section 2.02(d)(i).
**Cure Period** means the period commencing on the date that the Collateral Agent receives a Department Notice pursuant to Section 2.02(a) and ending on the earliest of:

(a) the relevant Cure Period Completion Date;

(b) any Step-out Date or Substitution Effective Date; or

(c) the last day of the Term.

**Cure Period Completion Date** means, subject to Section 8.02:

(a) with respect to any Payment Default, the date falling 30 Days after the date that the Collateral Agent receives the relevant Department Notice;

(b) with respect to any Bankruptcy Related Default, the date falling 90 Days after the date that the Collateral Agent receives the relevant Department Notice;

(c) with respect to any Non-Completion Default, the date falling 90 Days after the date that the Collateral Agent receives the relevant Department Notice; provided, however, that such period will be extended by such reasonable period of time as may be required to achieve Substantial Completion (subject to a maximum extension of 275 days), but only to the extent that:

(i) in the reasonable opinion of the Department, there is a reasonable prospect of achieving Substantial Completion within 365 days of the relevant Department Notice; and

(ii) within the 90 Day period, the Collateral Agent and the Department (each acting reasonably) agree to a plan in relation to achieve Substantial Completion; and

(d) with respect to any Concessionaire Default not referred to in clauses (a) through (c) above, the date falling 90 Days after the date that the relevant Department Notice is received by the Collateral Agent; provided, however, that such period will, at the request of the Collateral Agent, be extended up to a maximum of 60 additional Days, but only to the extent that:

(i) within the 90 Day period, the Collateral Agent and the Department (each acting reasonably) agree to a plan specifying the remedial action to be taken in respect of the relevant Concessionaire Default; and

(ii) the extension requested by the Collateral Agent represents (in the reasonable opinion of the Department) a reasonable period of time to remedy the relevant Concessionaire Default.

**Department Notice** has the meaning given to it in Section 2.02(a).

**Designated Account** means the Concessionaire Damages Account as defined in the Collateral Agency and Account Agreement, dated as of July 1, 2012 (the “Collateral Agency
Agreement”) between the Concessionaire and U.S. Bank National Association, as Collateral Agent, or such other account in accordance with the terms of the Collateral Agency Agreement.

**Discharge Date** means the date on which all of the obligations of the Concessionaire under the Initial Project Financing Agreements have been irrevocably discharged in full to the satisfaction of the Collateral Agent.

**Event of Default** has the meaning given to such term in the Initial Project Financing Agreements.

**Initial Equity Members** means the Equity Members as of the date of this Agreement.

**Initial Financing Assignment** means the Financing Assignment granted by the Concessionaire pursuant to the Initial Project Financing Agreements.

**Initial Period** means:

(a) with respect to any Payment Default, the date falling 30 Days after the date that the Collateral Agent received the relevant Department Notice;

(b) with respect to any Bankruptcy Related Default, the date falling 90 Days after the date that the Collateral Agent receives the relevant Department Notice; and

(c) with respect to any Concessionaire Default not referred to in (a) or (b) above, the date falling 90 Days after the date that the Collateral Agent receives the relevant Department Notice;

in each case, as may be extended pursuant to Section 8.02.

**Initial Project Financing Agreement** has the meaning set forth in the Comprehensive Agreement, as the same may be amended or modified from time to time.

**Non-Completion Default** means a Concessionaire Default that arises pursuant to Section 19.01(e) of the Comprehensive Agreement.

**Payment Default** means a Concessionaire Default that arises pursuant to Section 19.01(c) of the Comprehensive Agreement.

**Property** means any right or interest in or to property of any kind whatsoever, whether real, personal or mixed and whether tangible or intangible.

**Qualified Substitute Concessionaire** means a Person who:

(a) has the legal capacity, power and authority to become a party to, and perform the obligations of the Concessionaire under, the Comprehensive Agreement;

(b) has the resources available to it (including committed financial resources) to perform the obligations of the Concessionaire under the Comprehensive Agreement;
(c) employs or subcontracts with Persons having the appropriate qualifications, experience and technical competence available to it that are sufficient to enable it to perform the obligations of the Concessionaire under the Comprehensive Agreement; and

(d) has not been:

   (i) debarred or prohibited from participating in state or federally-funded projects;

   (ii) indicted, convicted, pled guilty or nolo contendere to a violation of law involving fraud, conspiracy, collusion, bribery, perjury, material misrepresentation, or any other violation that show a similar lack of moral or ethical integrity; or

   (iii) barred or prohibited from owning or operating the Project under law, including the Foreign Investment and National Security Act of 2007, 50 USC App. 2170 (HR 556).

Step-in Date has the meaning given to it in Section 4.01(c).

Step-in Entity has the meaning given to it in Section 4.01(b).

Step-in Entity Accession Agreement means the agreement to be entered into by a Step-in Entity pursuant to Section 4.01(c).

Step-in Notice has the meaning given to it in Section 4.01(a).

Step-in Period in relation to a Step-in Entity means the period from and including the Step-in Date until the earliest of:

   (a) the last day of the Cure Period;

   (b) the Substitution Effective Date;

   (c) the Step-out Date;

   (d) the date of termination of the Comprehensive Agreement by the Department in accordance with this Agreement and the Comprehensive Agreement; and

   (e) the last day of the Term.

Step-out Date in relation to a Step-in Entity means the date upon which any Step-out Notice is served by such Step-in Entity pursuant to Section 4.03.

Step-out Notice has the meaning given to it in Section 4.03(a).

Substitute has the meaning given to it in Section 5.01.
** Substitute Accession Agreement** means the agreement to be entered into by a Substitute pursuant to Section 6.01.

**Substitution Effective Date** has the meaning given to it in Section 6.01.

**Substitution Notice** has the meaning given to it in Section 5.01.

**Section 1.02 Order of Precedence**

In the event of any conflict, ambiguity or inconsistency between the provisions of the Comprehensive Agreement and the provisions of this Agreement, the provisions of this Agreement will prevail.

**Section 1.03 No Effect on Comprehensive Agreement**

Nothing in this Agreement amends or modifies any of the Concessionaire’s obligations to the Department under the Comprehensive Agreement.

**ARTICLE 2 CONSENT TO SECURITY AND NOTICES**

**Section 2.01 Consent to Security**

Notwithstanding anything to the contrary in the Comprehensive Agreement:

(a) the Department acknowledges notice and receipt of and consents to:

(i) the assignment by the Concessionaire to the Collateral Agent of all of the Concessionaire’s Interest pursuant to the Initial Project Financing Agreements; and

(ii) the grant by each of the Initial Equity Members to the Collateral Agent of a security interest in their respective equity interests in the Concessionaire, in each case pursuant to the Initial Project Financing Agreements;

(b) none of the security interests referred to in Section 2.01(a):

(i) constitute (or with the giving of notice or lapse of time, or both, could constitute) either a breach by the Concessionaire of its obligations under the Comprehensive Agreement or a Concessionaire Default; or

(ii) require any consent of the Department that is either additional or supplemental to those granted pursuant to this Section 2.01;

(c) for the avoidance of doubt, the Collateral Agent will not, by virtue of the security interests referred to in Section 2.01(a), acquire any greater rights to the Concessionaire’s Interest than the Concessionaire itself has at any particular time pursuant to the Comprehensive Agreement; and
Section 2.02 Notice Requirements

(a) The Department will give the Collateral Agent written notice (a “Department Notice”) promptly upon becoming aware of the occurrence of any Concessionaire Default giving rise to the Department’s right to terminate or give notice terminating the Comprehensive Agreement, and will specify in the Department Notice:

(i) the unperformed obligations of the Concessionaire under the Comprehensive Agreement of which the Department is aware (having made reasonable inquiry) and grounds for termination of the Comprehensive Agreement in sufficient detail to enable the Collateral Agent to assess the scope and amount of any liability of the Concessionaire resulting therefrom;

(ii) all amounts due and payable by the Concessionaire to the Department under the Comprehensive Agreement, if any, on or before the date of the Department Notice and which remain unpaid at such date and, by cross-reference to the applicable provision(s) of the Comprehensive Agreement, the nature of the Concessionaire’s obligation to pay such amounts; and

(iii) the amount of any payments that the Department reasonably foresees will become due from the Concessionaire during the applicable Cure Period.

(b) The Department will update any Department Notice issued pursuant to Section 2.02(a) as and when it becomes aware of any unperformed obligations of the Concessionaire (including non-payment of amounts that have become due) under the Comprehensive Agreement that were not specified in the relevant Department Notice.

(c) For the avoidance of doubt, nothing in this Agreement will prevent multiple Department Notices running concurrently.

(d) The Collateral Agent will:

(i) promptly upon becoming aware of any Event of Default (whether or not a Department Notice has been served in connection with the same event) give the Department written notice (a “Collateral Agent Notice”);

(ii) specify in any Collateral Agent Notice the circumstances and nature of the Event of Default to which the Collateral Agent Notice relates; and

(iii) notify the Department of any decision to accelerate amounts outstanding under the Initial Project Financing Agreements or to exercise any enforcement remedies under the Initial Project Financing Agreements.
Section 2.03 Department Payments under the Comprehensive Agreement

(a) The Department will, unless directed otherwise by the Collateral Agent, deposit all amounts payable by it under the Comprehensive Agreement into the Designated Account and the Concessionaire agrees that any payment made in accordance with this Section 2.03 will constitute a complete discharge of the Department’s relevant payment obligations under the Comprehensive Agreement.

(b) The Collateral Agent acknowledges that all of the Department’s payment obligations to the Concessionaire pursuant to the Comprehensive Agreement are subject to Section 25.19 of the Comprehensive Agreement.

ARTICLE 3.
RIGHTS AND OBLIGATIONS DURING THE CURE PERIOD

Section 3.01 No Termination during the Cure Period

At any time during a Cure Period, the Department will not, subject to the terms of this Agreement:

(a) terminate or give notice terminating the Comprehensive Agreement for Concessionaire Default or exercise any rights under Section 19.02 (other than Sections 19.02(d) and 19.02(e)) of the Comprehensive Agreement; or

(b) take or support any action for the liquidation, bankruptcy, administration, receivership, reorganization, dissolution or winding up of the Concessionaire or for the composition or readjustment of the Concessionaire’s debts, or any similar insolvency procedure in relation to the Concessionaire, or for the appointment of a receiver, trustee, custodian, sequestrator, conservator, liquidator, administrator or similar official for the Concessionaire or for any part of the Concessionaire’s Property.

Section 3.02 Collateral Agent Rights

(a) At any time during an Event of Default (but, in the case of a Concessionaire Default, only for so long as the Initial Period has not expired), without giving a Step-in Notice, the Collateral Agent may (but shall have no obligation), at its sole option and discretion, perform or arrange for the performance of any act, duty, or obligation required of the Concessionaire under the Comprehensive Agreement, or remedy any breach of the Concessionaire thereunder at any time, which performance or remedy by or on behalf of the Collateral Agent will be accepted by the Department in lieu of performance by the Concessionaire and in satisfaction of the Concessionaire’s obligations under the Comprehensive Agreement. To the extent that any breach of the Concessionaire under the Comprehensive Agreement is remedied and/or any payment liabilities or obligations of the Concessionaire are performed by the Collateral Agent under this Section 3.02(a), such action will discharge the relevant liabilities or obligations of the Concessionaire to the Department. No such performance by or on behalf of the Collateral Agent under this Section 3.02(a) will be construed as an assumption by the Collateral Agent, or any
person acting on the Collateral Agent’s behalf, of any of the covenants, agreements or other obligations of the Concessionaire under the Comprehensive Agreement.

(b) At any time during a Cure Period or an Event of Default, the Collateral Agent may:

   (i) issue a Step-in Notice in accordance with the requirements of Section 4.01; or

   (ii) issue a Substitution Notice in accordance with the requirements of Section 5.01.

ARTICLE 4.
STEP-IN ARRANGEMENTS

Section 4.01 Step-in Notice

(a) Provided that all unperformed payment obligations of the Concessionaire identified in a Department Notice will have been remedied in full or waived by the Department on or before the Step-in Date, the Collateral Agent may provide the Department with a written notice (“Step-in Notice”) under this Section 4.01 at any time during any Cure Period or Event of Default.

(b) The Collateral Agent will nominate, in any Step-in Notice, any one of:

   (i) the Collateral Agent, a Lender or any of their respective Affiliates; or

   (ii) any Person approved by the Department in its discretion, such approval not to be unreasonably withheld or delayed if such Person meets all the criteria to be a Qualified Substitute Concessionaire and the Department has been provided with the relevant information required under Section 5.03 with respect to such Person (it being understood that if the Department has failed to respond to the Collateral Agent within 60 days of the date on which the Department has received the information specified in Section 5.03 in respect of any such nominated Person, the approval of the Department shall be deemed to have been given), (each a “Step-in Entity”), stating that the Step-in Entity is to become a joint and several obligor with the Concessionaire under the Comprehensive Agreement and this Agreement in accordance with the terms hereof.

(c) The Step-in Entity named in the Step-in Notice will be deemed to become a party to the Comprehensive Agreement and this Agreement on and from the date it executes a duly completed Step-in Entity Accession Agreement, substantially in the form attached hereto as Annex 1 (Form of Step-in Entity Accession Agreement), and submits it to the Department (the “Step-in Date”).

Section 4.02 Rights and Obligations on Step-in

(a) On and from the Step-in Date and during the Step-in Period, the Step-in Entity will be:
(i) jointly and severally entitled to exercise and enjoy the rights and powers expressed to be assumed by or granted to the Concessionaire under the Comprehensive Agreement and this Agreement;

(ii) entitled to exercise and enjoy the rights and powers expressed to be assumed by or granted to a Step-in Entity under this Agreement; and

(iii) jointly and severally liable with the Concessionaire for the payment of all sums due from the Concessionaire under or arising out of the Comprehensive Agreement at the Step-in Date and for the performance of all of the Concessionaire’s obligations under or arising out of the Comprehensive Agreement on or after the Step-in Date.

(b) Without prejudice to Article 7 (Reinstatement of Remedies), during the Step-in Period:

(i) the Department undertakes:

(A) not to terminate or give notice terminating the Comprehensive Agreement for Concessionaire Default or exercise any of its rights under Section 19.02 (other than Sections 19.02(d) and 19.02(e)) of the Comprehensive Agreement, unless:

(1) the grounds for termination or giving notice of termination or exercise of any of its rights under Section 19.02 (other than Sections 19.02(d) and 19.02(e)) of the Comprehensive Agreement arose during the Step-in Period; or

(2) the Step-in Entity fails to comply with the requirements of any plan agreed between the Department and the Collateral Agent in connection with the extension of the relevant Cure Period Completion Date; and

(B) not to take or support any action for the liquidation, bankruptcy, administration, receivership, reorganization, dissolution or winding up of the Concessionaire or for the composition or readjustment of the Concessionaire’s debts, or any similar insolvency procedure in relation to the Concessionaire, or for the appointment of a receiver, trustee, custodian, sequestrator, conservator, liquidator, administrator or similar official for the Concessionaire or for any part of the Concessionaire’s Property;

(C) not to suspend its performance (including in connection with any insolvency or bankruptcy proceeding in relation to Concessionaire) under the Comprehensive Agreement, unless the grounds for suspension of performance arose during the Step-in Period; and

(D) to continue to make payments required to be made to Concessionaire under the Comprehensive Agreement to the Designated Account.
(ii) the Department will owe its obligations under the Comprehensive Agreement and this Agreement to the Concessionaire and such Step-in Entity jointly; provided, however, that:

(A) subject to Section 4.02(b)(ii)(B), the performance of such obligations by the Department in favor of either such Step-in Entity or the Concessionaire will be a good and effective discharge of such obligations under this Agreement and the Comprehensive Agreement; and

(B) the Collateral Agent will be entitled at any time by notice in writing to the Department to direct (such direction being binding on the Collateral Agent, the Department and the Concessionaire) that, at all times thereafter while such Step-in Entity is deemed to be a party to the Comprehensive Agreement and this Agreement and subject to any further notice from the Collateral Agent, such Step-in Entity will be solely entitled to make any decisions, to give any directions, approvals or consents, to receive any payments or otherwise to deal with the Department under the Comprehensive Agreement and this Agreement.

(c) The Concessionaire will not be relieved from any of its obligations under the Comprehensive Agreement, whether arising before or after the Step-in Date, by reason of the Step-in Entity becoming a party to the Comprehensive Agreement pursuant to a Step-in Entity Accession Agreement, except to the extent provided in Section 3.02(a) and Section 6.02(a).

Section 4.03  Step Out

(a) A Step-in Entity may, at any time, by giving not less than 30 Days’ prior written notice (“Step-out Notice”) to the Department, terminate its obligations to the Department under the Comprehensive Agreement and this Agreement, whereupon the Step-in Entity will, upon the expiry of such notice, no longer be deemed to be a party to the Comprehensive Agreement and this Agreement and, except as provided in Section 4.03(b), will be released from all obligations under the Comprehensive Agreement and this Agreement. The obligations of the Department to the Step-in Entity in such capacity under the Comprehensive Agreement and this Agreement will also terminate upon the expiry of such notice.

(b) Nothing in this Section 4.03 will have the effect of releasing the Step-in Entity from any liability that relates to the performance or non-performance of the Comprehensive Agreement or this Agreement by the Concessionaire or the Step-in Entity during the Step-in Period.

ARTICLE 5.  
SUBSTITUTION PROPOSALS

Section 5.01  Notice of Proposed Substitute

To the extent that the Collateral Agent or the Lenders at any time propose to require the Concessionaire to assign its rights and obligations under the Comprehensive Agreement and/or this Agreement to a Person (a “Substitute”) designated by the Collateral Agent or the Lenders
(whether by mutual agreement or enforcement of rights under the Initial Project Financing Agreements), the effectiveness of such assignment will be conditional upon:

(a) the Collateral Agent issuing a notice (a “Substitution Notice”) to the Department requesting the prior approval of the proposed Substitute;

(b) the Department approving the identity of the proposed Substitute pursuant to Sections 5.02 or 5.04; and

(c) the proposed Substitute executing a Substitute Accession Agreement in accordance with Section 6.01.

Section 5.02 Grounds for Refusing Approval

The Department will only be entitled to withhold its approval to any proposed Substitute that is the subject of a Substitution Notice if:

(a) the proposed Substitute is not a Qualified Substitute Concessionaire; or

(b) subject to Section 6.04, there are outstanding breaches of the Comprehensive Agreement that have been previously notified by the Department to the Collateral Agent and have not, to the reasonable satisfaction of the Department, been remedied or waived prior to the date of the Substitution Notice; unless the Department has approved (such approval not to be unreasonably withheld or delayed) a plan specifying the remedial action that the Substitute will be required to take after the Substitution Effective Date in order to remedy each such breach.

Section 5.03 Provision of Information

The Collateral Agent will, as soon as practicable, provide to the Department such information in relation to the proposed Substitute and any Person who, it is proposed, will enter into a material subcontract with the proposed Substitute in relation to the Project, as the Department will reasonably require to enable it to reasonably determine whether the proposed Substitute is a Qualified Substitute Concessionaire, including:

(a) the name and address of the proposed Substitute;

(b) unless such proposed Substitute is a publicly-traded entity, the names of the proposed Substitute’s shareholders or members and the share capital or partnership or membership interests, as the case may be, held by each of them;

(c) the manner in which it is proposed to finance the proposed Substitute and the extent to which such financing is committed (to the extent relevant);

(d) copies of the proposed Substitute’s most recent financial statements (and if available, such financial statements will be for the last three financial years and audited), or in the case of a special purpose company, its opening balance sheet;

(e) a copy of the proposed Substitute’s organizational documents;
(f) details of the resources available to the proposed Substitute and the proposed Substitute’s appropriate qualifications, experience and technical competence available to the proposed Substitute to enable it to perform the obligations of the Concessionaire under the Comprehensive Agreement; and

(g) the names of the proposed Substitute’s directors and any key personnel who will have responsibility for the day-to-day management of its participation in the Project.

**Section 5.04  Deemed Approval**

If the Department has failed to respond to the Collateral Agent within 60 days of the date on which the Department has confirmed it has received the information specified in Section 5.03 in respect of any proposed Substitute, the approval of the Department will be deemed to have been given.

**ARTICLE 6.  SUBSTITUTION**

**Section 6.01  Substitution Effective Date**

If the Department approves (or is deemed to have approved) the identity of a proposed Substitute pursuant to Article 5, the Substitute will execute a duly completed Substitute Accession Agreement substantially in the form set out in Annex 2 to this Agreement and submit it to the Department (with a copy of it to the other parties to this Agreement). Such assignment will become effective on and from the date on which the Department countsigns the Substitute Accession Agreement or the date that is 10 days after the date the Department receives the completed Substitute Accession Agreement if the Department fails to countersign the Substitute Accession Agreement (the “Substitution Effective Date”).

**Section 6.02  Effectiveness of Substitution**

On and from the Substitution Effective Date:

(a) such Substitute will become a party to the Comprehensive Agreement and this Agreement in place of the Concessionaire who will be immediately released from its obligations arising under, and cease to be a party to, the Comprehensive Agreement and this Agreement from that Substitution Effective Date; and

(b) such Substitute will exercise and enjoy the rights and perform the obligations of the Concessionaire under the Comprehensive Agreement and this Agreement, and

(c) the Department shall owe its obligations (including, without limitation, any undischarged liability in respect of any loss or damage suffered or incurred by the Concessionaire prior to the Substitution Effective Date) under the Comprehensive Agreement and this Agreement to such Substitute in place of the Concessionaire and any Step-in Entity.
Section 6.03 Facilitation of Transfer

The Department will use its reasonable efforts to facilitate the transfer to the Substitute of the Concessionaire’s obligations under the Comprehensive Agreement and this Agreement.

Section 6.04 Settlement of Outstanding Financial Liabilities

(a) The Substitute will pay to the Department within 30 Days after the Substitution Effective Date any amount due from the Concessionaire to the Department under the Comprehensive Agreement and this Agreement as of the Substitution Effective Date (as notified by the Department to the Substitute reasonably in advance of such Substitution Effective Date).

(b) If the Substitute fails to satisfy its obligations pursuant to Section 6.04(a), the Department will be entitled to exercise its rights under the Comprehensive Agreement in respect of the amount so due and unpaid.

Section 6.05 Consequences of Substitution

On and from the Substitution Effective Date:

(a) subject to Section 6.04, any right of termination or any other right suspended by virtue of Section 3.01 will be of no further effect and the Department will not be entitled to terminate the Comprehensive Agreement and this Agreement by virtue of any act, omission or circumstance that occurred prior to such Substitution Effective Date;

(b) if any Step-in Entity is a party to or has any obligations under the Comprehensive Agreement and this Agreement on the Substitution Effective Date, such Step-in Entity will cease to be a party thereto and hereto and will be discharged from all obligations thereunder and hereunder; and

(c) the Department will enter into an equivalent direct agreement on substantially the same terms as this Agreement, save that the Concessionaire will be replaced as a party by the Substitute.

ARTICLE 7.
REINSTATEMENT OF REMEDIES

If a Department Notice has been given, the grounds for that notice are continuing and have not been remedied or waived by the Department and:

(a) no Step-in Entity or Substitute becomes a party to the Comprehensive Agreement and this Agreement before the Cure Period Completion Date relating thereto; or

(b) a Step-in Entity becomes a party to the Comprehensive Agreement and this Agreement, but the Step-in Period relating to such Step-in Entity ends without a Substitute becoming a party thereto and hereto,
then, on and from the Cure Period Completion Date or the date such Step-in Period expires, the Department will be entitled to:

(i) act upon any and all grounds for termination available to it in relation to the Comprehensive Agreement in respect of Concessionaire Defaults under the Comprehensive Agreement that have not been remedied or waived by the Department;

(ii) pursue any and all claims and exercise any and all remedies against the Concessionaire; and

(iii) if and to the extent that it is then entitled to do so under the Comprehensive Agreement, take or support any action of the type referred to in Section 3.01(b).

ARTICLE 8.
IMPACT OF BANKRUPTCY OR INSOLVENCY PROCEEDINGS

Section 8.01 Rejection of the Comprehensive Agreement

(a) If the Comprehensive Agreement is rejected by a trustee or debtor-in-possession in, or terminated as a result of, any bankruptcy or insolvency proceeding involving the Concessionaire and, within 150 days after such rejection or termination, the Collateral Agent will so request and will certify in writing to the Department that the Collateral Agent or the Collateral Agent’s permitted designee or assignee, including a Qualified Substitute Concessionaire, intends to perform the obligations of the Concessionaire as and to the extent required under the Comprehensive Agreement, the Department will execute and deliver to the Collateral Agent (or any Substitute satisfying the requirements of this Agreement if directed to do so by the Collateral Agent) a new comprehensive agreement. The new comprehensive agreement will contain conditions, agreements, terms, provisions and limitations which are the same as those of the Comprehensive Agreement, except for any obligations that have been fulfilled by the Concessionaire, any party acting on behalf of or stepping-in for the Concessionaire or the Collateral Agent prior to such rejection or termination. References in this Agreement to the “Comprehensive Agreement” will be deemed also to refer to any such new comprehensive agreement.

(b) The effectiveness of any new comprehensive agreement referred to in Section 8.01(a) above will be conditional upon the Collateral Agent first reimbursing the Department in respect of its Allocable Costs incurred in connection with the execution and delivery of such new comprehensive agreement.

Section 8.02 Extension of Cure Period Completion Date and Initial Period

If the Collateral Agent is prohibited by any court order, bankruptcy or insolvency proceedings from:

(a) remedying the Concessionaire Default that is the subject of a Department Notice; or
(b) from commencing or prosecuting foreclosure proceedings,

each of the relevant Cure Period Completion Date and Initial Period will be extended by a period of time equal to the shorter of the period of such prohibition or 150 Days.

**ARTICLE 9.**
**TERMINATION OF THIS AGREEMENT**

This Agreement will remain in effect until the earliest to occur of:

(a) the Discharge Date;

(b) the time at which all of the parties’ respective obligations and liabilities under the Comprehensive Agreement and this Agreement have expired or have been satisfied in accordance with the terms of the Comprehensive Agreement and this Agreement; and

(c) any assignment to a Substitute has occurred under Article 6 and the Department shall have entered into an equivalent direct agreement on substantially the same terms as this Agreement, save that the Concessionaire has been replaced as a party by the Substitute.

**ARTICLE 10.**
**PRESERVATION OF FUNDS**

Notwithstanding the other provisions of this Agreement and the terms and conditions of the Initial Project Financing Agreements, the Collateral Agent agrees for itself and on behalf of the Lenders that it will not exercise any rights under the Initial Project Financing Agreements or take any other steps that would prejudice the operation of Sections 9.04 (Major Maintenance Reserve Fund), 17.07 (Restoration; Insurance Proceeds) or 20.02 (Handback Obligations and Reserve) of the Comprehensive Agreement.

**ARTICLE 11.**
**GENERAL PROVISIONS**

Section 11.01 Representations and Warranties

(a) The undersigned signatory for the Collateral Agent hereby represents and warrants that he or she is an officer of the Collateral Agent and that he or she has full and complete authority to enter into this Agreement on behalf of the Collateral Agent.

(b) The Collateral Agent hereby represents and warrants that the Collateral Agent has full power, right and authority to execute and perform each and all of its obligations under this Agreement. These representations and warranties are made for the purpose of inducing the Department and the Concessionaire to enter into this Agreement.

(c) The Collateral Agent represents and warrants that this Agreement has been duly authorized, executed and delivered by the Collateral Agent and constitutes a valid and legally binding obligation of the Collateral Agent, enforceable against it in accordance with the terms
hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity.

(d) The undersigned signatory for the Concessionaire hereby represents and warrants that he or she is an officer of the Concessionaire and that he or she has full and complete authority to enter into this Agreement on behalf of the Concessionaire.

(e) The Concessionaire hereby represents and warrants that the Concessionaire has full power, right and authority to execute and perform each and all of its obligations under this Agreement and the Comprehensive Agreement. These representations and warranties are made for the purpose of inducing the Department and the Collateral Agent to enter into this Agreement.

(f) The Concessionaire represents and warrants that each of this Agreement and the Comprehensive Agreement has been duly authorized, executed and delivered by the Concessionaire and constitutes a valid and legally binding obligation of the Concessionaire, enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity.

(g) The Concessionaire represents and warrants that there is no Concessionaire Default or, to the best of its knowledge, no Department Default, there exists no event or condition that would, with the giving of notice or passage of time or both, constitute such a Concessionaire Default or, to the best of its knowledge, a Department Default, and no such Concessionaire Default or, to the best of its knowledge, Department Default has occurred prior to the date hereof.

(h) The undersigned signatory for the Department hereby represents and warrants that he or she is an authorized official of the Department and has full and complete authority to enter into this Agreement on behalf of the Department.

(i) The Department has full power, right and authority to execute and perform each and all of its obligations under this Agreement and the Comprehensive Agreement. These representations and warranties are made for the purpose of inducing the Collateral Agent to enter into this Agreement.

(j) The Department represents and warrants that each of this Agreement and the Comprehensive Agreement has been duly authorized, executed and delivered by the Department and constitutes a valid and legally binding obligation of the Department, enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity.

(k) The Department represents and warrants that there is no Department Default or, to the best of its knowledge, no Concessionaire Default, there exists no event or condition that would, with the giving of notice or passage of time or both, constitute such a Department Default
or, to the best of its knowledge, a Concessionaire Default, and no such Department Default or, to the best of its knowledge, Concessionaire Default has occurred prior to the date hereof.

Section 11.02 Public Information and Confidentiality

The Department and the Collateral Agent will, for each other’s benefit, comply with the requirements of Section 18.02 of the Comprehensive Agreement as if any reference to the Concessionaire therein was a reference to the Collateral Agent.

Section 11.03 Amendments and Waivers

(a) No amendment of this Agreement, and no waiver of any term, covenant or condition of this Agreement, will be effective unless in writing and signed by the parties to this Agreement.

(b) The exercise by a party of any right or remedy provided under this Agreement or law will 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 law will be deemed to be a waiver of any other or subsequent right or remedy under this Agreement or law. The consent by one party to any act by the other party requiring such consent will not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

Section 11.04 Non-collusion

(a) The Collateral Agent warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for the Collateral Agent, to solicit or secure this Agreement and that it has not paid or agreed to pay any company or person any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from making of this Agreement.

(b) For breach or violation of this warranty, the Department will have the right to terminate this Agreement without liability.

Section 11.05 Disputes

(a) In the event of any dispute between the Department and the Collateral Agent under this Agreement, the parties will resolve the dispute according to the dispute resolution procedures set forth in the Comprehensive Agreement, with the Collateral Agent having the same rights and obligations of the Concessionaire under the disputes resolution procedures set forth in Article 21 of the Comprehensive Agreement.

(b) Nothing in Section 11.05(a) affects the Collateral Agent’s rights and remedies against the Concessionaire and the Concessionaire’s Interest under the Initial Project Financing Agreements and Financing Assignments or the procedures available to the Collateral Agent under law to exercise its security interests thereunder.
Section 11.06 Successors and Assigns

(a) No party to this Agreement may assign or transfer any part of its rights or obligations hereunder without the prior written consent of the other parties; provided, however, that the Collateral Agent may assign or transfer its rights and obligations hereunder to a successor Collateral Agent in accordance with the Initial Project Financing Agreements and the Department may transfer its rights or obligations hereunder in accordance with and subject to the terms and conditions set forth in Section 25.03 of the Comprehensive Agreement. In connection with any such assignment or transfer, the Department agrees to enter into a new direct agreement with the successor Collateral Agent on terms that are substantially the same as those of this Agreement.

(b) This Agreement will be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

Section 11.07 Severability

In the event any one or more of the provisions contained in this Agreement will, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability will not affect any other provision thereof and this Agreement will be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

Section 11.08 Prior Contracts Superseded

This Agreement constitutes the sole agreement of the parties hereto with respect to the subject matter set forth herein and supersedes any prior understandings or written or oral contracts between the parties respecting such subject matter.

Section 11.09 Notices and Communications

(a) Whenever under the provisions of this Agreement it will be necessary or desirable for one party to serve any approval, notice, request, demand, report or other communication on another party, the same will be in writing and will not be effective for any purpose unless and until actually received by the addressee or unless served (i) personally, (ii) by independent, reputable, overnight commercial courier, (iii) by facsimile transmission, where the transmitting party includes a cover sheet identifying the name, location and identity of the transmitting party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein or (iv) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:
EXECUTION VERSION – JULY 31, 2012

If to the Department:
Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219
Attention:    Chief Financial Officer
Facsimile:    (804) 786-2940

With copies to:
Office of the Attorney General
900 E. Main Street
Richmond, VA 23219
Attention:    Chief, Transportation Section
Facsimile:    (804) 786-9136

If to the Concessionaire:
95 Express Lanes LLC
6440 General Green Way
Alexandria, Virginia 22312
Attention:    President
Facsimile:    (571) 419-6101

If to the Collateral Agent:
U.S. Bank National Association
1021 East Cary Street, Suite 1850
Richmond, Virginia 23219
Attention:    Stephanie E. Haysley
Facsimile:    (804) 343-1572

(b)  Any party may, from time to time, by notice in writing served upon the other parties as aforesaid, designate an additional and/or a different mailing address or an additional and/or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally will be deemed delivered upon receipt, if served by mail or independent courier will be deemed delivered on the date of receipt as shown by the addressee’s registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier, and if served by facsimile transmission will be deemed delivered on the date of receipt as shown on the received facsimile (provided, that the original is thereafter delivered as aforesaid).

Section 11.10 Effect of Breach

Without prejudice to any rights a party may otherwise have, a breach of this Agreement will not of itself give rise to a right to terminate the Comprehensive Agreement.
Section 11.11 Counterparts

This instrument may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

Section 11.12 No Third-Party Beneficiaries

Nothing contained in this Agreement is intended or will be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement.

Section 11.13 No Partnership

Nothing contained in this Agreement will be deemed to constitute a partnership between the parties hereto. None of the parties will hold itself out contrary to the terms of this Section 11.13.

Section 11.14 No Interference

The Concessionaire joins in this Agreement to acknowledge and consent to the arrangements set out and agrees not to knowingly do or omit to do anything that may prevent any party from enforcing its rights under this Agreement.

Section 11.15 Collateral Agent

(a) Notwithstanding anything to the contrary in this Agreement, but subject to Article 4 (solely to the extent the Collateral Agent or any of its Affiliates is the Step-In Entity), Section 11.01 and Section 11.15(b), the Collateral Agent shall not have any liability to the Department under this Agreement, unless the Collateral Agent expressly assumes such liability in writing.

(b) The Department acknowledges and agrees that the Collateral Agent shall not be obligated or required to perform any of Concessionaire’s obligations under the Comprehensive Agreement, except during any Step-in Period (solely to the extent the Collateral Agent or any of its Affiliates is the Step-In Entity).

Section 11.16 Governing Law

This Agreement will be governed by and construed in accordance with the laws of the Commonwealth of Virginia applicable to contracts executed and to be performed within the State. Venue for any legal action arising out of this Agreement will lie in the Circuit Court in the City of Richmond, Virginia, Division I.
IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Agreement as of the date first written above.

VIRGINIA DEPARTMENT OF TRANSPORTATION,
an agency of the Commonwealth of Virginia

By: __________________________
Name: Gregory A. Whirley, Sr.
Title: Commissioner of Highways

95 EXPRESS LANES LLC,
a Delaware limited liability company

By: __________________________
Name: _________________________
Title: __________________________

U.S. BANK NATIONAL ASSOCIATION

By: __________________________
Name: _________________________
Title: __________________________
ANNEX 1

FORM OF STEP-IN ENTITY ACCESSION AGREEMENT

[Date]

To: [Name of the Department’s Representative]
Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219
Facsimile: (804) 786-2940

Copied to: Office of the Attorney General
900 E. Main Street
Richmond, VA 23219
Attention: Chief Transportation Section
Facsimile: (804) 786-9136

[Lenders and other parties to Finance Documents to be listed]

[insert address]

For the attention of: [●]

From: [Step-in Entity]

I-95 HOV/HOT LANES PROJECT

STEP-IN ENTITY ACCESSION AGREEMENT

Ladies and Gentlemen:

Reference is made to the Comprehensive Agreement, dated as of July 31, 2012 (as amended, amended and restated, supplemented or otherwise modified from time to time, the “Comprehensive Agreement”), between the Virginia Department of Transportation (the “Department”) and 95 Express Lanes LLC (the “Concessionaire”) and the Direct Agreement, dated as of July 31, 2012 (as amended, amended and restated, supplemented or otherwise modified from time to time, the “Direct Agreement”), among the Department, the Concessionaire and U.S. Bank National Association, as Collateral Agent.

Terms not otherwise defined herein will have the same meaning given to them in the Direct Agreement.
1. We hereby confirm that we are a Step-in Entity pursuant to Article 4 of the Direct Agreement.

2. We acknowledge and agree that, upon and by reason of our execution of this Step-in Entity Accession Agreement, we will become a party to the Comprehensive Agreement and the Direct Agreement jointly and severally with the Concessionaire as a Step-in Entity and, accordingly, will have the rights and powers and assume the obligations of the Concessionaire under the Comprehensive Agreement and the Direct Agreement in accordance with the terms of the Direct Agreement.

3. Our address, fax and telephone number and address for electronic mail for the purpose of receiving notices are as follows:

[contact details of Step-in Entity]

4. This Step-in Entity Accession Agreement will be governed by, and construed in accordance with, the law of the Commonwealth of Virginia. Venue for any legal action arising out of this Agreement will lie in the Circuit Court in the City of Richmond, Virginia, Division I.

The terms set forth herein are hereby agreed to:

[Step-in Entity]

By  ______________________
Name:
Title:
ANNEX 2

FORM OF SUBSTITUTE ACCESSION AGREEMENT

[Date]

To: [Name of the Department’s Representative]
Virginia Department of Transportation
1401 E. Broad Street Richmond
VA 23219
Facsimile: (804) 786-2940

Copied to: Office of the Attorney General
900 E.Main Street
Richmond, VA 23219
Attention: Chief Transportation Section
Facsimile: (804) 786-9136

From: [Substitute]

I-95 HOV/HOT LANES PROJECT

SUBSTITUTE ACCESSION AGREEMENT

Ladies and Gentlemen:

Reference is made to the Comprehensive Agreement, dated as of July 31, 2012 (as amended, amended and restated, supplemented or otherwise modified from time to time, the “Comprehensive Agreement”), between the Virginia Department of Transportation (the “Department”) and 95 Express Lanes LLC (the “Concessionaire”) and the Direct Agreement, dated as of July 31, 2012 (as amended, amended and restated, supplemented or otherwise modified from time to time, the “Direct Agreement”), among the Department, the Concessionaire and U.S. Bank National Association, as Collateral Agent.

Terms defined not otherwise defined herein will have the same meaning given to them in the Direct Agreement.

1. We hereby confirm that we are a Substitute pursuant to Article 6 of the Direct Agreement.

2. We acknowledge and agree that, upon and by reason of our execution of this Substitute Accession Agreement, we will become a party to the Comprehensive Agreement and the Direct Agreement as a Substitute and, accordingly, will have the rights and powers and assume the obligations of the Concessionaire under the
Comprehensive Agreement and the Direct Agreement in accordance with the terms of the Direct Agreement.

3. Our address, fax and telephone number and address for electronic mail for the purpose of receiving notices are as follows:

[contact details of Substitute]

4. This Substitute Accession Agreement will be governed by, and construed in accordance with, the law of the Commonwealth of Virginia. Venue for any legal action arising out of this Agreement will lie in the Circuit Court in the City of Richmond, Virginia, Division I.

The terms set forth herein are hereby agreed to:

[Substitute]

By: ________________________
Name:
Title:

Agreed for and on behalf of:
Virginia Department of Transportation

By: ________________________
Name:
Title:

[Provided under separate cover]
EXHIBIT V

TURNOVER PLAN

[see attached]
1 Introduction

The Concessionaire and the Department acknowledge that as of the Agreement Date, the level of engineering and design for the I-95 HOV/ HOT Lanes Project is not sufficient to allow the parties to set forth with specificity all the protocols which will define their operational relationship. This document will outline the framework of the operational relationship between the Concessionaire and the Department and will form the basis for the development of more specific protocols and turnover of assets prior to Service Commencement.

In order to timely review and finalize the Turnover Plan prior to Service Commencement, the Concessionaire and the Department shall undertake the following:

1. The Concessionaire and the Department shall meet to review and agree requirements for the transition of gate operations, and to facilitate testing and final integration transition planning to meet Service Commencement by no later than December 31, 2012.
2. Meet on a regular basis after this to discuss the specific steps needed to implement the transition plan prior to Service Commencement based upon an agreed schedule.

1.1 Operational Management

The Concessionaire and the Department shall establish a management committee to coordinate operations of the HOT Lanes and the GP Lanes in accordance with the terms of the Agreement. The senior members of the committee shall include the Northern Virginia District Administrator and the Concessionaire’s General Manager. The committee’s operational management shall be administered by the Department’s Northern Region Operations Director and the Concessionaire’s Operations Manager. Day-to-day coordination between the Concessionaire and the Department as required by the Agreement shall be coordinated by Department’s Northern Region Traffic Operations Manager (based in the Department’s Traffic Management Center) and the Concessionaire’s Senior Control Room Officer.

2 Boundaries

2.1 Narrative Description

The boundaries defined in this Turnover plan include, but are not limited to:

1. The existing I-95 reversible High Occupancy Vehicle (HOV) facility located in the center median, between the northbound and southbound General Purpose (GP) lanes. The existing HOV lanes extend from Dumfries in Prince William County, just south of the Route 234 (Dumfries Road) interchange, to the Turkeycock ramps, north of the Edsall Road Interchange.
2. The addition of two new reversible HOV/HOT lanes along the 9-mile segment within the median between Route 610 (Garrisonville Road) and the existing terminus south of Route 234 (Dumfries Road);
3. Entry/exit points, between the GP lanes and the HOV/HOT lanes, and HOV/HOT Lanes and arterials (see below).
4. North of the Capital Beltway on I-395, the proposed HOT Lanes will transition back to HOV 3+ at the Turkeycock ramps, north of the Edsall Road interchange. All northbound HOT traffic will be directed to exit from the HOT lanes back into the GP lanes at a new flyover connection constructed at the Turkeycock ramps when the reversible lanes are flowing to the north. Conversely, southbound traffic will be able to enter the HOT lanes at the existing ramp connection between the GP lanes and the HOT lanes.
5. The Springfield Interchange to include the Phase VIII HOV ramps/gates.

2.2 The following are existing access points to the I-95 HOV system:

<table>
<thead>
<tr>
<th>Connection Location</th>
<th>Northbound Connections</th>
<th>Southbound Connections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Between Joplin Road and Dumfries Road</td>
<td>NB GP to NB HOV</td>
<td>SB HOV to SB GP</td>
</tr>
<tr>
<td>Between Dumfries Road and Dale Boulevard</td>
<td>NB GP to NB HOV</td>
<td>SB HOV to SB GP</td>
</tr>
<tr>
<td>Opitz Blvd. Flyover</td>
<td>Opitz Blvd. to NB HOV</td>
<td>SB HOV to SB GP</td>
</tr>
<tr>
<td>Prince William Parkway Park and Ride Lot Flyover</td>
<td>Park and Ride lot to NB HOV</td>
<td>SB HOV to Park and Ride Lot</td>
</tr>
<tr>
<td>Gordon Boulevard</td>
<td>Gordon Blvd to NB HOV</td>
<td>SB HOV to Gordon Blvd</td>
</tr>
<tr>
<td>Route 1</td>
<td>Route 1 to NB HOV</td>
<td>SB HOV to Route 1</td>
</tr>
<tr>
<td>Between Lorton Road and Fairfax County Parkway (Route 286)</td>
<td>NB GP to NB HOV</td>
<td>SB HOV to SB GP</td>
</tr>
<tr>
<td>Between Fairfax County Parkway (Rte 286) and Franconia Springfield Parkway</td>
<td>NB HOV to NB GP flyover</td>
<td>SB GP to SB HOV</td>
</tr>
<tr>
<td>Franconia-Springfield Parkway (F/S Pkwy)</td>
<td>NB HOV to F/S Pkwy and F/S Pkwy to NB HOV</td>
<td>SB HOV to F/S Pkwy and F/S Pkwy to SB HOV</td>
</tr>
<tr>
<td>Franconia Interchange</td>
<td>NB GP to NB HOV</td>
<td>SB HOV to SB GP</td>
</tr>
<tr>
<td>Franconia Road</td>
<td>Franconia Road EB to NB HOV</td>
<td>SB HOV to WB Franconia</td>
</tr>
<tr>
<td>Springfield Interchange</td>
<td>EB &amp; WB I-495 to NB HOV/HOT; NB HOV/HOT to EB &amp; WB I-495*</td>
<td>EB &amp; WB I-495 to NB HOV/HOT; NB HOV/HOT to EB &amp; WB I-495*</td>
</tr>
<tr>
<td>Turkeycock Run</td>
<td>NB GP to NB HOV</td>
<td>SB HOV to SB GP or SB GP to SB HOV</td>
</tr>
</tbody>
</table>

* Connections being constructed as part of the Capital Beltway HOT Lanes
2.3 The following are modifications in access to the I-95 HOV system

<table>
<thead>
<tr>
<th>Connection Location</th>
<th>Northbound Connections</th>
<th>Southbound Connections</th>
<th>Type of Modification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Between VA 619 (Joplin Road) and VA 610</td>
<td>NB general purpose lanes to NB HOV/HOT lanes</td>
<td>SB HOV/HOT lanes to SB general purpose lanes</td>
<td>New- NB slip ramp and SB flyover</td>
</tr>
<tr>
<td>(Garrisonville Road)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Between US 234 (Dumfries Road) and VA 619</td>
<td>N/A</td>
<td>SB HOV/HOT Lanes to SB general purpose lanes</td>
<td>Expanded- replace SB slip ramp with flyover</td>
</tr>
<tr>
<td>(Joplin Road)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Between Opitz &amp; Dale Blvd</td>
<td>N/A</td>
<td>SB GP to SB HOV/HOT Lanes</td>
<td>New</td>
</tr>
<tr>
<td>Between VA 123 (Gordon Road) and VA 294</td>
<td>NB HOV/HOT lanes to NB general purpose lanes</td>
<td>N/A</td>
<td>New</td>
</tr>
<tr>
<td>(Prince William County Parkway) and Optiz Blvd</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Between VA 642 (Lorton Road) an Rte 1</td>
<td>N/A</td>
<td>SB GP to SB HOV/HOT Lanes</td>
<td>New</td>
</tr>
<tr>
<td>Between VA 286 (Fairfax County Parkway) and VA 638 (Pohick Road)</td>
<td>N/A</td>
<td>SB HOV/HOT Lanes to SB general purpose lanes</td>
<td>Ramp deleted to accommodate new connection to Fairfax County Parkway</td>
</tr>
<tr>
<td>VA 286 (Fairfax County Parkway) via Alban Road/ Boudinot Drive</td>
<td>NB HOV/HOT lanes to Fairfax County Parkway (via Alban Rd/Boudinot Drive)</td>
<td>Fairfax County Parkway (via Alban Road/Boudinot Drive) to SB HOV/HOT Lanes</td>
<td>New (Reversible)</td>
</tr>
<tr>
<td>Between VA 648 (Edsall Road) and Turkeycock Run</td>
<td>NB HOV/HOT lanes to NB general purpose lanes</td>
<td>N/A</td>
<td>New</td>
</tr>
</tbody>
</table>

3 Transition

3.1 List of ITS Assets to be Transferred

List of ITS Assets to be transferred from the Department to the Concessionaire shall be identified and agreed upon by both parties by December 31st, 2012. This list shall include:

- Access Gates
- DMS
- Lighting
- Signing
- Electrical Service Panels

3.2 Department Testing During Construction

Testing during design and construction will be in accordance with the Technical Requirements. The Requirements for Departmental testing and acceptance of new or relocated ITS Assets shall be finalized and agreed upon by the Department and Concessionaire no later than June 1st, 2013. This includes testing of Departmental traffic signals tied to Concessionaire access gates.
3.3 Concessionaire Testing

Testing during design and construction will be in accordance with the Technical Requirements. Concessionaire testing of ITS Assets during construction shall be finalized and agreed upon by the Department and Concessionaire no later than June 1st, 2013. The current proposed testing of equipment is as follows:

3.3.1 Reversible Gates

It is proposed that to facilitate the testing and commissioning of the reversible gate system, that the existing reversible roadway control system module of the Department’s ATMS may be taken offline during the periods when testing of the existing gates and signs are being performed by the Concessionaire’s TMS vendor. The Department does not anticipate any changes to the Department’s ATMS being required to support the testing and integration of the Concessionaire’s new reversible roadway control system software. A potential change to the Department’s ATMS that will need to be determined by the Department is any permanent modification to its ATMS software to address the ultimate state after final cut over and control of the reversible roadway will no longer be performed by the Department.

3.3.2 Access to Existing Reversible Roadway Control System

It is proposed that, during the design and construction of the Project, the process for providing access to the existing reversible roadway control system for the testing and integration activities would be for VDOT to open up the firewall on its network and allow the Concessionaire’s proposed TMS Gate Control module to communicate with the existing gate controllers and DMS associated with each gate group. The parties will review and agree the proposed access to the network to minimize any configuration changes. The direct fiber connections between the Concessionaire’s HOT-OC and VDOT’s PSTOC that have been implemented as part of the Capital Beltway HOT Lanes project will provide the physical connection between the two centers for the initial testing and integration activities. The procedures and time periods in which VDOT will modify its firewall or implement other changes to its network configuration at the PSTOC for these activities will be established by mutual agreement between the parties. The Concessionaire’s Design-Build Contractor is currently finalizing the design of the Concessionaire’s new communication network and confirming how it will be constructed and the most efficient way to effect the transition from VDOT communication and control of the reversible roadway system to the Concessionaire ultimately controlling the gates and signs. The transferred assets will be connected through the new HOT Lanes fiber network to the HOT-OC, then to VDOT through the Center-2-Center (C2C) connection. Once the details for the Concessionaire’s communication network design and the transition steps required to facilitate that design have been agreed to by VDOT and the Concessionaire, those details will be incorporated into the final Turnover Plan for the I-95 reversible roadway gate operations.

3.3.3 Testing and Integration Procedures

Detailed procedures will be developed outlining how and when the Concessionaire will conduct the testing of the Tolling and Traffic Management Systems (TTMS) software’s ability to communicate with and control the existing gates and associated DMS. Included with these procedures will be the maintenance of traffic plans (MOT) that must be in place to prevent access
to the reversible roadway while testing is underway. This will include what messages can be displayed on the DMS as part of the testing that will not create an unsafe situation to the motorists. It is anticipated that the majority of the testing will need to be done at night as agreed upon between VDOT and the Concessionaire regarding allowable road closures. Day time reversible operations will need to be included as part of the testing strategy.

Given the length of roadway and number of access points that will need to be tested along with all of the safety interlock elements of the reversible roadway control system, there may be certain tests that cannot be completed during a single overnight shutdown of the reversible roadway. VDOT and the Concessionaire will work together to identify if and when extended closures over perhaps a low volume weekend will be permitted. This will include extensive public outreach to notify the public regarding any extended closures in accordance with the Technical Requirements.

### 3.3.4 Final Cut Over

The permanent transition from VDOT to Concessionaire control of the reversible roadway system will be dependent upon the communication network implementation and transition steps developed to implement the ultimate communication network integration. The final cut over ensures that there is only one ETTM System (the Concessionaire’s TTMS) that is connected to the gates and associated DMS to eliminate the potential for conflicting commands. In order to demonstrate that the Concessionaire’s TTMS software is successfully operating and controlling the reversible roadway system it may be necessary for the final cut over to occur prior to initiating tolling operations. VDOT and the Concessionaire will work together to develop the final cut over plan to meet the Service Commencement timeframe.

### 3.3.5 Ultimate System Interfaces

The ultimate interface between the Concessionaire’s TMS software and VDOT’s new ATMS platform will be handled through a center-to-center interface between the two systems, with the Reversible Roadway Control System managed by the Concessionaire. VDOT and the Concessionaire will develop the operating procedures and protocols for managing the I-95 HOT Lanes prior to becoming operational. These operating procedures will then be used to define the interface requirements between the TMS software and VDOT’s new ATMS platform. The interface requirements must then be included into the overall system requirements for the Department’s new ATMS platform.

### 3.4 Interfaces

The Department and Concessionaire shall develop and agree on a notification process/timeline for project related impacts to existing Departmental equipment, no later than August 31st, 2012.

#### 3.4.1 Electrical Power Distribution

1. The existing Department power feeds all existing ITS equipment, overhead signs, lighting and traffic signals within the project footprint. The existing lighting and ITS systems will be maintained by the Department until the Concessionaire begins impacting assets per the Technical Requirements Section 3.17.L.
2. Temporary power outages for construction purposes shall be allowed as follows:

a. **Existing Gates/Gate Groups** – The Concessionaire shall be allowed to de-energize gates for a period no longer than seven (7) days, in accordance with the notification process (or as mutually agreed), for purposes of mitigating construction conflicts with existing gates, adding new gates to an existing gate group or providing new power connections from the proposed Concessionaire duct bank. The Concessionaire shall not cause more than two gate group outages at a time. In the event that outages caused by the Concessionaire require personnel to manually operate gates/gate groups, the Concessionaire shall provide qualified personnel to manually operate the gates/gate groups under the direction of VDOT personnel in a manner consistent with the Departments normal operations. It is understood that gate controllers and the associated gate DMS are interlocked and one cannot operate without the other. In the event a gate group is taken offline and the associated DMS cannot display a message, the Concessionaire shall supplement the message with a portable DMS. It will be the responsibility of the Concessionaire to work with the Department to ensure that the message on the DMS reflects the condition state of the gates (i.e. ramp open/closed, HOV restricted or open to traffic). Any delay to opening or closing gates due to de-energized gates will not be charged to the Department MOT time bank.

b. **Replacement/Relocation of Existing Gates/Gate Groups** – The Concessionaire shall not be allowed to de-energize existing gates or gate groups for purposes of replacing/relocating gates without prior approval by the Department. The Concessionaire shall prepare and submit to the Department for review and approval, a plan for maintaining access and safe operation of ramps during period gates are inoperable prior to requesting gate outage.

c. **DMS for Gate Operations** – The Concessionaire shall be allowed to de-energize DMS for a period no longer than seven (7) days, in accordance with the notification process (or as mutually agreed), for purposes of mitigating construction conflicts, upgrading DMS or providing new power connections from the proposed Concessionaire duct bank. Any DMS currently used in conjunction with gate operations shall be supplemented with a portable DMS. It will be the responsibility of the Concessionaire to work with the Department to ensure that the message on the DMS reflects the condition state of the gates (i.e. ramp open/closed, HOV restricted or open to traffic). It is understood that gate controllers and the associated DMS are interlocked and one cannot work without the other. In the event a gate associated DMS is taken offline, the Concessionaire shall be responsible for manually operating the associated gate group gates under the direction of VDOT personnel in a manner consistent with the Departments normal operations. Removal of a gate associated DMS and by interlock, the associated gate group; shall be applied to the stipulation that the Concessionaire cannot cause more than two gate group outages at a time.

d. **DMS for Travel Advisory** – The Concessionaire shall be allowed to de-energize DMS for a period no longer than thirty (30) days, in accordance with the notification process (or as mutually agreed), for purposes of mitigating construction conflicts or providing new power connection from the proposed Concessionaire duct bank.

e. **Lighting** – The Concessionaire shall be allowed to de-energize overhead roadway lighting for a period no longer than thirty (30) days, in accordance with the notification process (or as mutually agreed), for purposes of mitigating construction
conflicts, adding additional lighting to an existing circuit, upgrading service panel, or modifying existing power metering. This limitation shall apply to both HOV lanes, GP lanes, and any other adjacent ramps and roads being impacted by construction. It is understood that the Concessionaire will isolate outages to minimize the number lights offline and will not cause there to be outages of both lighting and overhead sign lighting in the same vicinity.

f. **CCTV/Traffic Detection** – The Concessionaire shall be allowed to de-energize CCTV cameras/traffic detection equipment for a period of no longer than ten (10) days, in accordance with the notification process (or as mutually agreed), for purposes of relocating or replacing-in-kind. For CCTV outages lasting longer than twenty-four (24) hours, the Concessionaire shall provide a temporary portable camera for use by the Department. For instances where CCTV cameras/traffic detection equipment is being replaced and moved to a new location, the Concessionaire must wait until replacement infrastructure or equipment has been installed and accepted by the Department before de-energizing and removing the existing equipment.

g. **Signing** – The Concessionaire shall be allowed to de-energize overhead sign lighting for a period of no longer than seven (7) days, in accordance with the notification process (or as mutually agreed), for purposes of mitigating construction impacts, upgrading sign panels, upgrading service panel, or modifying existing panel metering. The Concessionaire shall not cause there to be outages of both lighting and overhead sign lighting in the same vicinity.

3. The Concessionaire shall be responsible for paying for the power of any equipment transitioned to a Concessionaire service meter.

4. The Department shall coordinate with the Concessionaire for access to the Department’s portion of the power distribution system when that portion falls within the Concessionaire’s work zone during construction or within the HOT Lanes following transition. The Concessionaire and the Department shall mutually agree upon response levels that consider safe access to work zones, lane closures, and the operational impact to the affected systems.

3.4.2 **Communications Systems**

1. The Concessionaire shall do its best to minimize impact to the existing Departmental communications infrastructure. In locations where existing fiber-optics are relocated or replaced, the new infrastructure shall be in place and ready for connection prior to disconnecting existing infrastructure and shall be coordinated with the Department at least ten (10) days prior to the disconnection of existing fiber-optics. The existing fully redundant fiber optic network shall not be compromised for more than eight (8) hours in order to complete splicing exercises.

2. The Concessionaire shall be responsible for maintaining communications to all existing to-remain Department equipment as well as any upgraded Concessionaire equipment that replaces existing equipment currently used to operate the existing HOV facility. Temporary communications outages for construction purposes shall be allowed as outlined:

   a. **Existing Gates/Gate Groups** – The Concessionaire shall be allowed to disconnect gates for a period no longer than seven (7) days, in accordance with the notification
process (or as mutually agreed), for purposes of mitigating construction conflicts, adding new gates to an existing gate group or providing new fiber-optic connections from the proposed Concessionaire duct bank. The Concessionaire shall not cause more than two gate group outages at a time. In the event that outages caused by the Concessionaire require personnel to manually operate gates/gate groups, the Concessionaire shall provide qualified personnel to manually operate the gates/gate groups under the direction of VDOT personnel in a manner consistent with the Departments normal operations. It is understood that gate controllers and the associated gate DMS are interlocked and one cannot operate without the other. In the event a gate group is taken offline and the associated DMS cannot display a message, the Concessionaire shall supplement the message of with a portable DMS. It will be the responsibility of the Concessionaire to work with the Department to ensure that the message on the DMS reflects the condition state of the gates (i.e. ramp open/closed, HOV restricted or open to traffic). Any delay to opening or closing gates due to de-energized gates will not be charged to the Department MOT time bank.

a. **Replacement/Relocation of Existing Gates/Gate Groups** – The Concessionaire shall not be allowed to disconnect existing gates or gate groups for purposes of replacing/relocating gates without prior approval by the Department. The Concessionaire shall prepare and submit to the Department for review and approval, a plan for maintaining access and safe operation of ramps during period gates are inoperable prior to requesting gate outage.

b. **DMS for Gate Operations** – The Concessionaire shall be allowed to disconnect DMS boards for a period no longer than seven (7) days, in accordance with the notification process (or as mutually agreed), for purposes of mitigating construction conflicts, upgrading DMS or providing new fiber-optic connections from the proposed Concessionaire duct bank. Any DMS currently used in conjunction with gate operations shall be supplemented with a portable DMS. It will be the responsibility of the Concessionaire to work with the Department to ensure that the message on the DMS reflects the condition state of the gates (i.e. ramp open/closed, HOV restricted or open to traffic). It is understood that gate controllers and the associated DMS are interlocked and one cannot work without the other. In the event a gate associated DMS is taken offline, the Concessionaire shall be responsible for manually operating the associated gate group gates under the direction of VDOT personnel in a manner consistent with the Departments normal operations. Removal of a gate associated DMS and by interlock, the associated gate group; shall be applied to the stipulation that the Concessionaire cannot cause more than two gate group outages at a time.

c. **DMS for Traveler Advisory** – The Concessionaire shall be allowed to de-energize DMS for a period no longer than thirty (30) days, in accordance with the notification process (or as mutually agreed), for purposes of mitigating construction conflicts or providing new fiber-optic connections from the proposed Concessionaire duct bank.

d. **CCTV/Traffic Detection** – The Concessionaire shall be allowed to disconnect CCTV cameras/traffic detection equipment for a period of no longer than ten (10) days, in accordance with the notification process (or as mutually agreed), for purposes of relocating or replacing-in-kind. For CCTV outages lasting longer than twenty-four (24) hours, the Concessionaire shall provide a temporary portable camera for use by the Department. For instances where CCTV cameras/traffic detection equipment is being replaced and moved to a new location, the Concessionaire must wait until
replacement infrastructure or equipment has been installed and accepted by the Department before disconnecting and removing the existing equipment.

3. The Department shall coordinate with the Concessionaire for access to the Department’s communications system when that portion falls within the Concessionaire’s work zone during construction or within the HOT Lanes following turnover. The Concessionaire and the Department shall mutually agree upon response levels that consider safe access to work zones, lane closures, and the operational impact to the affected systems.

4. 3rd Party Cable – Under a Memorandum of Agreement between the Department and the United States of America, the Department currently provides conduit infrastructure to the Army Corps of Engineers (COE) for communications cable. When requested, the Department will assist in coordination with the COE and other 3rd Parties for the relocation of conduit and cables impacted by construction of the project. The Concessionaire will provide access to the work zones as needed to the Department, the 3rd Party cable providers, and their contractors for installation or relocation of communications cable within Concessionaire installed duct bank. Coordination and scheduling of access shall be mutually agreed upon by the Department, 3rd Parties, and the Concessionaire.

3.4.3 Existing Departmental Equipment

Department equipment associated with HOV lane operations will be removed from the project and delivered to the Department as identified in the Design Documentation. Existing assets either being removed or relocated by the project are to be inspected and their condition recorded by the Concessionaire prior to disconnection. Any equipment identified as defective shall be brought to the attention of the Department prior to deactivation.

3.4.4 Snow Removal During Construction

The Department and Concessionaire shall develop and agree upon a process for ensuring Departmental access to the HOV lanes as needed to perform snow removal, no later than September 30th, 2012. Allowable equipment outages defined above may not preclude the Department from requiring gate system operability prior to a forecasted snow event or as agreed in snow removal plan.

4 Post Construction

4.1 ITS and Traffic Control Devices

4.1.1 Traffic Control Devices to be Retained and Operated by the Department

The Department will retain ownership of all existing ITS components with the exception of access gates and any DMS tied to the access gates. Departmental ownership include, existing DMS not associated with the gates, CCTV cameras, traffic detection equipment, ramp meters,
weather stations, traffic signals, overhead lighting not specifically dedicated to the HOT Lanes, and overhead Signing not related to HOT Lanes.

4.1.2 Traffic Control Devices to be Operated by the Concessionaire

The Concessionaire will maintain and operate all ITS equipment dedicated to operation of the HOT Lanes including but not limited to, access gates, DMS, CCTV cameras, AID cameras, overhead lighting specifically dedicated to the HOT Lanes, and overhead signing specifically dedicated to HOT Lanes in accordance with the Agreement.

4.2 Department/Other Agency Assets

4.2.1 The existing Department communications duct bank to remain within the HOT Lanes O&M Boundaries will be maintained by the Department. This includes manholes, conduit, communications cabling, and associated infrastructure.

5 Maintenance, Repair and Replacement Activities

1. The Department equipment, facilities and operations shall not be impacted by the Concessionaire without prior approval.

2. The Department equipment, facilities and operations shall not be impacted by the Concessionaire without prior approval.

3. The Concessionaire equipment facilities and operations shall not be impacted by the Department without prior approval.

4. The Concessionaire and the Department shall agree to protocols addressing the following:
   a. Department access to the HOT Lanes to repair and maintain structures which span both the HOT Lanes and the GP Lanes and other assets on the HOT Lanes not maintained by the Concessionaire.
   b. Concessionaire access to the General Purpose Lanes as may be required to maintain the HOT Lanes and associated areas.
   c. The Department shall have a right of access to the HOT Lanes in order to carry out emergency repairs to address safety hazards on structures spanning both the HOT Lanes and the GP Lanes, subject to complying with the Concessionaires work practices and coordination with the Concessionaire to facilitate and maintain safe and efficient operations or implementation of appropriate traffic management on the HOT Lanes.
   d. The Concessionaire shall have the right to access its ETTM Equipment, ETTM facilities, and signage mounted on the Department’s gantries, bridges, and other structures, subject to complying with the Department’s work practices and coordinating such work with the Department to facilitate and maintain safe and efficient operations or implementation of appropriate traffic management on the GP Lanes.
6 Asset Maintenance Scheduling

1. The Department and the Concessionaire shall agree and document protocols prior to Service Commencement that provide for the following:

   a. Coordination of Major Maintenance activities to reduce the impact of the such work on traffic

   b. Sharing of asset condition data to facilitate coordination of activities and to promote the best whole life cycle maintenance decision-making where assets are shared

   c. Coordination of relevant responsibilities as outlined in the Technical Requirements.
EXHIBIT T

KNOWN PRE-EXISTING HAZARDOUS SUBSTANCES

[see attached]
EXHIBIT T

KNOWN PRE-EXISTING HAZARDOUS SUBSTANCES

The table below identifies the Known Pre-Existing Hazardous Substances located within or directly adjacent to the I-95 HOV/HOT Lanes Project:

<table>
<thead>
<tr>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Petroleum impacted soils discovered during installation of the tower on the west side of Garrisonville Road interchange between 1994 and 2000. Site is located approx. 200 ft. west of the HOT lanes. Per the Marshall Miller &amp; Associates Phase I ESA report, no other information was available for this REC.</td>
</tr>
<tr>
<td>Potential environmental concern due to auto repair activities</td>
</tr>
<tr>
<td>No PC numbers or USTs were confirmed with the property. However, these facilities typically house drums containing antifreeze, waste oil, and other fluids used with automobile maintenance services. New R/W is proposed up to the building along the property frontage. Limited subsurface investigations in the proposed road construction area were completed and all test results for groundwater and soil samples collected were below detection limits.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Summary</th>
<th>Description</th>
<th>Location</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Report of petroleum impacted soils</td>
<td>Petroleum impacted soils discovered during installation of the tower on the west side of Garrisonville Road interchange between 1994 and 2000. Site is located approx. 200 ft. west of the HOT lanes. Per the Marshall Miller &amp; Associates Phase I ESA report, no other information was available for this REC.</td>
<td>Cellular Tower, Northwest corner of I-95 and Route 610, Outside of HOT Lanes alignment</td>
<td>Phase I ESA, I-95/395 HOV/Bus/HOT Lanes Southern Section, Marshall Miller &amp; Associates</td>
</tr>
<tr>
<td>Potential environmental concern due to auto repair activities</td>
<td>No PC numbers or USTs were confirmed with the property. However, these facilities typically house drums containing antifreeze, waste oil, and other fluids used with automobile maintenance services. New R/W is proposed up to the building along the property frontage. Limited subsurface investigations in the proposed road construction area were completed and all test results for groundwater and soil samples collected were below detection limits.</td>
<td>SAAB International Motors, 7520 Backlick Road, Springfield</td>
<td>Preliminary Site Assessment Report, Proposed I-95 and Backlick Road Improvement, Marshall Miller &amp; Assoc.; Subsurface Investigation Report, Proposed Route 7900 and Route 617 Improvements, Marshall Miller &amp; Associates</td>
</tr>
<tr>
<td>Summary</td>
<td>Description</td>
<td>Location</td>
<td>Reference</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
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<td>-----------</td>
</tr>
<tr>
<td>Potential environmental concern due to former UST located on property</td>
<td>Two USTs are currently registered on the site. However, USTs were formerly present on the property when Volkswagen operated at the site. These tanks were removed prior to Car Craft Collision Center acquiring the property. In addition, this type of facility typically house drums containing antifreeze, waste oil, and other fluids with automobile maintenance services. There are no PCs registered to the facility. New R/W is proposed at the northeast corner of the property. No subsurface investigation was conducted at this site since there was limited to no R/W proposed in this area.</td>
<td>Car Craft Collision Center, 7616 Backlick Road, Springfield</td>
<td>Preliminary Site Assessment Report, Proposed I-95 and Backlick Road Improvement, Marshall Miller &amp; Assoc.; Subsurface Investigation Report, Proposed Route 7900 and Route 617 Improvements, Marshall Miller &amp; Associates</td>
</tr>
<tr>
<td>Potential environmental concerns of impacted soils due to leaking UST</td>
<td>Total petroleum hydrocarbons and volatile organic compounds (VOCs) were detected in the soil and groundwater at the site. The pollution case was closed on July 14, 2000. The site was enrolled into the VRP program in March 2001 due to the VOCs detected on the property, including trichloroethene. The impacted area is estimated approximately 300 feet from VDOT’s road construction. The depth to water ranges between 30 to 55 feet at the site, and the groundwater flow direction is to the southwest (away from the road project. The property remains an active VRP site but closure has been requested. No R/W is</td>
<td>Fairfax Lumber and Millwork, 7622 Backlick Road, Springfield</td>
<td>Preliminary Site Assessment Report, Proposed I-95 and Backlick Road Improvement, Marshall Miller &amp; Assoc.; Subsurface Investigation Report,</td>
</tr>
<tr>
<td>Summary</td>
<td>Description</td>
<td>Location</td>
<td>Reference</td>
</tr>
<tr>
<td>---------</td>
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<tr>
<td>Groundwater impact from PCE</td>
<td>The suspected source of PCE at the intersection of Franconia and Commerce Street, in Springfield, is from a former dry cleaning facility previously located adjacent to the 7-11 store on Parcel 63. A subsurface investigation was conducted in 1999 by Marshall Miller &amp; Associates and found that contamination from tetrachloroethene (PCE) is present in the groundwater underlying the subject parcels and the plume is relatively well delineated in the north and eastern direction. The concentrations found in the groundwater in six of the sample locations exceeded the EPA’s published drinking standard of 5 µg/l. The concentration in GP-10 also exceeded the maximum concentration for the toxicity characteristic for consideration as a hazardous waste of 700 µg/l.</td>
<td>Intersection of Franconia/Commerce Street, Springfield</td>
<td>Commerce/Franconia PCE Investigation, Marshall Miller &amp; Associates, 1999</td>
</tr>
<tr>
<td>Potential environmental concern from auto repair/junk yard</td>
<td>Due to the amount of junk cars and automobile debris on this property, this is a property of concern. VDOT planned to acquire 9 feet of R/W from this property.</td>
<td>Schaeffer Industrial Park, 7818 Loisdale Rd, Springfield</td>
<td>Preliminary Site Assessment, I-95/395/495 Fairfax County, VA, Marshall Miller &amp; Associates, 1998</td>
</tr>
<tr>
<td>Suspected former landfill</td>
<td>This property extends northward along Loisdale Road to just south of Loisdale Estates. This property was at one time a gravel pit and is now a suspected former landfill. Review of aerial photographs between 1970 and 1990 shows intermittent activity such as clearing, excavating, and filling, and periods of no activity. This property is reported as being used as a landfill that ceased operations in 1979. However, there are no records to indicate the age, owner, the size, or type of waste disposed of in the landfill, or if any environmental precautions were in place during the operation or at closure of the landfill.</td>
<td>Located north of Springfield Self Storage on Loisdale Road, Springfield</td>
<td>Preliminary Site Assessment, I-95/395/495 Fairfax County, VA, Marshall Miller &amp; Associates, 1998</td>
</tr>
<tr>
<td>Gasoline spill</td>
<td>On February 26, 1995, a tanker truck overturned and spilled approx. 5,700 gallons of gasoline on Northbound I-95 overpass.</td>
<td>Northbound On-</td>
<td>Environmental</td>
</tr>
</tbody>
</table>
## KNOWN PRE-EXISTING HAZARDOUS SUBSTANCES

<table>
<thead>
<tr>
<th>Summary</th>
<th>Description</th>
<th>Location</th>
<th>Reference</th>
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</thead>
<tbody>
<tr>
<td>on on-ramp to I-95 NB at Backlick Rd in Newington</td>
<td>gallons of gasoline adjacent to a storm drain which directed the fuel through a series of drainage ditches and culverts to a stormwater retention basin. Water and product in the retention basin drained via a standpipe to a drainage system on the western side of I-95. The drainage system ultimately discharges into Accotink Creek. Excavation of the top six inches to one foot of impacted soil in the immediate vicinity of the spill was conducted and the soil was replaced with clean fill and stone followed by hydro-mulching and seeding. The underflow dam was stabilized to maximize its effectiveness and ability to handle future rainfall events. No product was observed behind the dam; and inspection of the spill impact areas was conducted on a weekly basis for 3 months.</td>
<td>Ramp to I-95 at Backlick Road in Newington, Exit 166</td>
<td>Conditions Status Report, Quality Environmental Solutions (QES), 1995</td>
</tr>
<tr>
<td>All Bridges and Structures Within Roadway Alignments</td>
<td>A determination on the classification (Type A or Type B) of protective coating of all metal on existing structures within the project limits is required. In absence of any characterization, all structures are presumed to be Type B until paint tests conclude otherwise. In addition, bridge inspection for asbestos containing material should be conducted on all bridge structures within the project corridor prior to construction activities or demolition of bridges.</td>
<td>Entire Corridor</td>
<td>2007 Road and Bridge Specs; VDOT Memo - Asbestos Containing Materials on Bridges - 2009</td>
</tr>
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</table>
EXHIBIT U

FEDERAL REQUIREMENTS

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<th>No. of Pages</th>
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<td>Attachment 3 – Wage Determination of the Secretary of Labor</td>
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<td>Attachment 4 – Special Provision for Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity (Executive Order 11246)</td>
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<td>Attachment 9 – Special Provision for Use of Domestic Metal</td>
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ATTACHMENT 1 TO EXHIBIT U

FEDERAL REQUIREMENTS FOR FEDERAL-AID CONSTRUCTION FACILITIES

GENERAL. — The work herein proposed will be financed in whole or in part with Federal funds, and therefore all of the statutes, rules and regulations promulgated by the Federal Government and applicable to the Work as a result of the Project being financed in part with Federal funds will apply to such Work. The "Required Contract Provisions, Federal-Aid Construction Contracts, Form FHWA 1273,” are included in this Exhibit U. Whenever in said required contract provisions references are made to:

(a) "SHA contracting officer", "SHA resident engineer", or "authorized representative of the SHA", such references shall be construed to mean the Department or its Authorized Representative;

(b) “contractor”, “prime contractor”, “bidder” or “prospective primary participant”, such references shall be construed to mean the Concessionaire or its authorized representative and/or the Design-Build Contractor or its authorized representative, as may be appropriate under the circumstances;

(c) “contract” or “prime contract”, such references shall be construed to mean the Design-Build Contract;

(d) “subcontractor”, “supplier”, “vendor”, “prospective lower tier participant” or “lower tier subcontractor”, such references shall be construed to mean, as appropriate, Contractors other than the Design-Build Contractor; and

(e) “department”, “agency” or “department or agency entering into this transaction”, such references shall be construed to mean the Department, except where a different department or agency is specified.

In the event of any discrepancy between the provisions of this Exhibit U that are intended to incorporate or summarize statutes, rules or regulations promulgated by the Federal Government and the actual statutes, rules or regulations in effect from time to time, the actual statutes, rules or regulations shall apply and supersede the inconsistent provisions set forth herein.

PERFORMANCE OF PREVIOUS CONTRACT. — In addition to the provisions in Section II, "Nondiscrimination," and Section VII, "Subletting or Assigning the Contract," of the Form 1273 required contract provisions, the Concessionaire shall cause the contractor to comply with the following:

The bidder shall execute the CERTIFICATION WITH REGARD TO THE PERFORMANCE OF PREVIOUS CONTRACTS OR SUBCONTRACTS SUBJECT TO THE EQUAL OPPORTUNITY CLAUSE AND THE FILING OF REQUIRED REPORTS located in the proposal. No request for subletting or assigning any portion of
the contract in excess of $10,000 will be considered under the provisions of Section VII of the required contract provisions unless such request is accompanied by the CERTIFICATION referred to above, executed by the proposed subcontractor.

NON-COLLUSION PROVISION. — The provisions in this section are applicable to all contracts except contracts for Federal Aid Secondary Projects. Title 23, United States Code, Section 112, requires as a condition precedent to approval by the Federal Highway Administrator of the contract for this work that each bidder file a sworn statement executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with the submitted bid. A form to make the non-collusion affidavit statement required by Section 112 as a certification under penalty of perjury rather than as a sworn statement as permitted by 28 U.S.C., Sec. 1746, is included in the Proposal.

PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN SUBCONTRACTING. — Part 26, Title 49, Code of Federal Regulations applies to this Project. Pertinent sections of said Code are incorporated within other sections of the Contract and the Department Disadvantaged Business Enterprise Program adopted pursuant to 49 CFR Part 26.

CONVICT PRODUCED MATERIALS

a. FHWA Federal-aid projects are subject to 23 CFR § 635.417, Convict produced materials.

b. Materials produced after July 1, 1991, by convict labor may only be incorporated in a Federal aid highway construction project if such materials have been:
   (i) produced by convicts who are on parole, supervised release, or probation from a prison, or
   (ii) produced in a prison project in which convicts, during the 12 month period ending July 1, 1987, produced materials for use in Federal aid highway construction projects, and the cumulative annual production amount of such materials for use in Federal aid highway construction does not exceed the amount of such materials produced in such project for use in Federal aid highway construction during the 12 month period ending July 1, 1987.

FHWA FORM 1273 SECTIONS VII.1 AND VII.2 INAPPLICABLE – Pursuant to 23 CFR 635.116(d), the requirements of Sections VII.1 and VII.2 of FHWA Form 1273 (Attachment 2 to Exhibit U to the Agreement) are inapplicable to the Agreement.

ACCESS TO RECORDS

a. As required by 49 CFR 18.36(i)(10), the Concessionaire and its Contractors shall allow FHWA and the Comptroller General of the United States, or their duly authorized representatives, access to all books, documents, papers, and records of the Concessionaire and Contractors which are directly pertinent to any grantee or subgrantee contract, for the purpose of making audit, examination, excerpts, and transcriptions thereof. In addition, as required by 49 CFR 18.36(i)(11), the Concessionaire and its Contractors shall retain
all such books, documents, papers, and records for three years after final payment is made pursuant to any such contract and all other pending matters are closed.

b. The Concessionaire agrees to include this section in each Contract at each tier, without modification except as appropriate to identify the Contractor who will be subject to its provisions.

**SUBCONTRACTING**

a. Any distribution of work shall be evidenced by a written binding agreement on file at the project site. Where no field office exists, such agreement shall be readily available upon request to Department inspector(s) assigned to the project.

b. The provisions contained in Form FHWA-1273 specifically, and other federal provisions included with the prime Contract are generally applicable to all Federal-aid construction projects and must be made a part of, and physically incorporated into all contracts, as well as, appropriate subcontracts for work so as to be binding in those agreements.
ATTACHMENT 2 TO EXHIBIT U

REQUIRED CONTRACT PROVISIONS
FEDERAL-AID CONSTRUCTION CONTRACTS

FHWA FORM 1273

FHWA-1273 -- Revised May 1, 2012

REQUIRED CONTRACT PROVISIONS
FEDERAL-AID CONSTRUCTION CONTRACTS

I. General
II. Nondiscrimination
III. Nonsegregated Facilities
IV. Davis-Bacon and Related Act Provisions
V. Contract Work Hours and Safety Standards Act Provisions
VI. Subletting or Assigning the Contract
VII. Safety: Accident Prevention
VIII. False Statements Concerning Highway Projects
IX. Implementation of Clean Air Act and Federal Water Pollution Control Act
X. Compliance with Governmentwide Suspension and Debarment Requirements
XI. Certification Regarding Use of Contract Funds for Lobbying

ATTACHMENTS

A. Employment and Materials Preference for Appalachian Development Highway System or Appalachian Local Access Road Contracts (included in Appalachian contracts only)

I. GENERAL

1. Form FHWA-1273 must be physically incorporated in each construction contract funded under Title 23 (excluding emergency contracts solely intended for debris removal). The contractor (or subcontractor) must insert this form in each subcontract and further require its inclusion in all lower tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services).

The applicable requirements of Form FHWA-1273 are incorporated by reference for work done under any purchase order, rental agreement or agreement for other services. The prime
contractor shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.

Form FHWA-1273 must be included in all Federal-aid design-build contracts, in all subcontracts and in lower-tier subcontracts (excluding subcontracts for design services, purchase orders, rental agreements and other agreements for supplies or services). The design-builder shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.

Contracting agencies may reference Form FHWA-1273 in bid proposal or request for proposal documents, however, the Form FHWA-1273 must be physically incorporated (not referenced) in all contracts, subcontracts and lower-tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services related to a construction contract).

2. Subject to the applicability criteria noted in the following sections, these contract provisions shall apply to all work performed on the contract by the contractor's own organization and with the assistance of workers under the contractor's immediate superintendence and to all work performed on the contract by piecework, station work, or by subcontract.

3. A breach of any of the stipulations contained in these Required Contract Provisions may be sufficient grounds for withholding of progress payments, withholding of final payment, termination of the contract, suspension / debarment or any other action determined to be appropriate by the contracting agency and FHWA.

4. Selection of Labor: During the performance of this contract, the contractor shall not use convict labor for any purpose within the limits of a construction project on a Federal-aid highway unless it is labor performed by convicts who are on parole, supervised release, or probation. The term Federal-aid highway does not include roadways functionally classified as local roads or rural minor collectors.

II. NONDISCRIMINATION

The provisions of this section related to 23 CFR Part 230 are applicable to all Federal-aid construction contracts and to all related construction subcontracts of $10,000 or more. The provisions of 23 CFR Part 230 are not applicable to material supply, engineering, or architectural service contracts.

In addition, the contractor and all subcontractors must comply with the following policies: Executive Order 11246, 41 CFR 60, 29 CFR 1625-1627, Title 23 USC Section 140, the Rehabilitation Act of 1973, as amended (29 USC 794), Title VI of the Civil Rights Act of 1964, as amended, and related regulations including 49 CFR Parts 21, 26 and 27; and 23 CFR Parts 200, 230, and 633.

The contractor and all subcontractors must comply with: the requirements of the Equal Opportunity Clause in 41 CFR 60-1.4(b) and, for all construction contracts exceeding $10,000, the Standard Federal Equal Employment Opportunity Construction Contract Specifications in 41 CFR 60-4.3.
Note: The U.S. Department of Labor has exclusive authority to determine compliance with Executive Order 11246 and the policies of the Secretary of Labor including 41 CFR 60, and 29 CFR 1625-1627. The contracting agency and the FHWA have the authority and the responsibility to ensure compliance with Title 23 USC Section 140, the Rehabilitation Act of 1973, as amended (29 USC 794), and Title VI of the Civil Rights Act of 1964, as amended, and related regulations including 49 CFR Parts 21, 26 and 27; and 23 CFR Parts 200, 230, and 633.

The following provision is adopted from 23 CFR 230, Appendix A, with appropriate revisions to conform to the U.S. Department of Labor (US DOL) and FHWA requirements.

1. **Equal Employment Opportunity:** Equal employment opportunity (EEO) requirements not to discriminate and to take affirmative action to assure equal opportunity as set forth under laws, executive orders, rules, regulations (28 CFR 35, 29 CFR 1630, 29 CFR 1625-1627, 41 CFR 60 and 49 CFR 27) and orders of the Secretary of Labor as modified by the provisions prescribed herein, and imposed pursuant to 23 U.S.C. 140 shall constitute the EEO and specific affirmative action standards for the contractor's project activities under this contract. The provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) set forth under 28 CFR 35 and 29 CFR 1630 are incorporated by reference in this contract. In the execution of this contract, the contractor agrees to comply with the following minimum specific requirement activities of EEO:

   a. The contractor will work with the contracting agency and the Federal Government to ensure that it has made every good faith effort to provide equal opportunity with respect to all of its terms and conditions of employment and in their review of activities under the contract.

   b. The contractor will accept as its operating policy the following statement:

   "It is the policy of this Company to assure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, color, national origin, age or disability. Such action shall include: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, and/or on-the-job training."

2. **EEO Officer:** The contractor will designate and make known to the contracting officers an EEO Officer who will have the responsibility for and must be capable of effectively administering and promoting an active EEO program and who must be assigned adequate authority and responsibility to do so.

3. **Dissemination of Policy:** All members of the contractor's staff who are authorized to hire, supervise, promote, and discharge employees, or who recommend such action, or who are substantially involved in such action, will be made fully cognizant of, and will implement, the contractor's EEO policy and contractual responsibilities to provide EEO in each grade and classification of employment. To ensure that the above agreement will be met, the following actions will be taken as a minimum:
a. Periodic meetings of supervisory and personnel office employees will be conducted before the start of work and then not less often than once every six months, at which time the contractor's EEO policy and its implementation will be reviewed and explained. The meetings will be conducted by the EEO Officer.

b. All new supervisory or personnel office employees will be given a thorough indoctrination by the EEO Officer, covering all major aspects of the contractor's EEO obligations within thirty days following their reporting for duty with the contractor.

c. All personnel who are engaged in direct recruitment for the project will be instructed by the EEO Officer in the contractor's procedures for locating and hiring minorities and women.

d. Notices and posters setting forth the contractor's EEO policy will be placed in areas readily accessible to employees, applicants for employment and potential employees.

e. The contractor's EEO policy and the procedures to implement such policy will be brought to the attention of employees by means of meetings, employee handbooks, or other appropriate means.

4. Recruitment: When advertising for employees, the contractor will include in all advertisements for employees the notation: "An Equal Opportunity Employer." All such advertisements will be placed in publications having a large circulation among minorities and women in the area from which the project work force would normally be derived.

a. The contractor will, unless precluded by a valid bargaining agreement, conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minorities and women. To meet this requirement, the contractor will identify sources of potential minority group employees, and establish with such identified sources procedures whereby minority and women applicants may be referred to the contractor for employment consideration.

b. In the event the contractor has a valid bargaining agreement providing for exclusive hiring hall referrals, the contractor is expected to observe the provisions of that agreement to the extent that the system meets the contractor's compliance with EEO contract provisions. Where implementation of such an agreement has the effect of discriminating against minorities or women, or obligates the contractor to do the same, such implementation violates Federal nondiscrimination provisions.

c. The contractor will encourage its present employees to refer minorities and women as applicants for employment. Information and procedures with regard to referring such applicants will be discussed with employees.

5. Personnel Actions: Wages, working conditions, and employee benefits shall be established and administered, and personnel actions of every type, including hiring, upgrading, promotion,
transfer, demotion, layoff, and termination, shall be taken without regard to race, color, religion, sex, national origin, age or disability. The following procedures shall be followed:

a. The contractor will conduct periodic inspections of project sites to insure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel.

b. The contractor will periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory wage practices.

c. The contractor will periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the contractor will promptly take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, such corrective action shall include all affected persons.

d. The contractor will promptly investigate all complaints of alleged discrimination made to the contractor in connection with its obligations under this contract, will attempt to resolve such complaints, and will take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination may affect persons other than the complainant, such corrective action shall include such other persons. Upon completion of each investigation, the contractor will inform every complainant of all of their avenues of appeal.

6. Training and Promotion:

a. The contractor will assist in locating, qualifying, and increasing the skills of minorities and women who are applicants for employment or current employees. Such efforts should be aimed at developing full journey level status employees in the type of trade or job classification involved.

b. Consistent with the contractor's work force requirements and as permissible under Federal and State regulations, the contractor shall make full use of training programs, i.e., apprenticeship, and on-the-job training programs for the geographical area of contract performance. In the event a special provision for training is provided under this contract, this subparagraph will be superseded as indicated in the special provision. The contracting agency may reserve training positions for persons who receive welfare assistance in accordance with 23 U.S.C. 140(a).

c. The contractor will advise employees and applicants for employment of available training programs and entrance requirements for each.

d. The contractor will periodically review the training and promotion potential of employees who are minorities and women and will encourage eligible employees to apply for such training and promotion.

7. Unions: If the contractor relies in whole or in part upon unions as a source of employees, the contractor will use good faith efforts to obtain the cooperation of such unions to increase opportunities for minorities and women. Actions by the contractor, either directly or through a contractor's association acting as agent, will include the procedures set forth below:
a. The contractor will use good faith efforts to develop, in cooperation with the unions, joint training programs aimed toward qualifying more minorities and women for membership in the unions and increasing the skills of minorities and women so that they may qualify for higher paying employment.

b. The contractor will use good faith efforts to incorporate an EEO clause into each union agreement to the end that such union will be contractually bound to refer applicants without regard to their race, color, religion, sex, national origin, age or disability.

c. The contractor is to obtain information as to the referral practices and policies of the labor union except that to the extent such information is within the exclusive possession of the labor union and such labor union refuses to furnish such information to the contractor, the contractor shall so certify to the contracting agency and shall set forth what efforts have been made to obtain such information.

d. In the event the union is unable to provide the contractor with a reasonable flow of referrals within the time limit set forth in the collective bargaining agreement, the contractor will, through independent recruitment efforts, fill the employment vacancies without regard to race, color, religion, sex, national origin, age or disability; making full efforts to obtain qualified and/or qualifiable minorities and women. The failure of a union to provide sufficient referrals (even though it is obligated to provide exclusive referrals under the terms of a collective bargaining agreement) does not relieve the contractor from the requirements of this paragraph. In the event the union referral practice prevents the contractor from meeting the obligations pursuant to Executive Order 11246, as amended, and these special provisions, such contractor shall immediately notify the contracting agency.

8. Reasonable Accommodation for Applicants / Employees with Disabilities: The contractor must be familiar with the requirements for and comply with the Americans with Disabilities Act and all rules and regulations established there under. Employers must provide reasonable accommodation in all employment activities unless to do so would cause an undue hardship.

9. Selection of Subcontractors, Procurement of Materials and Leasing of Equipment: The contractor shall not discriminate on the grounds of race, color, religion, sex, national origin, age or disability in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The contractor shall take all necessary and reasonable steps to ensure nondiscrimination in the administration of this contract.

a. The contractor shall notify all potential subcontractors and suppliers and lessors of their EEO obligations under this contract.

b. The contractor will use good faith efforts to ensure subcontractor compliance with their EEO obligations.

10. Assurance Required by 49 CFR 26.13(b):

a. The requirements of 49 CFR Part 26 and the State DOT’s U.S. DOT-approved DBE program are incorporated by reference.
b. The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the contracting agency deems appropriate.

11. Records and Reports: The contractor shall keep such records as necessary to document compliance with the EEO requirements. Such records shall be retained for a period of three years following the date of the final payment to the contractor for all contract work and shall be available at reasonable times and places for inspection by authorized representatives of the contracting agency and the FHWA.

a. The records kept by the contractor shall document the following:

(1) The number and work hours of minority and non-minority group members and women employed in each work classification on the project;

(2) The progress and efforts being made in cooperation with unions, when applicable, to increase employment opportunities for minorities and women; and

(3) The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minorities and women;

b. The contractors and subcontractors will submit an annual report to the contracting agency each July for the duration of the project, indicating the number of minority, women, and non-minority group employees currently engaged in each work classification required by the contract work. This information is to be reported on Form FHWA-1391. The staffing data should represent the project work force on board in all or any part of the last payroll period preceding the end of July. If on-the-job training is being required by special provision, the contractor will be required to collect and report training data. The employment data should reflect the work force on board during all or any part of the last payroll period preceding the end of July.

III. NONSEGREGATED FACILITIES

This provision is applicable to all Federal-aid construction contracts and to all related construction subcontracts of $10,000 or more.

The contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex, or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensure that its employees are not assigned to perform their services at any location, under the contractor's control, where the facilities are segregated. The term "facilities" includes waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, washrooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas.
transportation, and housing provided for employees. The contractor shall provide separate or single-user restrooms and necessary dressing or sleeping areas to assure privacy between sexes.

IV. **DAVIS-BACON AND RELATED ACT PROVISIONS**

This section is applicable to all Federal-aid construction projects exceeding $2,000 and to all related subcontracts and lower-tier subcontracts (regardless of subcontract size). The requirements apply to all projects located within the right-of-way of a roadway that is functionally classified as Federal-aid highway. This excludes roadways functionally classified as local roads or rural minor collectors, which are exempt. Contracting agencies may elect to apply these requirements to other projects.

The following provisions are from the U.S. Department of Labor regulations in 29 CFR 5.5 “Contract provisions and related matters” with minor revisions to conform to the FHWA-1273 format and FHWA program requirements.

1. **Minimum wages**

   a. All laborers and mechanics employed or working upon the site of the work, will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

   Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph 1.d. of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph 1.b. of this section) and the Davis-Bacon poster (WH–1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

   b. (1) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed
under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

(i) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(ii) The classification is utilized in the area by the construction industry; and

(iii) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(2) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(3) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Wage and Hour Administrator for determination. The Wage and Hour Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(4) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs 1.b.(2) or 1.b.(3) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

c. Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

d. If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the
applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

2. Withholding

The contracting agency shall upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor under this contract, or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the contracting agency may, after written notice to the contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

3. Payrolls and basic records

a. Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

b. (1) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the contracting agency. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH–347 is available for this purpose from the Wage and Hour Division Web site at
http://www.dol.gov/esa/whd/forms/wh347instr.htm or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the contracting agency for transmission to the State DOT, the FHWA or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the contracting agency.

(2) Each payroll submitted shall be accompanied by a “Statement of Compliance,” signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(i) That the payroll for the payroll period contains the information required to be provided under §5.5(a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under §5.5(a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;

(ii) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;

(iii) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(3) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH–347 shall satisfy the requirement for submission of the “Statement of Compliance” required by paragraph 3.b.(2) of this section.

(4) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

c. The contractor or subcontractor shall make the records required under paragraph 3.a. of this section available for inspection, copying, or transcription by authorized representatives of the contracting agency, the State DOT, the FHWA, or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the FHWA may, after written notice to the contractor, the contracting agency or the State DOT, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.
4. Apprentices and trainees

a. Apprentices (programs of the USDOL).

Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed.

Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination.

In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

b. Trainees (programs of the USDOL).

Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration.
The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration.

Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.

In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

c. Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

d. Apprentices and Trainees (programs of the U.S. DOT).

Apprentices and trainees working under apprenticeship and skill training programs which have been certified by the Secretary of Transportation as promoting EEO in connection with Federal-aid highway construction programs are not subject to the requirements of paragraph 4 of this Section IV. The straight time hourly wage rates for apprentices and trainees under such programs will be established by the particular programs. The ratio of apprentices and trainees to journeymen shall not be greater than permitted by the terms of the particular program.

5. Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

6. Subcontracts. The contractor or subcontractor shall insert Form FHWA-1273 in any subcontracts and also require the subcontractors to include Form FHWA-1273 in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

7. Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.
8. **Compliance with Davis-Bacon and Related Act requirements.** All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

9. **Disputes concerning labor standards.** Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

10. **Certification of eligibility.**

   a. By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

   b. No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).


V. **CONTRACT WORK HOURS AND SAFETY STANDARDS ACT**

The following clauses apply to any Federal-aid construction contract in an amount in excess of $100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by 29 CFR 5.5(a) or 29 CFR 4.6. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

1. **Overtime requirements.** No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

2. **Violation; liability for unpaid wages; liquidated damages.** In the event of any violation of the clause set forth in paragraph (1.) of this section, the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (1.) of this section, in the sum of $10 for each calendar day on which such individual was required or
permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1.) of this section.

3. Withholding for unpaid wages and liquidated damages. The FHWA or the contacting agency shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2.) of this section.

4. Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (1.) through (4.) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (1.) through (4.) of this section.

VI. SUBLETTING OR ASSIGNING THE CONTRACT

This provision is applicable to all Federal-aid construction contracts on the National Highway System.

1. The contractor shall perform with its own organization contract work amounting to not less than 30 percent (or a greater percentage if specified elsewhere in the contract) of the total original contract price, excluding any specialty items designated by the contracting agency. Specialty items may be performed by subcontract and the amount of any such specialty items performed may be deducted from the total original contract price before computing the amount of work required to be performed by the contractor's own organization (23 CFR 635.116).

   a. The term “perform work with its own organization” refers to workers employed or leased by the prime contractor, and equipment owned or rented by the prime contractor, with or without operators. Such term does not include employees or equipment of a subcontractor or lower tier subcontractor, agents of the prime contractor, or any other assignees. The term may include payments for the costs of hiring leased employees from an employee leasing firm meeting all relevant Federal and State regulatory requirements. Leased employees may only be included in this term if the prime contractor meets all of the following conditions:

       (1) the prime contractor maintains control over the supervision of the day-to-day activities of the leased employees;

       (2) the prime contractor remains responsible for the quality of the work of the leased employees;

       (3) the prime contractor retains all power to accept or exclude individual employees from work on the project; and
(4) the prime contractor remains ultimately responsible for the payment of predetermined minimum wages, the submission of payrolls, statements of compliance and all other Federal regulatory requirements.

b. "Specialty Items" shall be construed to be limited to work that requires highly specialized knowledge, abilities, or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid or propose on the contract as a whole and in general are to be limited to minor components of the overall contract.

2. The contract amount upon which the requirements set forth in paragraph (1) of Section VI is computed includes the cost of material and manufactured products which are to be purchased or produced by the contractor under the contract provisions.

3. The contractor shall furnish (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work) and (b) such other of its own organizational resources (supervision, management, and engineering services) as the contracting officer determines is necessary to assure the performance of the contract.

4. No portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the contracting officer, or authorized representative, and such consent when given shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract. Written consent will be given only after the contracting agency has assured that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract.

5. The 30% self-performance requirement of paragraph (1) is not applicable to design-build contracts; however, contracting agencies may establish their own self-performance requirements.

VII. SAFETY: ACCIDENT PREVENTION

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

1. In the performance of this contract the contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR 635). The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the contracting officer may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

2. It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR 1926) promulgated by the
Secretary of Labor, in accordance with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704).

3. Pursuant to 29 CFR 1926.3, it is a condition of this contract that the Secretary of Labor or authorized representative thereof, shall have right of entry to any site of contract performance to inspect or investigate the matter of compliance with the construction safety and health standards and to carry out the duties of the Secretary under Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C.3704).

VIII. FALSE STATEMENTS CONCERNING HIGHWAY PROJECTS

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

In order to assure high quality and durable construction in conformity with approved plans and specifications and a high degree of reliability on statements and representations made by engineers, contractors, suppliers, and workers on Federal-aid highway projects, it is essential that all persons concerned with the project perform their functions as carefully, thoroughly, and honestly as possible. Willful falsification, distortion, or misrepresentation with respect to any facts related to the project is a violation of Federal law. To prevent any misunderstanding regarding the seriousness of these and similar acts, Form FHWA-1022 shall be posted on each Federal-aid highway project (23 CFR 635) in one or more places where it is readily available to all persons concerned with the project:

18 U.S.C. 1020 reads as follows:

"Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the cost thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction on any highway or related project submitted for approval to the Secretary of Transportation; or

Whoever knowingly makes any false statement, false representation, false report or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or

Whoever knowingly makes any false statement or false representation as to material fact in any statement, certificate, or report submitted pursuant to provisions of the Federal-aid Roads Act approved July 1, 1916, (39 Stat. 355), as amended and supplemented;

Shall be fined under this title or imprisoned not more than 5 years or both."

IX. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT
This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

By submission of this bid/proposal or the execution of this contract, or subcontract, as appropriate, the bidder, proposer, Federal-aid construction contractor, or subcontractor, as appropriate, will be deemed to have stipulated as follows:

1. That any person who is or will be utilized in the performance of this contract is not prohibited from receiving an award due to a violation of Section 508 of the Clean Water Act or Section 306 of the Clean Air Act.

2. That the contractor agrees to include or cause to be included the requirements of paragraph (1) of this Section X in every subcontract, and further agrees to take such action as the contracting agency may direct as a means of enforcing such requirements.

X. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION

This provision is applicable to all Federal-aid construction contracts, design-build contracts, subcontracts, lower-tier subcontracts, purchase orders, lease agreements, consultant contracts or any other covered transaction requiring FHWA approval or that is estimated to cost $25,000 or more – as defined in 2 CFR Parts 180 and 1200.

1. **Instructions for Certification – First Tier Participants:**

   a. By signing and submitting this proposal, the prospective first tier participant is providing the certification set out below.

   b. The inability of a person to provide the certification set out below will not necessarily result in denial of participation in this covered transaction. The prospective first tier participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective first tier participant to furnish a certification or an explanation shall disqualify such a person from participation in this transaction.

   c. The certification in this clause is a material representation of fact upon which reliance was placed when the contracting agency determined to enter into this transaction. If it is later determined that the prospective participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the contracting agency may terminate this transaction for cause of default.

   d. The prospective first tier participant shall provide immediate written notice to the contracting agency to whom this proposal is submitted if any time the prospective first tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
e. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180 and 1200. “First Tier Covered Transactions” refers to any covered transaction between a grantee or subgrantee of Federal funds and a participant (such as the prime or general contractor). “Lower Tier Covered Transactions” refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). “First Tier Participant” refers to the participant who has entered into a covered transaction with a grantee or subgrantee of Federal funds (such as the prime or general contractor). “Lower Tier Participant” refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

f. The prospective first tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

g. The prospective first tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions," provided by the department or contracting agency, entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the $25,000 threshold.

h. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (https://www.epls.gov/), which is compiled by the General Services Administration.

i. Nothing contained in the foregoing shall be construed to require the establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of the prospective participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

j. Except for transactions authorized under paragraph (f) of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

* * * * *
2. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – First Tier Participants:

a. The prospective first tier participant certifies to the best of its knowledge and belief, that it and its principals:

   (1) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency;

   (2) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

   (3) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (a)(2) of this certification; and

   (4) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

b. Where the prospective participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

2. **Instructions for Certification - Lower Tier Participants:**

(Applicable to all subcontracts, purchase orders and other lower tier transactions requiring prior FHWA approval or estimated to cost $25,000 or more - 2 CFR Parts 180 and 1200)

a. By signing and submitting this proposal, the prospective lower tier is providing the certification set out below.

b. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department, or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

c. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous by reason of changed circumstances.

d. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are
defined in 2 CFR Parts 180 and 1200. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations. “First Tier Covered Transactions” refers to any covered transaction between a grantee or subgrantee of Federal funds and a participant (such as the prime or general contract). “Lower Tier Covered Transactions” refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). “First Tier Participant” refers to the participant who has entered into a covered transaction with a grantee or subgrantee of Federal funds (such as the prime or general contractor). “Lower Tier Participant” refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

e. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

f. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the $25,000 threshold.

g. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (https://www.epls.gov/), which is compiled by the General Services Administration.

h. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

i. Except for transactions authorized under paragraph e of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

* * * * *

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Participants:

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**ATTACHMENT 2**
**TO EXHIBIT U**

DMEAST #14984306 v5
1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

* * * * *

XI. CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts which exceed $100,000 (49 CFR 20).

1. The prospective participant certifies, by signing and submitting this bid or proposal, to the best of his or her knowledge and belief, that:

   a. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

   b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

3. The prospective participant also agrees by submitting its bid or proposal that the participant shall require that the language of this certification be included in all lower tier subcontracts, which exceed $100,000 and that all such recipients shall certify and disclose accordingly.
ATTACHMENT A - EMPLOYMENT AND MATERIALS PREFERENCE FOR APPALACHIAN DEVELOPMENT HIGHWAY SYSTEM OR APPALACHIAN LOCAL ACCESS ROAD CONTRACTS

This provision is applicable to all Federal-aid projects funded under the Appalachian Regional Development Act of 1965.

1. During the performance of this contract, the contractor undertaking to do work which is, or reasonably may be, done as on-site work, shall give preference to qualified persons who regularly reside in the labor area as designated by the DOL wherein the contract work is situated, or the subregion, or the Appalachian counties of the State wherein the contract work is situated, except:

   a. To the extent that qualified persons regularly residing in the area are not available.

   b. For the reasonable needs of the contractor to employ supervisory or specially experienced personnel necessary to assure an efficient execution of the contract work.

   c. For the obligation of the contractor to offer employment to present or former employees as the result of a lawful collective bargaining contract, provided that the number of nonresident persons employed under this subparagraph (1c) shall not exceed 20 percent of the total number of employees employed by the contractor on the contract work, except as provided in subparagraph (4) below.

2. The contractor shall place a job order with the State Employment Service indicating (a) the classifications of the laborers, mechanics and other employees required to perform the contract work, (b) the number of employees required in each classification, (c) the date on which the participant estimates such employees will be required, and (d) any other pertinent information required by the State Employment Service to complete the job order form. The job order may be placed with the State Employment Service in writing or by telephone. If during the course of the contract work, the information submitted by the contractor in the original job order is substantially modified, the participant shall promptly notify the State Employment Service.

3. The contractor shall give full consideration to all qualified job applicants referred to him by the State Employment Service. The contractor is not required to grant employment to any job applicants who, in his opinion, are not qualified to perform the classification of work required.

4. If, within one week following the placing of a job order by the contractor with the State Employment Service, the State Employment Service is unable to refer any qualified job applicants to the contractor, or less than the number requested, the State Employment Service will forward a certificate to the contractor indicating the unavailability of applicants. Such certificate shall be made a part of the contractor's permanent project records. Upon receipt of this certificate, the contractor may employ persons who do not normally reside in the labor area to fill positions covered by the certificate, notwithstanding the provisions of subparagraph (1c) above.

5. The provisions of 23 CFR 633.207(e) allow the contracting agency to provide a contractual preference for the use of mineral resource materials native to the Appalachian region.
6. The contractor shall include the provisions of Sections 1 through 4 of this Attachment A in every subcontract for work which is, or reasonably may be, done as on-site work.
ATTACHMENT 3 TO EXHIBIT U

FEDERAL PREVAILING WAGE RATES
General Decision Number: VA120020 04/20/2012 VA20

Superseded General Decision Number: VA20100112

State: Virginia

Construction Type: Highway


* INDEPENDENT CITIES

HIGHWAY CONSTRUCTION PROJECTS (excluding tunnels, building structures in rest area projects & railroad construction; bascule, suspension & spandrel arch bridges designed for commercial navigation, bridges involving marine construction; and other major bridges).

<table>
<thead>
<tr>
<th>Modification Number</th>
<th>Publication Date</th>
<th>Rates</th>
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<tbody>
<tr>
<td>0</td>
<td>01/06/2012</td>
<td>CARPENTER (STRUCTURE)............ $ 18.55</td>
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<td>CEMENT MASON/CONCRETE FINISHER...$ 19.00</td>
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<td>LABORER</td>
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<tr>
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<td>Asphalt Raker....................$ 15.85</td>
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<td></td>
<td>Construction Worker I</td>
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<td>(Skilled Laborer)...............$ 14.41</td>
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<td></td>
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<td></td>
<td>(Laborer)......................$ 13.54</td>
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<td></td>
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<td>Guardrail Erector................$ 26.00</td>
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<td>Pipe Layer......................$ 19.00</td>
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<td></td>
<td>Power Tool Operator............$ 15.00</td>
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<td>Sign Erector....................$ 15.00</td>
</tr>
<tr>
<td></td>
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<td>PAINTER.........................$ 16.13</td>
</tr>
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* SUVA2010-010 02/01/2011
POWER EQUIPMENT OPERATOR:
Air Compressor.............$ 15.18
Asphalt Distributor........$ 17.50
Asphalt Paver..............$ 16.50
Backhoe....................$ 20.59
Boom/Auger................$ 18.50
Bulldozer (Utility)........$ 17.00
Bulldozer..................$ 20.40
Concrete Finisher Machine..$ 18.35
Concrete Saw...............$ 15.00
Crane, Derrick, Dragline
(1 cm & under).............$ 24.00
Crane, Derrick, Dragline
(over 1 cm)...............$ 20.00
Crusher Tender.............$ 22.99
Drill Operator.............$ 14.00
Excavator (Gradall).........$ 18.00
Front End Loader (2 cm &
under).......................$ 19.00
Front End Loader (over 2
cm).........................$ 20.42
Hydro Seeder...............$ 16.50
Mechanic...................$ 21.00
Mobile Mixer...............$ 17.00
Motor Grader (Fine Grade)..$ 27.25
Motor Grader (Rough Grade)$ 24.82
Pavement Marking Operator..$ 17.00
Pavement Marking Truck
Operator....................$ 13.45
Pavement Planing Groundman.$ 19.75
Pavement Planing Operator..$ 25.00
Pile Driver Operator.......$ 16.00
Roller (Finish).............$ 17.94
Roller (Rough)...............$ 17.06
Slip-Form Paver............$ 21.00
Slurry Seal Paver Machine..$ 12.00
Stone-Spreader...............$ 16.23
Tractor, Crawlers...........$ 17.31
Trenching Machine..........$ 19.00
Vacuum Machine................$ 16.64

TRAFFIC SIGNALIZATION:
Traffic Signal Installation $ 21.16

TRUCK DRIVER
Fuel & Lubricant Service
Truck Driver.................$ 16.50
Truck Driver (Multi-Rear
Axle)........................$ 18.00
Truck Driver (Single Rear
Axle).........................$ 17.50
Truck Driver (Tandem Rear
Axle)........................$ 15.97
Truck Driver, Heavy Duty
(7 c.y. & under)............$ 17.75
Truck Driver, Heavy Duty
(over 7 c.y.)...............$ 19.00
Truck, Utility.............$ 11.80

WELDER...........................$ 13.00

WELDERS - Receive rate prescribed for craft performing operation to which welding is incidental.

Unlisted classifications needed for work not included within the scope of the classifications listed may be added after award only as provided in the labor standards contract clauses (29CFR 5.5 (a) (1) (ii)).

The body of each wage determination lists the classification and wage rates that have been found to be prevailing for the cited type(s) of construction in the area covered by the wage determination. The classifications are listed in alphabetical order of “identifiers” that indicate whether the particular rate is union or non-union.

Union Identifiers

An identifier enclosed in dotted lines beginning with characters other than “SU” denotes that the union classification and rate have found to be prevailing for that classification. Example: PLUM0198-005 07/01/2011. The first four letters, PLUM, indicate the international union and the four-digit number, 0198, that follows indicates the local union number or district council number where applicable, i.e., Plumbers Local 0198. The next number, 005 in the example, is an internal number used in processing the wage determination. The date, 07/01/2011, following these characters is the effective date of the most current negotiated rate/collective bargaining agreement which would be July 1, 2011 in the above example.

Union prevailing wage rates will be updated to reflect any changes in the collective bargaining agreements governing the rate.

Non-Union Identifiers

Classifications listed under an “SU” identifier were derived from survey data by computing average rates and are not union rates; however, the data used in computing these rates may include both union and non-union data. Example: SULA2004-007 5/13/2010. SU indicates the rates are not union rates, LA indicates the State of Louisiana; 2004 is the year of the survey; and 007 is an internal number used in producing the wage determination. A 1993 or later date, 5/13/2010, indicates the classifications and rates under that identifier were issued as a General Wage Determination on that date.

Survey wage rates will remain in effect and will not change until a new survey is conducted.
WAGE DETERMINATION APPEALS PROCESS

1.) Has there been an initial decision in the matter? This can be:

* an existing published wage determination
* a survey underlying a wage determination
* a Wage and Hour Division letter setting forth a position on a wage determination matter
* a conformance (additional classification and rate) ruling

On survey related matters, initial contact, including requests for summaries of surveys, should be with the Wage and Hour Regional Office for the area in which the survey was conducted because those Regional Offices have responsibility for the Davis-Bacon survey program. If the response from this initial contact is not satisfactory, then the process described in 2.) and 3.) should be followed.

With regard to any other matter not yet ripe for the formal process described here, initial contact should be with the Branch of Construction Wage Determinations. Write to:

Branch of Construction Wage Determinations
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

2.) If the answer to the question in 1.) is yes, then an interested party (those affected by the action) can request review and reconsideration from the Wage and Hour Administrator (See 29 CFR Part 1.8 and 29 CFR Part 7). Write to:

Wage and Hour Administrator
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

The request should be accompanied by a full statement of the interested party’s position and by any information (wage payment data, project description, area practice material, etc.) that the requestor considers relevant to the issue.

3.) If the decision of the Administrator is not favorable, an interested party may appeal directly to the Administrative Review Board (formerly the Wage Appeals Board). Write to:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

4.) All decisions by the Administrative Review Board are final.

================================================================
END OF GENERAL DECISION
General Decision Number: VA120067 07/06/2012  VA67
Superseded General Decision Number: VA20100159
State: Virginia
Construction Types: Heavy (Heavy and Sewer and Water Line)

Counties: Manassas Park*, Manassas* and Prince William Counties in Virginia.

*INDEPENDENT CITIES

HEAVY CONSTRUCTION PROJECTS (Including Sewer and Water Lines)

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<tr>
<th>Modification Number</th>
<th>Publication Date</th>
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<tr>
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<td>1</td>
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BRVA0001-003 05/01/2011

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>MASON - STONE</td>
<td>$32.88</td>
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<td>13.99</td>
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CARP0132-018 05/01/2011

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ELEC0026-019 06/01/2011

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ENGI0077-019 09/08/2010

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<tbody>
<tr>
<td>POWER EQUIPMENT OPERATOR:</td>
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<tr>
<td>35 ton Cranes and Above</td>
<td>$31.09</td>
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<tr>
<td>Cranes Below 35 tons</td>
<td>$30.63</td>
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<tr>
<td>Mechanic</td>
<td>$32.46</td>
</tr>
<tr>
<td>Tower and Climbing Cranes</td>
<td>$31.09</td>
</tr>
<tr>
<td>Tower Cranes and Cranes</td>
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</tr>
<tr>
<td>100 tons and Over</td>
<td>$32.09</td>
</tr>
</tbody>
</table>

b. PREMIUM PAY:
   Tower crane and cranes 100-ton and over to receive $1.00 per hour premium.

LAB00710-010 04/01/2010

<table>
<thead>
<tr>
<th>Rates</th>
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<tbody>
<tr>
<td>LABORER: Pipelayer.............. $16.61</td>
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* PAIN0051-014 06/01/2012

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<tr>
<td>Glazing Contracts over $2 million.......................... $27.14</td>
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PLAS0891-006 05/01/2010

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SUVA2010-057 09/03/2010

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<td>DIVER............................ $23.73</td>
<td>4.21</td>
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<td>IRONWORKER, STRUCTURAL.......... $20.55</td>
<td>8.25</td>
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<td>LABORERS Common or General........... $11.02</td>
<td>1.32</td>
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<tr>
<td>Flagger............................ $ 7.39</td>
<td>0.20</td>
</tr>
<tr>
<td>Landscape....................... $ 10.00</td>
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POWER EQUIPMENT OPERATOR:

<table>
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<th>Rates</th>
<th>Fringes</th>
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<tbody>
<tr>
<td>Backhoe......................... $18.47</td>
<td>0.75</td>
</tr>
<tr>
<td>Bobcat/Skid Loader................ $11.40</td>
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</tr>
<tr>
<td>Bulldozer....................... $17.54</td>
<td></td>
</tr>
<tr>
<td>Crane (Tower)................... $23.29</td>
<td>6.02</td>
</tr>
<tr>
<td>Excavator........................ $17.79</td>
<td></td>
</tr>
<tr>
<td>Loader......................... $14.60</td>
<td>0.75</td>
</tr>
<tr>
<td>Trackhoe...................... $12.75</td>
<td>1.24</td>
</tr>
<tr>
<td>Tugboat........................... $19.00</td>
<td></td>
</tr>
</tbody>
</table>
TRUCK DRIVER, Includes All
Dump Trucks................. $ 12.16
-----------------------------------------------------------------

WELDERS - Receive rate prescribed for craft performing
operation to which welding is incidental.
-----------------------------------------------------------------

Unlisted classifications needed for work not included within
the scope of the classifications listed may be added after
award only as provided in the labor standards contract clauses
(29CFR 5.5 (a) (l) (ii)).
-----------------------------------------------------------------

The body of each wage determination lists the classification
and wage rates that have been found to be prevailing for the
cited type(s) of construction in the area covered by the wage
determination. The classifications are listed in alphabetical
order of "identifiers" that indicate whether the particular
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characters other than "SU" denotes that the union
classification and rate have found to be prevailing for that
classification. Example: PLUM0198-005 07/01/2011. The
first four letters, PLUM, indicate the international union and
the four-digit number, 0198, that follows indicates the local
union number or district council number where applicable,
i.e., Plumbers Local 0198. The next number, 005 in the
example, is an internal number used in processing the wage
determination. The date, 07/01/2011, following these
characters is the effective date of the most current
negotiated rate/collective bargaining agreement which would be
July 1, 2011 in the above example.

Union prevailing wage rates will be updated to reflect any
changes in the collective bargaining agreements governing the
rate.

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Classifications listed under an "SU" identifier were derived
from survey data by computing average rates and are not union
rates; however, the data used in computing these rates may
include both union and non-union data. Example: SULA2004-007
5/13/2010. SU indicates the rates are not union rates, LA
indicates the State of Louisiana; 2004 is the year of the
survey; and 007 is an internal number used in producing the
wage determination. A 1993 or later date, 5/13/2010, indicates
the classifications and rates under that identifier were issued as a General Wage Determination on that date.

Survey wage rates will remain in effect and will not change until a new survey is conducted.

-----------------------------------------------

WAGE DETERMINATION APPEALS PROCESS

1.) Has there been an initial decision in the matter? This can be:

* an existing published wage determination
* a survey underlying a wage determination
* a Wage and Hour Division letter setting forth a position on a wage determination matter
* a conformance (additional classification and rate) ruling

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U.S. Department of Labor
200 Constitution Avenue, N.W.
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3.) If the decision of the Administrator is not favorable, an interested party may appeal directly to the Administrative Review Board (formerly the Wage Appeals Board). Write to:
Administrative Review Board  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

4.) All decisions by the Administrative Review Board are final.

================================================================

END OF GENERAL DECISION
ATTACHMENT 4 TO EXHIBIT U

SF030AF-0708

VIRGINIA DEPARTMENT OF TRANSPORTATION
SPECIAL PROVISION FOR
NOTICE OF REQUIREMENT FOR AFFIRMATIVE ACTION TO ENSURE
EQUAL EMPLOYMENT OPPORTUNITY (EXECUTIVE ORDER 11246)

1. The Offeror's or Bidder's attention is called to the "Equal Opportunity Clause" and the "Standard Federal Equal Employment Opportunity Construction Contract Specifications" set forth herein.

2. The goals for female and minority participation, expressed in percentage terms of the Contractor's aggregate work force in each trade on all construction works in the covered area, are as follows:

   Females- 6.9%
   Minorities - See Attachment "A"

The goals are applicable to all the Contractor's construction work performed in the covered area, whether or not it is Federal or federally assisted. If the Contractor performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for such geographical area where the work is actually performed. With regard to this second area, the Contractor also is subject to the goals for both its federally involved and non-federally involved construction.

The Contractor's compliance with the Executive Order and the regulations in 41 CFR Part 60-4 shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by the specifications, set forth in 41 CFR 60-4.3(a), and its efforts to meet the goals established herein. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract, and in each trade, and the Contractor shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Contractor to Contractor or from project to project for the sole purpose of meeting the Contractor's goals shall be a violation of the contract, the Executives Order and the regulations in 41 CFR Part 60-4. Compliance with the goals will be measured against the total work hours performed.

3. The Contractor shall provide written notification to the Director of the Office of Federal Contract Compliance Programs within 10 workings days the award of any construction subcontract in excess of $10,000 at any tier for construction works under this contract. The notification shall list the name, address and telephone number of the subcontractor, employer identification number, estimated dollar amount of the subcontract, estimated
starting and completion dates of the subcontract and the geographical area in which the contract is to be performed.

STANDARD FEDERAL EQUAL EMPLOYMENT OPPORTUNITY CONSTRUCTION CONTRACT SPECIFICATIONS (EXECUTIVE ORDER 11246)

1. As, used in this provision:

   a. "Covered area" means the geographical area described in the solicitation from which this contract resulted;

   b. "Director" means Director, Office of Federal Contract Compliance Programs, United States Department of Labor, or any person to whom the Director delegates authority;

   c. "Employer identification number" means the Federal Social Security number used on the Employer's Quarterly Federal Tax Return, U. S. Treasury Department Form 941;

   d. "Minority" includes:

      (i) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);

      (ii) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);

      (iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and

      (iv) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

2. Whenever the Contractor, or any Subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of $10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation.

3. If the Contractor is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the U. S. Department of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors must be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each Contractor or Subcontractor participating in an approved Plan is individually
required to comply with its obligations under the EEO clause, and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other Contractors and Subcontractors toward a goal in an approved Plan does not excuse any covered Contractor's or Subcontractor's failure to take good faith efforts to achieve the Plan goals and timetables.

4. The Contractor shall implement the specific affirmative action standards provided in paragraphs 7a through p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the coverer area. Covered construction Contractors performing construction work in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed. Goals are published periodically in the Federal Register in notice form, and such notices may be obtained from any Office of Federal Contract Compliance Programs office or from Federal procurement contracting officers. The Contractor is expected to make substantially uniform progress in meeting its goals in each craft during the period specified.

5. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the Contractor's obligations under these specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.

6. In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the Contractor during the training period, and the Contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U. S. Department of Labor.

7. The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, shall assign two or more women to each construction project. The Contractor shall specifically ensure that all foreman, superintendents and other on-site supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites in such facilities.
b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.

c. Maintain a current file of the names, addresses and telephone numbers of each minority and female off the street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union, or if referred, not employed by the Contractor, this shall be documented in the file with the reason therefore, along with whatever additional actions the Contractor may have taken.

d. Provide immediate written notification to the Director when the union or unions which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or women sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.

e. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources complied under 7b above.

f. Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper or annual report; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.

g. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination, or other employment decisions including specific review of these items with onsite supervisory personnel such as Superintendents and General Foremen prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed and disposition of the subject matter.

h. Disseminate the Contractor's EEO policy externally by including in any news media advertisement that the Contractor is "An Equal Opportunity Employer" for minority and female, and providing written notification to and discussing the
Contractor's EEO policy with other Contractors and Subcontractors with whom the Contractor does or anticipates doing business.

i. Directs its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures and tests to be used in the selection process.

j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of Contractor's workforce.

k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60-3.

l. Conduct, at least annually, an inventory and evaluation of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for such opportunities through appropriate training or other means.

m. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out.

n. Ensure that all facilities and company activities are nonsegregated, except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

o. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

p. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

8. Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7a through p). The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under 7a through p of these Specifications provided that the contractor actively participates in the group, makes every effort to assure that the
group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

9. Goals for women have been established. However, the Contractor IS required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female and all women, both minority and non-minority. Consequently, the Contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner, that is even thought the Contractor has achieved its goals for women, the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized.

10. The Contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex or nation origin.

11. The Contractor shall not enter into any Subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.

12. The Contractor shall carry out such sanctions and penalties for violation of these specifications and the Equal Opportunity Clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations by the Office of Federal Contract Compliance Programs. Any Contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.

13. The Contractor, in fulfilling its obligations under these specifications shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 7 of these specifications, so as to achieve maximum results from Its efforts to ensure equal employment opportunity. If the Contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director will proceed in accordance with 41 CFR 60-4.8.

14. The Contractor shall designate and make known to the Department a responsible official as the EEO Officer to monitor all employment related activity, to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice, trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, Contractors will not be required to maintain separate records.
15. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).
Economic Area Goal (Percent)

Virginia:
021 Roanoke-Lynchburg, VA
SMSA Counties:
4640 Lynchburg, VA .................................................. 19.3
   VA Amherst; VA Appomattox; VA Campbell; VA Lynchburg.
6800 Roanoke, VA .................................................. 10.2
   VA Botetourt; VA Craig; VA Roanoke; VA Roanoke City; VA Salem
Non-SMSA Counties................................................. 12.0
   VA Alleghany; VA Augusta; VA Bath; VA Bedford; VA Bland; VA Carroll;
   VA Floyd; VA Franklin; VA Giles; VA Grayson; VA Henry; VA Highland;
   VA Montgomery; VA Nelson; VA Patrick; VA Pittsylvania; VA Pulaski;
   VA Rockbridge; VA Rockingham; VA Wythe; VA Bedford City; VA Buena Vista;
   VA Clifton Forge; VA Covington; VA Danville; VA Galax; VA Harrisonburg;
   VA Lexington; VA Martinsville; VA Radford; VA Staunton; VA Waynesboro;
   WV Pendleton.

022 Richmond, VA:
SMSA Counties:
6140 Petersburg - Colonial Heights - Hopewell, VA .................. 30.6
   VA Dinwiddie; VA Prince George; VA Colonial Heights; VA Hopewell;
   VA Petersburg.
6760 Richmond, VA .................................................. 24.9
   VA Charles City; VA Chesterfield; VA Goochland, VA Hanover; VA
   Henrico; VA New Kent; VA Powhatan; VA Richmond.
Non-SMSA Counties.................................................. 27.9
   VA Albemarle; VA Amelia; VA Brunswick; VA Buckingham, VA Caroline;
   VA Charlotte; VA Cumberland; VA Essex; VA Fluvanna; VA Greene; VA
   Greensville; VA Halifax; VA King and Queen; VA King William; VA
   Lancaster; VA Louisa; VA Lunenburg; VA Madison; VA .Mecklenburg; VA
   Northumberland; VA Nottoway; VA Orange; VA Prince Edward; VA Richmond
   VA Sussex; VA Charlottesville; VA Emporia; VA South Boston

023 Norfolk - Virginia Beach - Newport News VA:
SMSA Counties:
5680 Newport News- Hampton, VA .................................. 27.1
   VA Gloucester; VA James City; VA York; VA Hampton; VA Newport
   News; VA Williamsburg.
5720 Norfolk - Virginia Beach - Portsmouth, VA - NC ............ 26.6
   NC Currituck; VA Chesapeake; VA Norfolk; VA Portsmouth; VA
   Suffolk; VA Virginia Beach.
Non-SMSA Counties .................................................. 29.7
   NC Bertie; NC Camden; NC Chowan; NC Gates; NC Hertford;
   NC Pasquotank; NC Perquimans; VA Isle of Wight; VA Matthews;
VA Middlesex; VA Southampton; VA Surry; VA Franklin.

Washington, DC:

020 Washington, DC.

SMSA Counties:

8840 Washington, DC - MD - VA ................................................................. 28.0

DC District of Columbia; MD Charles; MD Montgomery MD Prince
Georges; VA Arlington; VA Fairfax; VA Loudoun; VA Prince William
VA Alexandria; VA Fairfax City; VA Falls Church.

Non- SMSA Counties........................................................................ 25.2

MD Calvert; MD Frederick; MD St. Marys: MD Washington; VA Clarke;
VA Culpeper; VA Fauquier; VA Frederick; VA King George; VA Page; VA
Rappahannock; VA Shenandoah; VA Spottsylvania; VA Stafford; VA
Warren; VA Westmoreland; VA Fredericksburg; VA Winchester WV Berkeley;
WV Grant; WV Hampshire; WV Hardy; WV Jefferson; WV Morgan.

Tennessee:

052 Johnson City - Kingsport - Bristol, TN - VA

SMSA Counties:

3630 Johnson City - Kingsport -Bristol, TN-VA ........................................ 2.6

TN Carter; TN Hawkins; TN Sullivan; TN Washington; VA Scott: VA
Washington; VA Bristol.

Non-SMSA Counties.............................................................. 3.2

TN Greene; TN Johnson; VA Buchanan; VA Dickenson; Va Lee;
VA Russell; VA Smyth; VA Tazewell; VA Wise; VA Norton; WV McDowell;
WV Mercer.
ATTACHMENT 5 TO EXHIBIT U

DEBARMENT AND SUSPENSION CERTIFICATION

1. By signing and submitting its proposal or bid, and by executing the Comprehensive Agreement or Subcontract, each prospective Concessionaire and Contractor (at all tiers) shall be deemed to have signed and delivered the following certification:

   The undersigned certifies to the best of its knowledge and belief, that it and its principals:

   a. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

   b. Have not within a 3-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

   c. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph 1b of this certification; and

   d. Have not within a 3-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

2. Where the prospective Concessionaire or Contractor is unable to certify to any of the statements in this certification, such Person shall attach a certification to its proposal or bid, or shall submit it with the executed Comprehensive Agreement or Contract, stating that it is unable to provide the certification and explaining the reasons for such inability.
CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING

By signing and submitting its proposal or bid, and by executing the Comprehensive Agreement or Subcontract, each prospective the Concessionaire and Contractor (at all tiers) shall be deemed to have signed and delivered the following:

1. The prospective the Concessionaire/Contractor certifies, to the best of its knowledge and belief, that:
   
   a. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of ANY Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

   b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with THIS Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions, and shall include a copy of said form in its proposal or bid, or submit it with the executed Comprehensive Agreement or Contract.

2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

3. The Concessionaire/Contractor shall require that the language of this certification be included in all lower tier Contracts which exceed $100,000 and that all such recipients shall certify and disclose accordingly.

4. The undersigned certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the undersigned understands and agrees that the provisions of 31 U.S.C. §3801, et seq., apply to this certification and disclosure, if any.

[Note: Pursuant to 31 U.S.C. § 1352(c)(1)-(2)(A), any person who makes a prohibited expenditure or fails to file or amend a required certification or disclosure form shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each expenditure or failure.]
NOTE: THE CONCESSIONAIRE AND EACH CONTRACTOR IS REQUIRED, PURSUANT TO FEDERAL LAW, TO INCLUDE THE ABOVE LANGUAGE IN CONTRACTS OVER $100,000 AND TO OBTAIN THIS LOBBYING CERTIFICATE FROM EACH CONTRACTOR BEING PAID $100,000 OR MORE.
ATTACHMENT 7 TO EXHIBIT U

[RESERVED]
ATTACHMENT 8 TO EXHIBIT U

COMPLIANCE WITH BUY AMERICA REQUIREMENTS

The Concessionaire shall comply with the Federal Highway Administration (FHWA) Buy America Requirement in 23 CFR 635.410, which permits FHWA participation in this Agreement only if domestic steel and iron will be used on the Project. To be considered domestic, all steel and iron used and all products manufactured from steel and iron must be produced in the United States and all manufacturing processes, including application of a coating, for these materials must occur in the United States. Coating includes all processes that protect or enhance the value of the material to which the coating is applied. This requirement does not preclude a minimal use of foreign steel and iron materials, provided that the cost of such materials included in any Contract between the Concessionaire and a Contractor involving construction work does not exceed 0.1% of the contract price of such Contract.

Concurrently with execution of the Agreement, the Concessionaire has completed and submitted, or shall complete and submit, to the Department a Buy America Certificate, in format below. After submittal, the Concessionaire is bound by its original certification. However, in accordance with 49 USC 5323(j)(7), the Concessionaire may have the opportunity to correct an inadvertent error in its certification. The Concessionaire may correct any certification of noncompliance or failure to properly complete this certification if the Concessionaire attests under penalty of perjury that it submitted an incorrect certification as a result of an inadvertent or clerical error. The burden of establishing such inadvertent or clerical error is on the Concessionaire. The Concessionaire’s failure to sign the certification is not considered an inadvertent or clerical error.

A false certification is a criminal act in violation of 18 U.S.C. 1001. Should this Agreement be investigated, the Concessionaire has the burden of proof to establish that it is in compliance.

At the Concessionaire’s request, the Department may, but is not obligated to, seek a waiver of Buy America requirements if grounds for the waiver exist. However, the Concessionaire certifies that it will comply with the applicable Buy America requirements if a waiver of those requirements is not available or not pursued by the Department. A request for a waiver shall be treated as a Concessionaire request for a Deviation under Section 14.03 of the Agreement.
BUY AMERICA CERTIFICATE

Certificate of Compliance

The Concessionaire hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j)(2), and the applicable regulations in 23 CFR 635.410.

Date: _________________________________________

Signature:______________________________________

Concessionaire’s Name: _______________________________

Title: _________________________________________

Or

Certificate for Noncompliance

The Concessionaire hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j)(2), but may qualify for a waiver to the requirement to 49 U.S.C. 5323(j)(2)(B) or (j)(2)(D) and regulations in 23 CFR 635.410.

Date: __________________________________________

Signature: ______________________________________

Concessionaire’s Name: ________________________________

Title: __________________________________________
ATTACHMENT 9 TO EXHIBIT U

S102CF1-0309

VIRGINIA DEPARTMENT OF TRANSPORTATION

SPECIAL PROVISION FOR

USE OF DOMESTIC MATERIAL

February 26, 2009

SECTION 102.05 PREPARATION OF BID of the Specifications is amended to include the following:

In accordance with the provisions of Section 635.410(b) of Title 23 CFR, hereinafter referred to as “Buy America”, except as otherwise specified, all iron and steel products (including miscellaneous steel items such as fasteners, nuts, bolts and washers) to be permanently incorporated for use on federal aid projects shall be produced in the United States of America regardless of the percentage they exist in the manufactured product or final form they take. Therefore, "Domestically produced in the United States of America" means all manufacturing processes must occur in the United States of America, to mean, in one of the 50 States, the District of Columbia, Puerto Rico or in the territories and possessions of the United States. Manufacturing processes are defined as any process which alters or modifies the chemical content, physical size or shape or final finish of iron or steel material such as rolling, extruding, bending, machining, fabrication, grinding, drilling, finishing, or coating whereby a raw material or a reduced iron ore material is changed, altered or transformed into a steel or iron item or product which, because of the process, is different from the original material. For the purposes of satisfying this requirement “coating” is defined as the application of epoxy, galvanizing, painting or any other such process that protects or enhances the value of the material. Materials used in the coating process need not be domestic materials.

For the purposes herein the manufacturing process is considered complete when the resultant product is ready for use as an item in the project (e.g. fencing, posts, girders, pipe, manhole covers, etc.) or is incorporated as a component of a more complex product by means of further manufacturing. Final assembly of a product may occur outside of the United States of America provided no further manufacturing process takes place.

Raw materials such as iron ore, pig iron, processed, pelletized and reduced iron ore, waste products (including scrap, that is, steel or iron no longer useful in its present form from old automobiles, machinery, pipe, railroad rail, or the like and steel trimmings from mills or product manufacturing) and other raw materials used in the production of steel and/or iron products may, however, be imported. Extracting, handling, or crushing the raw materials which are inherent to the transporting the materials for later use in the manufacturing process are exempt from Buy America. The use of foreign source steel or iron billet is not acceptable.
under the provisions of Buy America. For the purposes of this provision all steel or iron material not meeting the criteria as domestically produced in the United States of America will be considered as “foreign” material. All iron and steel items will be classified hereinafter as "domestic" or "foreign", identified by and subject to the provisions herein.

Domestically produced iron or steel ingots or billets shipped outside the United States of America for any manufacturing process and returned for permanent use in a project would not comply with “Buy America” requirements.

Buy America provisions do not apply to iron or steel products used temporarily in the construction of a project such as temporary sheet piling, temporary bridges, steel scaffolding, falsework or such temporary material or product or material that remains in place for the Contractor’s convenience.

Section 635.410(b) of Title 23 CFR permits a minimal amount of steel or iron material to be incorporated in the permanent work on a federal-aid contract. The cost of such materials or products must not exceed one-tenth of one percent of the contract amount or $2500, whichever is greater. The cost of the foreign iron or steel material is defined as its monetary value delivered to the job site and supported by invoices or bill of sale to the Contractor. This delivered to site cost must include transportation, assembly, installation and testing.

In the event the total cost of all "foreign" iron and steel product or material does not exceed one-tenth of one percent of the total contract cost or $2,500, whichever is greater, the use of such material meeting the limitations herein will not be restricted by the domestic requirements herein. However, by signing the bid, the Bidder certifies that such cost does not exceed the limits established herein.

**Waivers:**

With prior concurrence from Federal Highway Administration (FHWA) headquarters, the Federal Highway Division Administrator may grant a waiver to specific projects provided it can be demonstrated:

1. that the use of domestic steel or iron materials would be inconsistent with the public interest; or

2. materials or products requested for use are not produced in the United States in sufficient or reasonably available quantities and are of satisfactory quality for use in the permanent work.

The waiver request shall be submitted with supportive information to include:

1. Project number\description, project cost, waiver item, item cost, country of origin for the product, reason for the waiver, and

2. Analysis of redesign of the project using alternative or approved equal domestic products.
In order to grant such a waiver the request for the waiver must be published in the Federal Register for a period not less than 15 days or greater than 60 days prior to waiving such requirement. An initial 15 day comment period to the waiver will be available to the public by means of the FHWA website: http://www.fhwa.dot.gov/construction/contracts/waivers.cfm. Following that initial 15 day period of review and comment the request for waiver will be published by the FHWA in the Federal Register. The effective date of the FHWA finding, either to approve or deny the waiver request, will be 15 days following publication in the Federal Register.

Only the FHWA Administrator may grant nationwide waivers which still are subject to the public rulemaking and review process.

**Alternative Bidding Procedures:**

An alternative bidding procedure may be employed to justify the use of foreign iron and/or steel. To qualify under this procedure the total project is bid using two alternatives, one based on the use of domestic products and the other, the use of corresponding foreign source steel and/or iron materials.

In accordance with the provisions of Section 103.02 the Contract will be awarded to the lowest responsive and responsible bidder who submits the lowest total bid based on furnishing domestic iron or steel unless such total exceeds the lowest total bid based on furnishing foreign iron and/or steel by more than 25 percent, in which case the award will be made to the lowest responsive and responsible bidder furnishing foreign iron and/or steel based upon furnishing verifiable supportive data. The bidder shall submit a bid based on permanently incorporating only domestic iron and/or steel in the construction of the project. The bidder may also submit a bid for the same proposed contract based on being allowed to permanently incorporate corresponding foreign iron and/or steel materials meeting the other contract requirements into the work on the contract. If he chooses to submit such a bid, that alternate bid shall clearly indicate which foreign iron and/or steel items will be permanently installed in the work as well as contain prices for all other items listed in the corresponding domestic proposal to complete a total “Foreign” bid.

In the event the contract is awarded to the bidder furnishing foreign iron and/or steel materials or items the provision for price adjustment of steel items will be permitted, however, price fluctuations shall use the U.S. index as stated in the Special Provision for Price Adjustment For Steel. The Contractor must indicate which corresponding eligible steel items he chooses price adjustment to apply. In the event the contract is awarded to a bidder furnishing foreign iron and/or steel items and during the life of that contract the Contractor discovers he can not furnish foreign iron and/or steel material as originally anticipated and agreed upon, he shall be responsible to honor the total bid price and furnish such iron and/or steel materials meeting the contract requirements from other sources as necessary to complete the work.

In the event the Contractor proposes to furnish "foreign" iron and steel and can verify a savings in excess of 25 percent of the overall project cost if bid using domestic materials, the Contractor shall submit a second complete paper bid proposal clearly marked “Foreign”
including Form C-7 and supportive data supplement on all sheets. Supportive data shall list, but not be limited to, origin of material, best price offer, quantity and complete description of material, mill analysis, evidence or certification of conformance to contract requirements, etc. The “Foreign” bid shall be completed using the best price offer for each corresponding bid item supplying foreign material in the alternative bid and submit the same with the Contractor’s “Domestic” bid. The Contractor shall write the word “Foreign” by the bid total shown on Form C-7 as well as last page of Schedule of Items showing the total bid amount. The bidder shall also contact the State Contract Engineer to inform him that he is also submitting an alternate “Foreign” paper bid.

The information listed on the supportive data sheet(s) will be used to provide the basis for verification of the required cost savings. In the event comparison of the prices given, or corrected as provided in Section 103.01 of the Specifications, shows that use of "foreign" iron and steel items does not represent a cost savings exceeding the aforementioned 25 percent, "domestic" iron and/or steel and prices given there for shall be used and the "100 percent Domestic Items Total" shall be the Contractor's bid.

Certification of Compliance:

Where domestic material is supplied, prior to final payment the Contractor shall furnish to the Department a certificate of compliance (such as may be furnished by steel mill test reports) that all steel and/or iron products supplied to the project except as may be permitted (one-tenth of one percent of the total contract cost or $2,500, whichever is greater) and permanently incorporated into the work satisfies the domestic requirements herein. This certification shall contain a definitive statement about the origin of all products covered under the provisions of Buy America as stated herein.

In lieu of the Contractor providing personal certification, the Contractor may furnish a stepped certification in which each handler of the product, such as supplier, fabricator, manufacturer, processor, etc. furnishes an individual certification that their step in the process was domestically performed.
EXHIBIT Y

INSURANCE COVERAGE REQUIREMENTS FOR DESIGN-BUILD CONTRACTOR AND O&M CONTRACTOR

Section 1 Insurance Coverages Prior to Final Acceptance

Except as set forth below, the Concessionaire will obtain and maintain, or cause the Design-Build Contractor to obtain and maintain, the following insurance coverages during the performance of the Design-Build Work. Unless required otherwise, all insurance coverages listed below will be purchased specifically and exclusively for the Project, with coverage limits devoted solely to the Project. Policy coverage limits may be achieved through a combination of insurance policies (e.g. primary and/or excess).

(a) Workers’ Compensation and Employer’s Liability Insurance with statutory workers’ compensation (Coverage A) limits and employer’s liability (Coverage B) limits of $2 million bodily injury by accident, each accident, and $2 million bodily injury by disease, each employee. Coverage will be extended, if needed, to cover any claims under the United States Longshore and Harbor Workers’ Compensation Act (33 U.S.C. §§ 901-950) and the Jones Act (46 U.S.C. § 30104).

(b) Commercial General Liability Insurance including coverage for premises and operations, independent contractors, personal injury, product and completed operations, explosion, collapse and underground, and broad form contractual liability of limits of at least $2 million per occurrence and $4 million annual aggregate applicable on a per project basis. The Department is to be named as an additional insured on a primary, non-contributory basis.

(c) Automobile Liability Insurance with a limit of at least $2 million combined single limit for bodily injury and property damage covering all owned (if any), non-owned, hired, or borrowed vehicles on site or off. The Department is to be named as an additional insured on a primary, non-contributory basis.

(d) Umbrella/Excess Liability Insurance in excess of the underlying limits noted above for employer’s liability, commercial general liability, and automobile liability in the amount of $100 million per occurrence and in the aggregate.

(e) Builder’s Risk Insurance for physical loss, destruction, or physical damage to the Work. The Builder’s Risk insurance will cover the Concessionaire, the Design-Build Contractor, the Department, and other Contractors of all tiers prior to Final Acceptance; provided, that the limits of such coverage may be based on a maximum probable loss analysis, subject to the Department’s approval of such maximum probable loss analysis by an independent third party acceptable to the Department. In no event will the limits of such coverage be less than $100 million. Further, the policy will include sub-limits for certain specified perils including, but not limited to: Offsite Storage, Property in Transit, Expediting Expenses, Demolition and Increased Cost of Construction, Debris Removal and Professional Fees/ Loss adjustment expenses. At Design-Build Contractor’s option, Mobile Equipment may be covered under the Builder’s Risk Insurance or a separate Equipment Floater Policy may be purchased. The policy also will include replacement cost coverage for materials, supplies, equipment,
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(f) **Contractor’s Pollution Liability Insurance** to indemnify for bodily injury, property damage, or amounts which the Concessionaire, its employees, its agents, or its Contractors are legally obligated to pay for clean up/remediation work arising out of the Design-Build Work, including coverage, if needed, for marine operations and coverage for liabilities under the Oil Pollution Act of 1990 (33 U.S.C. §§ 2701-2762) and the Comprehensive Environmental Response, Liability, and Compensation Act (42 U.S.C. §§ 9601-9675) for marine operations. Such insurance will have minimum limits of $10 million any one claim and in the aggregate and will remain in full force and effect for the period of the Design-Build Work and five years completed operations extension after Substantial Completion of the Project.

(g) **Marine Protection and Indemnity Insurance** – if any of the Design-Build Work requires marine operations - the Concessionaire and its Contractors shall provide protection and indemnity coverage with respect to bodily injury or property damage arising from marine operations including damage to piers, wharves, other fixed or movable structures, and loss or damage to any other vessel, craft, or property on such other vessel or craft. Such insurance will have minimum limits of $5 million in the aggregate. The Concessionaire is not obligated to purchase a Project-specific Marine Protection and Indemnity Insurance, but will cause such insurance coverage to name the Department as an additional insured on a primary, non-contributory basis.

(h) **Railroad Protective Liability Insurance**, as may be required by any railroad in connection with Work across, under or adjacent to the railroad’s tracks or railroad right-of-way, including for the Norfolk Southern Railroad with a coverage limit of $5 million per occurrence and $10 million in the aggregate.

(i) **Architects/Engineers Professional Liability Insurance** covering the Design-Build Contractor’s lead design engineer for acts, errors, or omissions arising in connection with the Design-Build Work, including design and engineering work performed pursuant to the Interim Agreement, for not less than $15 million any one claim and in the aggregate. Such insurance, which may be purchased and maintained by the Design-Build Contractor’s lead design engineer, will remain in full force and effect during the performance of the Design-Build Work and with an extended reporting period for five years after Substantial Completion.

**Section 2 Insurance Coverages Required for the Project During the Operating Period**

The Concessionaire will obtain and maintain, or cause the O&M Contractor to obtain and maintain, the following insurance coverages applicable to the O&M Work. Policy coverage limits may be achieved through a combination of insurance policies (e.g. primary and/or excess).

(a) **Workers’ Compensation and Employer’s Liability Insurance** with statutory workers’ compensation (Coverage A) limits and employer’s liability (Coverage B) limits of $1 million bodily injury by accident, each accident, and $1 million bodily injury by disease, each employee. Coverage will be extended, if needed, to cover any claims under the United States

(b) **Commercial General Liability Insurance** including coverage for premises and operations, independent contractors, personal injury, product and completed operations, explosion, collapse and underground, and broad form contractual liability of limits of at least $2 million per occurrence and $4 million annual aggregate, applicable on a per location basis. The Department is to be named as an additional insured on a primary, non-contributory basis.

(c) **Automobile Liability Insurance** with a limit of at least $2 million combined single limit for bodily injury and property damage covering all owned (if any), non-owned, hired, or borrowed vehicles on site or off. The Department is to be named as an additional insured on a primary, non-contributory basis.

(d) **Umbrella/Excess Liability Insurance** in excess of the underlying limits noted above for employer’s liability, commercial general liability, and automobile liability in the amount of $100 million per occurrence and in the aggregate.

(e) **Property and Business Interruption Insurance** at replacement cost covering loss, damage, or destruction to the Project, including improvements and betterments; *provided*, that the limits of such coverage may be based on a maximum probable loss analysis, subject to the Department’s approval of such maximum probable loss analysis by an independent third party acceptable to the Department. In no event will the limits of such coverage be less than $100 million. Coverage will include, but not be limited to, the following: flood; earthquake; earth movement; collapse; water (including overflow); leakage; utility interruption; debris removal; business ordinance or law for increased costs of construction; extra expenses; valuable papers; and terrorism. Subject to the applicable deductible, such coverage also will insure against interruption or loss of projected Toll Revenues for at least six months from the occurrence of the risk, resulting from physical damage to the Project and any relevant feeder roads. The Department is to be named as an additional insured on a primary, non-contributory basis. The Concessionaire is responsible for all loss or damage to personal property (including but not limited to materials, fixtures/contents, equipment, tools, and supplies) of the Concessionaire.

(f) **Pollution Liability Insurance** to indemnify for bodily injury, property damage, or amounts which the Concessionaire, its employees, its agents, or its Contractors are legally obligated to pay for clean up/remediation work arising out of the O&M Work, including coverage, if needed, for marine operations and coverage for liabilities under the Oil Pollution Act of 1990 (33 U.S.C. §§ 2701-2762) and the Comprehensive Environmental Response, Liability, and Compensation Act (42 U.S.C. §§ 9601-9675) for marine operations. Such insurance will have minimum limits of $10 million any one claim and in the aggregate.

(g) **Marine Protection and Indemnity Insurance** – if any of the O&M Work requires marine operations - the Concessionaire and its Contractors shall provide protection and indemnity coverage with respect to bodily injury or property damage arising from marine operations including damage to piers, wharves, other fixed or movable structures and loss or damage to any other vessel, craft, or property on such other vessel or craft. Such insurance will have minimum limits of $5 million in the aggregate.
Section 3  Insurance Coverage Requirements for Other Contractors

The Concessionaire will cause all Contractors (other than the Design-Build Contractor and the O&M Contractor) performing any portion of the Work to obtain and maintain the following insurance coverages or be responsible for maintaining such coverages on their behalf:

(a)  **Workers’ Compensation and Employer’s Liability Insurance** with statutory workers’ compensation (Coverage A) limits and employer’s liability (Coverage B) limits of $1 million bodily injury by accident, each accident, and $1 million bodily injury by disease, each employee. Coverage will be extended, if needed, to cover any claims under the United States Longshore and Harbor Workers’ Compensation Act (33 U.S.C. §§ 901-950) and the Jones Act (46 U.S.C. § 30104).

(b)  **Commercial General Liability Insurance** will include coverage for premises and operations, independent contractors, personal injury, product and completed operations, explosion, collapse and underground, and contractual liability with limits for contract expenditures of less than $100,000, the limits must be no less than $1,000,000 per occurrence and $1,000,000 in the aggregate annually, and for contract expenditure greater than $100,000, limits of no less than $2,000,000 per occurrence and $2,000,000 in the aggregate annually. To the extent commercially obtainable, deductible per occurrence should not exceed $100,000. The Concessionaire and the Department are to be named as additional insured on a primary, non-contributory basis.

(c)  **Automobile Liability Insurance** with a limit of at least $500,000 combined single limit for bodily injury and property damage covering all owned (if any), non-owned, hired, or borrowed vehicles on site or off. The Concessionaire and the Department are to be named as additional insured.

(d)  **Umbrella/Excess Liability Insurance** in excess of the underlying limits noted above for employer’s liability, commercial general liability and automobile liability in the amount of $2,000,000 per occurrence and in the aggregate for contracts of less than $100,000 or $5,000,000 per occurrence and in the aggregate for contracts greater than $100,000.

(e)  **Professional Liability Insurance** (applicable only to Contractors rendering professional services, including, but not limited to, architects, engineers, traffic consultants, accountants, attorneys, etc.) with limits of at least $1,000,000 per claim and in the aggregate. Such insurance will remain in full force and effect during the performance of such professional services and with an extended reporting period for two years after completion of such professional services.
SHARED FACILITIES AGREEMENT

by and between

Capital Beltway Express LLC

and

95 Express Lanes LLC

Dated as of July 31, 2012
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SHAREDPASCILITIES AGREEMENT

This SHARED FACILITIES AGREEMENT (this “Agreement”), dated as of July 31, 2012, by and between Capital Beltway Express LLC, a Delaware limited liability company (“CBE”), and 95 Express Lanes LLC, a Delaware limited liability company (“95 Express”); CBE and 95 Express are sometimes referred to herein individually as a “Party” and collectively as the “Parties.”

RECITALS

WHEREAS, CBE has entered into the Amended and Restated Comprehensive Agreement Relating to the Route 495 Hot Lanes in Virginia Project, dated as of December 19, 2007 (the “ARCA”), with the Virginia Department of Transportation (the “Department” or “VDOT”), pursuant to which it is causing to be constructed and will operate the Route 495 HOT Lanes in Virginia Project (the “Beltway Project”);

WHEREAS, 95 Express intends to enter into the Comprehensive Agreement Relating to the I-95 HOV/HOT Lanes Project (the “CA” and, together with the ARCA, the “Comprehensive Agreements”), with VDOT, pursuant to which it, subject to the occurrence of Financial Close (as defined below), will cause to be constructed and will operate the I-95 HOV/HOT Lanes Project (the “I-95 Project” and, together with the Beltway Project, the “HOT Lanes Projects”);

WHEREAS, as part of the Beltway Project CBE has constructed and equipped a building located at 6440 General Green Way, Alexandria, Virginia (the “Express Operations Center”) housing, among other things, certain equipment and personnel used for the TTMS and administration of the Beltway Project; the Express Operations Center is owned by the Department but, pursuant to the ARCA, CBE has the exclusive right to manage, operate, maintain, improve and equip the Express Operations Center, with the right to jointly own and operate assets or property used for the operation or maintenance of the Beltway Project and other projects owned or operated by Affiliates of CBE so long as the cost of such assets and properties are reasonably shared and documented;

WHEREAS, CBE has equipped the Express Operations Center with equipment and software used as part of the tolling and traffic management system of the Beltway Project, and the operator thereof provides personnel to operate such equipment and software and to provide certain other services to the Beltway Project;

WHEREAS, the Parties have determined that shared use of the Express Operations Center, certain of the tolling and traffic management system equipment located therein (and associated software), certain additional tolling and traffic management system and other equipment (and associated software) contemplated to be installed therein, and certain of the services provided by the operator thereof, will promote efficiencies and result in lower costs to the Parties than if each of the Parties constructed and operated separate buildings and utilized separate tolling and traffic management system equipment and operating personnel for the tolling and administration of its respective HOT Lanes Project;
WHEREAS, 95 Express has requested and the Department has agreed to grant to 95 Express in the CA the right, subject to the rights of CBE set forth in the ARCA and herein, to have access to and the shared right to manage, operate, maintain, improve and equip the Express Operations Center and utilize certain of the tolling and traffic management system equipment (and associated software) in connection with the tolling and administration of the I-95 Project;

WHEREAS, the Parties wish to set forth their mutual understandings and agreements regarding the right of 95 Express to access and utilize the Express Operations Center on a shared basis with CBE.

NOW, THEREFORE, in consideration of the premises and the mutual agreements contained herein, each of CBE and 95 Express hereby covenants and agrees as follows:

ARTICLE 1

DEFINITIONS

1.1 Definitions. As used in this Agreement, the following capitalized terms have the meanings indicated:

“95 Express” has the meaning set forth in the first paragraph of this Agreement.

“95 Express Dedicated Space” means that portion of the Express Operations Center identified on Exhibit C-1 as “I-95.”

“95 Express Indemnified Parties” has the meaning set forth in Section 8.2.

“Access Fee” has the meaning set forth in Section 3.1

“Additional Contribution” has the meaning set forth in Section 10.1.

“Affiliate” means, when used to indicate a relationship with a specified Person, a Person that (a) directly or indirectly, through one or more intermediaries has a 10% or more voting or economic interest in such specified Person or (b) controls, is controlled by or is under common control with such specified Person, and a Person is deemed to be controlled by another Person, if controlled in any manner whatsoever that results in control in fact by that other Person (or that other Person and any Person or Persons with whom that other Person is acting jointly or in concert), whether directly or indirectly and whether through share ownership, a trust, a contract or otherwise.

“Agreement” has the meaning set forth in the first paragraph hereof.

“Allocated Interest” means, with respect to a Party, a percentage equal to the amount of the Beltway Project’s, in the case of CBE, or the I-95 Project’s, in the case of 95 Express, use of the Shared Facilities and Shared Services, as a percentage of the total use of the Shared Facilities and Shared Services. Each Party’s Allocated Interest in the Shared Facilities and Shared Services is set forth on Exhibit A, but such Allocated Interests may be modified pursuant to Section 4.1.4.
“**ARCA**” has the meaning set forth in the recitals hereto.

“**Beltway DB Contract**” means that certain Turnkey Lump-Sum Design-Build Contract for the Route 495 HOT Lanes in Virginia Project, dated as of December 18, 2007, between CBE and Fluor-Lane LLC pursuant to which Fluor-Lane LLC is designing and constructing the Beltway Project.

“**Beltway Financing Documents**” means the documents pursuant to which the Lenders to CBE provide debt financing for the Beltway Project.

“**Beltway OSSA**” means that certain Amended and Restated Operating and Support Services Agreement, dated as of June 12, 2008, between CBE and TUSA Operations, pursuant to which TUSA Operations will operate and maintain the Beltway Project (including, subject to the terms of this Agreement, the Shared Facilities) on behalf of and as an independent contractor for CBE, or any replacement agreement regarding the operation and maintenance of the Beltway Project.

“**Beltway Project**” has the meaning set forth in the recitals hereto.

“**Beltway Project Documents**” means, collectively, (i) the ARCA, (ii) the Beltway DB Contract, (iii) the Beltway OSSA, (iv) the Governmental Approvals applicable to the Beltway Project, (v) the Beltway Financing Documents, and (vi) any additional contract, instrument or agreement, or any amendment, modification or supplement to one of the Beltway Project Documents, in each case entered into by CBE after the Effective Date, which may have a material effect on the development, construction, testing, startup or commercial operations of the Beltway Project or on the performance of CBE’s obligations hereunder.

“**Business Day**” means any day on which the Department is officially open for business.

“**CA**” has the meaning set forth in the recitals hereto.

“**CBE**” has the meaning set forth in the first paragraph of this Agreement.

“**CBE Dedicated Space**” means that portion of the Express Operations Center identified on Exhibit C-1 as “CBE.”

“**CBE Indemnified Parties**” has the meaning set forth in Section 8.1.

“**Change in Law**” means (a) the enactment of any Law after the Effective Date, or (b) any change, amendment to, repeal or revocation of any Law or in the interpretation or application thereof by any Governmental Authority after the Effective Date; excluding, however, any change in or new Law enacted but not yet effective as of the Effective Date.

“**Claim**” means any and all claims, disputes, disagreements, causes of action, demands, suits, proceedings, damages, injuries, liabilities, obligations, losses, costs and expenses.

“**Comprehensive Agreements**” has the meaning set forth in the recitals hereto and, if a Person that is an Affiliate of both CBE and 95 Express becomes a party to this Agreement
pursuant to Section 4.1.5, shall also refer to the comprehensive or concession agreement between such Person and the Department.

“Default Rate” means an interest rate per annum equal to the lesser of (a) the sum of the Prime Rate, plus two hundred (200) basis points, and (b) the maximum rate permitted by Law.

“Designated Representative” means the person identified by each Party pursuant to Section 5.1 who is authorized to bind such Party regarding decisions or actions to be made under this Agreement.

“Dispute” has the meaning set forth in Section 10.3.

“Effective Date” means the date this Agreement is executed and delivered by the Parties.

“Event of Default” has the meaning set forth in Section 6.1.

“Express Operations Center” has the meaning set forth in the recitals hereto.

“Financing Documents” means, individually or collectively as the context requires, the Beltway Financing Documents and the I-95 Financing Documents.

“Financial Close” means the initial funding by the Lenders to 95 Express of debt financing for the I-95 Project as part of an irrevocable commitment, subject only to the satisfaction of customary conditions to continued funding, to lend to 95 Express an aggregate amount that, when combined with any equity and other funds that are then committed to be provided to 95 Express, is projected to be sufficient to allow the I-95 Project to be constructed, tested and placed into regular commercial operation pursuant to the CA.

“Force Majeure Event” means the occurrence of an event, act, omission, condition, or circumstance beyond either parties’ reasonable control and due to no fault of either Party, or those for whom either party is responsible, that materially prevents or delays either Party from performing any of its obligations pursuant to the Agreement. An event is not a Force Majeure Event if such event is otherwise specifically dealt with in the Agreement or arises by reason of:

(a) the negligence or misconduct of a Party;
(b) any act or omission by a Party in breach of the provisions of the Agreement;
(c) an event constituting a “Delay Event” (so defined) under either Comprehensive Agreement, other than events otherwise constituting Force Majeure Events hereunder;
(d) lack or insufficiency of funds or failure to make payment of monies or provide required security on the part of a Party;
(e) any strike, labor dispute or labor protest directed solely at a Party or caused by or attributable to any act (including any pricing or other practice or method of operation) or omission of a Party;
(f) market conditions and economic conditions affecting the availability, supply, or cost of labor, equipment and materials, construction equipment and supplies, or commodities; or

(j) market conditions and economic conditions affecting traffic volumes, traffic revenue or a Party’s ability to meet its financial obligations for its respective HOT Lanes Project.

“Generally Accepted Accounting Principles” or “GAAP” means such accepted accounting practice as conforms at the time to generally accepted accounting principles in the United States of America, consistently applied.

“Good Industry Practice” means the exercise of the degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced concessionaire, operator or contractor seeking in good faith to comply with its contractual obligations, complying with all applicable Laws and Governmental Approvals and engaged in the same type of undertaking under similar circumstances and conditions. “Good Industry Practice” is not intended to be limited to the optimum practice or method to the exclusion of all others, but rather to be a spectrum of reasonable and prudent practices, methods, standards and procedures.

“Governmental Approvals” means all local, regional, state and Federal agreements, studies, findings, permits, approvals, authorizations, certifications, consents, decisions, exemptions, filings, leases, licenses, registrations, rulings and other governmental authorizations required to be obtained or completed under Law prior to undertaking any particular activity contemplated by the Agreement.

“Governmental Authority” means any court, federal, state, or local government, department, commission, board, bureau, agency or other regulatory or governmental authority, but will not include the Department acting solely in its capacity as a party to either Comprehensive Agreement.

“HOT Lanes Projects” has the meaning set forth in the recitals hereto.

“Indemnity Claim Notice” has the meaning set forth in Section 8.3.1.

“I-95 DB Contract” means that certain Turnkey Lump-Sum Design-Build Contract for the I-95 HOV/HOT Lanes Project expected to be executed between 95 Express and Fluor-Lane 95, LLC pursuant to which Fluor-Lane 95, LLC will design and construct the I-95 Project.

“I-95 Financing Documents” means the documents pursuant to which the Lenders to 95 Express provide debt financing for the I-95 Project.

“I-95 OSSA” means that certain Operating and Support Services Agreement to be executed between 95 Express and TUSA Operations pursuant to which TUSA Operations will operate and maintain the I-95 Project (including, subject to the terms of this Agreement, the Shared Facilities) on behalf of and as an independent contractor for 95 Express, or any replacement agreement regarding the operation and maintenance of the I-95 Project.

“I-95 Project” has the meaning set forth in the recitals hereto.
“I-95 Project Documents” means, collectively, (i) the CA, (ii) the I-95 DB Contract, (iii) the I-95 OSSA, (iv) the Governmental Approvals applicable to the I-95 Project, (v) the I-95 Financing Documents, and (vi) any additional contract, instrument or agreement, or any amendment, modification or supplement to one of the I-95 Project Documents, in each case entered into by 95 Express after the Effective Date, which may have a material effect on the development, construction, testing, startup or commercial operations of the I-95 Project or on the performance of 95 Express’s obligations hereunder.

“Law” means (i) all laws, treaties, ordinances, judgments, decrees, injunctions, writs and orders of any Governmental Authority, and (ii) all rules, regulations, orders, formal interpretations and permits of any Governmental Authority having jurisdiction over the Shared Facilities or the Express Operations Center or the operation thereof, as applicable, in each case as the same may be in effect from time to time.

“Lender” means any Person providing debt financing to a Party for purposes of developing, constructing, operating, maintaining, repairing or rebuilding its HOT Lanes Project.

“Material Adverse Effect” means (a) with respect to CBE, a material adverse effect on any of (i) the operation and maintenance of the Beltway Project, (ii) the ability of CBE to meet its obligations under the Beltway Project Documents, (iii) any Governmental Approval material to CBE, or (iv) the business, operations or financial condition of CBE; and (b) with respect to 95 Express, a material adverse effect on any of (i) the operation and maintenance of the I-95 Project, (ii) the ability of 95 Express to meet its obligations under the I-95 Project Documents, (iii) any Governmental Approval material to 95 Express, or (iv) the business, operations or financial condition of 95 Express.

“Notice” has the meaning set forth in Section 10.6.

“Operations and Maintenance” means the operation and maintenance of the Shared Facilities by the Shared Facilities Operator, which includes any and all costs (both operating expenditures and capital expenditures) associated with such services.

“Operator” means TUSA Operations or such other Person that is the operator under either OSSA.

“OSSA” or “OSSAs” means, individually or collectively as the context requires, the Beltway OSSA and the I-95 OSSA.

“Party” or “Parties” means, initially, each of 95 Express and CBE, individually or collectively as the context requires, as well as any other Person becoming a party to this Agreement pursuant to Section 4.1.5.

“Person” means an individual, partnership, corporation, business trust, joint stock company, trust, unincorporated association, joint venture, Governmental Authority, limited liability company or any other entity of whatever nature.

“Prime Rate” means the interest rate per annum for large commercial loans as published in The Wall Street Journal, eastern edition, as the “prime rate” (sometimes referred to as the
“base rate”) from time to time (or, if more than one rate is published, the arithmetic mean of such rates), determined as of the date the obligation to pay interest arises.

“Representative” means, with respect to any Person, to the extent engaged by such Person for specific activities, any member, shareholder, officer, director, principal, agent, third party advisor (such as attorneys, accountants and consultants), employee, contractor, subcontractor or other representative or advisor of such Person.

“Required Modification” has the meaning set forth in Section 4.1.7.

“Shared Facilities” has the meaning set forth in Section 4.1.1.

“Shared Facilities Operator” means TUSA Operations or any replacement thereof selected pursuant to the terms of this Agreement.

“Shared Services” has the meaning set forth in Section 4.1.1.

“Term” has the meaning set forth in Section 2.1.

“TTMS” means toll and traffic management system, including transportation management system equipment, communications equipment, and associated hardware and physical infrastructure and other computer hardware and software (including both the tolling subsystem and Express Operations Center traffic management subsystem), in each case as set forth on Exhibit B-1.

“TUSA Operations” means Transurban (USA) Operations Inc.

“VDOT” or “Department” has the meaning set forth in the recitals hereto.

“Willful Action” means any of: (a) action taken or not taken by a Party at the direction of its directors, officers or employees having management or administrative responsibility affecting such Party’s performance under this Agreement, which action is knowingly or intentionally taken or not taken with conscious indifference to the consequences thereof or with the intent that injury or damage would result or would probably result therefrom, including any act or failure to act constituting gross negligence but excluding any act or failure to act which is merely involuntary, accidental or negligent; or (b) action taken or not taken by a Party at the direction of its directors, officers or employees having management or administrative responsibility affecting such Party’s performance under this Agreement, which action has been determined by final judgment or judicial decree to be a material default under this Agreement and which occurs or continues beyond the time specified in such final judgment or judicial decree for curing such default or, if no time is specified therein, which occurs or continues beyond a reasonable time to cure such default. For purposes of this definition, the phrase “employees having management or administrative responsibility” means employees of a Party who are responsible for one or more of the executive functions of planning, organizing, coordinating, directing, controlling and supervising such Party’s performance under this Agreement.

“Winding-Up” of, or in relation to, a Person means the dissolution, liquidation or bankruptcy of that Person, or any equivalent or analogous procedure under any Law.
1.2 Rules of Interpretation. Unless otherwise required by the context in which any term appears: (a) capitalized terms used in this Agreement shall have the meanings specified in this Article 1; (b) the singular shall include the plural and vice versa; (c) references to “Articles,” “Sections,” or “Exhibits” shall be to articles, sections, or Exhibits hereof, unless otherwise specified; (d) all references to a particular Person in any capacity shall be deemed to refer also to such Person’s authorized agents, successors and permitted assigns in such capacity; (e) the words “herein,” “hereof” and “hereunder” shall refer to this Agreement as a whole and not to any particular section or subsection hereof; (f) the words “include,” “includes” and “including” shall be deemed to be followed by the phrase “without limitation” and shall not be construed to mean that the examples given are an exclusive list of the topics covered; (g) all accounting terms not specifically defined herein shall be construed in accordance with Generally Accepted Accounting Principles; (h) references to this Agreement shall include a reference to all exhibits hereto, as the same may be amended, modified, supplemented or replaced from time to time; (i) references to any agreement, document or instrument shall be construed at a particular time to refer to such agreement, document or instrument as the same may be amended, modified, supplemented or replaced as of such time; (j) the masculine shall include the feminine and neuter and vice versa; and (k) references to a Law shall mean a reference to such Law as the same may be amended, modified, supplemented or restated and be in effect from time to time. The Parties collectively have prepared this Agreement, and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this Agreement or any part hereof.

ARTICLE 2
TERM

2.1 Effectiveness and Term. The term of this Agreement (the “Term”) shall commence on the Effective Date and, unless canceled or terminated earlier in accordance with its terms and except as otherwise expressly set forth in this Agreement, shall expire on the date on which either Comprehensive Agreement expires or is terminated, unless the Department assumes the rights and obligations under this Agreement of the Party whose Comprehensive Agreement is terminated as contemplated in Section 7.3, in which case this Agreement shall survive between the Department and the Party whose Comprehensive Agreement has not been terminated and otherwise remains in effect. In all events the Term shall terminate automatically on the date neither Comprehensive Agreement remains in effect.

2.2 Obligations Subject to Financial Close. Except for the rights and obligations set forth in Sections 4.1.5 and 4.1.6 and Articles 7 and 10, the rights and obligations of each Party under this Agreement are subject to and conditioned upon the occurrence of Financial Close with respect to the I-95 Project. 95 Express shall notify CBE promptly (and in any case within five (5) days) upon the occurrence of Financial Close, and shall provide such advance notice of its belief that Financial Close will occur as is reasonably possible. If Financial Close does not occur on or before December 20, 2013 and if payment of the Access Fee is not made within one (1) business day after Financial Close, then this Agreement shall terminate automatically without the need for the giving of notice or the taking of any action by either Party except as may be otherwise mutually agreed by the Parties.
2.3 Continued Access and Rights to Utilize. The termination of this Agreement as a result of the expiration or termination of a Comprehensive Agreement shall not affect the rights with respect to the Shared Facilities of the Party whose Comprehensive Agreement remains in effect.

ARTICLE 3

ACCESS RIGHTS TO EXPRESS OPERATIONS CENTER; PAYMENT OF ACCESS FEE

3.1 Grant of Access Rights by CBE. In consideration of, and subject to, the payment by 95 Express to CBE in immediately available funds in accordance with the wiring instructions set forth on Schedule 1 hereto of the sum of $21,395,410 (the “Access Fee”) on the date of Financial Close, CBE hereby grants to 95 Express and its respective designees an irrevocable, non-exclusive right during the Term:

3.1.1 to utilize the roads, grounds, parking areas, walkways and other properties located at the Express Operations Center that CBE has the right to utilize pursuant to the ARCA, other than the CBE Dedicated Space, and to utilize the other Shared Facilities on the terms set forth in this Agreement; and

3.1.2 of ingress, egress, regress and other access across, in and to all of its properties located at the Express Operations Center that CBE has the right to utilize pursuant to the ARCA, other than the CBE Dedicated Space;

in each case for the construction, testing, startup and operation and maintenance of the I-95 Project. Notwithstanding the foregoing, 95 Express agrees that it will not, without the prior written consent of CBE (not to be unreasonably withheld), but subject to Section 4.1.7, construct or install any communications line, fiber optic cable or other improvement or modification at the Express Operations Center other than those communications lines, fiber optic cables and other modifications or improvements as contemplated for the installation of the TTMS for the I-95 Project as set forth on Exhibit B-2, as well as replacements thereof and other improvements as the Express Operations Center that are already constructed or installed as shown on the drawing included as Exhibit C-2.

3.2 Grant of Access Rights by 95 Express. In consideration of the covenants and agreements set forth herein, 95 Express hereby grants to CBE and its respective designees an irrevocable, non-exclusive right during the Term:

3.2.1 to utilize the roads, grounds, parking areas, walkways and other properties located at the Express Operations Center that 95 Express has the right to utilize pursuant to the CA, other than the 95 Express Dedicated Space, and to utilize the other Shared Facilities on the terms set forth in this Agreement; and

3.2.2 of ingress, egress, regress and other access across, in and to all of its properties located at the Express Operations Center that 95 Express has the right to utilize pursuant to the CA, other than the 95 Express Dedicated Space;
in each case for the construction, testing, startup and operation and maintenance of the Beltway Project. Notwithstanding the foregoing, CBE agrees that it will not, without the prior written consent of 95 Express (not to be unreasonably withheld), but subject to Section 4.1.7, construct or install any communications line, fiber optic cable or other improvement or modification at the Express Operations Center other than those already constructed or installed or to be installed as shown on the drawing included as Exhibit C-2, and replacements thereof.

3.3 No Property Interest in Shared Facilities. Pursuant to the Comprehensive Agreements, the Shared Facilities constitute part of the Project Right of Way (as defined in the Comprehensive Agreements) for both the Beltway Project and the I-95 Project. The Parties acknowledge that the grants of ingress, egress, regress, other access, and rights to utilize the Express Operations Center and the other Shared Facilities do not constitute the conveyance of any ownership or other property interest in real or personal property in the same since the legal owner of the same is the Department. In addition, each Party acknowledges that the grants made by the other Party hereunder cannot and do not constitute a grant of any rights in the Project Right of Way of the Shared Facilities greater than those granted by the Department in the Comprehensive Agreements.

3.4 Maintenance and Repair. Each Party shall be solely responsible for maintaining and repairing those portions of its respective HOT Lanes Project except to the extent otherwise provided in this Agreement with respect to the Shared Facilities. Such maintenance and repair shall be performed in accordance with Good Industry Practice and the governing OSSA, and the costs thereof shall be borne by the Party with the maintenance and repair obligation except to the extent resulting from the gross negligence or willful misconduct of the other Party, in which case such other Party shall be responsible therefor.

3.5 Protections of Persons and Property. Each of the Parties shall be solely responsible for the safety and protection of its employees, agents and contractors, as well as its and their respective personal property, while at the Express Operations Center. Except as otherwise expressly provided in the immediately succeeding sentence or in Article 8 hereof, neither Party shall be held liable by the other Party for any injury or death of any such persons or any damage to any such property which may occur during such times with respect to Shared Facilities. Each Party hereby indemnifies and holds harmless the other Party from and against any claim made against such indemnified Party by the indemnifying Party’s employees, agents or contractors with respect to the Shared Facilities, except to the extent that such claim results from such otherwise indemnified Party’s gross negligence or willful misconduct.

ARTICLE 4

SHARED FACILITIES AND SHARED SERVICES

4.1 Shared Facilities and Shared Services.

4.1.1 Components. The Express Operations Center, the TTMS, and the other items enumerated as “Shared Facilities” on Exhibit B-1, as well as those items to be constructed or installed pursuant to Section 4.1.2 (collectively, the “Shared Facilities”), are intended to be utilized by both the Beltway Project and the I-95 Project as provided in this Agreement. For the
avoidance of doubt, “Shared Facilities” do not include the CBE Dedicated Space or the 95 Express Dedicated Space.

The services enumerated as “Shared Services” on Exhibit B-1 (collectively, the “Shared Services”) are intended to be utilized by both the Beltway Project and the I-95 Project as provided in this Agreement. The Parties, acting through their Designated Representatives, may jointly agree to add or delete Shared Services as they deem appropriate.

4.1.2 Installation of Additional Components. The Parties have agreed to enhance the capabilities of the Shared Facilities by causing the additional components and equipment identified on Exhibit B-2 to be installed. 95 Express will cause the additional components and equipment to be obtained, installed, commissioned and tested as part of the work to be performed under the I-95 DB Agreement. 95 Express will pay the cost of obtaining and installing the additional TTMS components of the Shared Facilities.

4.1.3 Right to Utilize. Each Party shall have the right to utilize on a nonexclusive basis an undivided interest equal to its Allocated Interest in the Shared Facilities. The right to use the Shared Facilities includes all rights of ingress, egress, regress and access necessary or appropriate in order to use, operate, maintain and repair such Shared Facilities, as well as the right of 95 Express to interconnect the tolling, traffic management and other data and information systems of the I-95 Project with such Shared Facilities (and to construct, operate, maintain, repair and, if necessary, replace and remove communications lines, fiber optic cables or other interconnections and any components thereof as provided in Section 3.1, such activities to be undertaken in accordance with the standards set forth in Section 4.3 and in a manner that minimizes interference with the operations of the Beltway Project), in accordance with and pursuant to the terms of this Agreement. Each Party shall consult and coordinate with the other Party in advance of taking any such action that could (singly or cumulatively with prior actions) result in any interference, interruption or hindrance to such other Party’s use of the Shared Facilities other than in an immaterial respect.

4.1.4 Adjustment of Allocated Interests. Commencing on the third anniversary of the Service Commencement Date (as defined in the CA) of the I-95 Project and on each succeeding three-year anniversary thereafter, or at either Party’s good-faith request, CBE and 95 Express shall in good faith seek to revise the Allocated Interests to more accurately reflect the actual use by each of the Beltway Project and the I-95 Project of the Shared Facilities and Shared Services during the succeeding three-year period. The Parties have agreed that the initial Allocated Interests have been established based on the projected number of tolling transactions to be processed through the Shared Facilities on behalf of each HOT Lanes Project, but if either Party determines that such metric ceases to be appropriate to reflect the actual costs of either HOT Lanes Project’s relative use of one or more of the Shared Facilities and/or the Shared Services, then such Party may propose use of a different metric at the time it requests a revision of the Allocated Interests, and the Parties may utilize such different metric or another metric as agreed by the Parties in writing. The Allocated Interests may also be adjusted on an interim basis at any time as provided in Section 4.1.7. Notwithstanding the foregoing, no adjustment to the Allocated Interests or change to the metric, in each case that would result in CBE’s share (expressed as a percentage) of the total costs payable under Section 4.2.2 increasing by more than three percent (3%) over CBE’s share of such total costs in effect immediately prior to such
adjustment or change, will be effective unless CBE has certified to 95 Express that it has notified CBE’s Lenders of the same. For example, by way of illustration only, if immediately prior to such adjustment or change CBE’s share of such total costs is 49%, and the adjustment or change would increase CBE’s share to more than 52%, then CBE must provide the certification specified in the immediately preceding sentence.

4.1.5 No Further Grants. Neither Party shall grant any Person other than the other Party the right to use any Shared Facility, except that CBE and 95 Express collectively may grant any Person that is an Affiliate of both of them the right to use and have access to the Shared Facilities subject to agreement on necessary amendments to this Agreement and such Person’s executing and delivering this Agreement as so amended, it being understood that (i) any such amendments hereto shall be subject to the terms of Sections 7.1 and 9.7, and (ii) in the case of CBE, CBE is not authorized to grant or agree to grant any Person the right to use and have access to the Shared Facilities unless CBE has certified to 95 Express that it has obtained approval from its Lenders with respect to such grant. Any such grant shall be on arms-length terms, and any consideration paid by the grantee shall be shared by CBE and 95 Express proportionately in accordance with their respective Allocated Interests.

4.1.6 Decision Making. All determinations concerning the Shared Facilities, other than day-to-day operational decisions made in the ordinary course by the Shared Facilities Operator and subject to any then-applicable budget approved under the OSSAs, shall be made by the Parties acting through their Designated Representatives; provided, however, that until such time as Financial Close has occurred, all decisions with respect to the Express Operations Center may be made by CBE, but CBE shall consult with 95 Express on those decisions which could reasonably be expected to have a Material Adverse Effect on 95 Express or the I-95 Project; and provided, further, that such consultation shall not obligate CBE to follow the advice or recommendation of 95 Express.

4.1.7 Unilateral Improvements, Modifications or Actions. If either Party proposes any improvement to, modification or replacement of, or other action with respect to the Shared Facilities that the other Party does not agree is for the collective benefit of the Beltway Project and the I-95 Project, but is nonetheless required for the proposing Party to comply with Law, its respective Comprehensive Agreement or Financing Documents (a “Required Modification”), then the proposing Party may undertake such Required Modification at no cost or expense to the other Party so long as the same is not reasonably expected to have a Material Adverse Effect on the other Party or its HOT Lanes Project, and the Allocated Interests shall be adjusted pursuant to Section 4.1.4 to take into account the effect of such Required Modification on each Party’s relative use of the Shared Facilities as so modified. If such Required Modification is reasonably expected to have a Material Adverse Effect on the other Party or its HOT Lanes Project, and the Allocated Interests shall be adjusted pursuant to Section 4.1.4 to take into account the effect of such Required Modification on each Party’s relative use of the Shared Facilities as so modified. If such Required Modification is reasonably expected to have a Material Adverse Effect on the other Party or its HOT Lanes Project, and the Allocated Interests shall be adjusted pursuant to Section 4.1.4 to take into account the effect of such Required Modification on each Party’s relative use of the Shared Facilities as so modified. If such Required Modification is reasonably expected to have a Material Adverse Effect on the other Party or its HOT Lanes Project, and the Allocated Interests shall be adjusted pursuant to Section 4.1.4 to take into account the effect of such Required Modification on each Party’s relative use of the Shared Facilities as so modified.
Adverse Effect on the other Party or its HOT Lanes Project, the proposing Party may proceed under Section 9.1.

4.2 Operating and Maintenance.

4.2.1 OSSAs. The Parties acknowledge and agree that each of the Beltway OSSA and the I-95 OSSA provide or will provide, in relevant part, for the operation of the Shared Facilities and performance of the Shared Services by the Operator thereunder. As of the Effective Date, TUSA Operations is the operator under both the Beltway OSSA and the I-95 OSSA, and the Parties intend that so long as TUSA Operations is the Operator under both such agreements, or if another Person becomes the Operator under both such agreements, it shall also be the Shared Facilities Operator under this Agreement. If TUSA Operations ceases to be the Operator under both such agreements, the Shared Facilities Operator shall be determined pursuant to Section 4.2.3. The Parties, acting through their Designated Representatives, shall be responsible for providing directions to the Shared Facilities Operator regarding Operations and Maintenance such that the Shared Facilities and Shared Services may be utilized by both Parties for the non-discriminatory and collective benefit of the Beltway Project and the I-95 Project, and such directions shall include a requirement that the back-up system referenced in Section 9.3 shall be diligently maintained, updated and tested periodically such that it will be fully operational and available for immediate use in the event of a division of the Shared Facilities in accordance with Section 9.3. Each Party shall promptly provide the other with copies of all Notices, reports, budgets, plans, forecasts and other deliverables under the Beltway OSSA or the I-95 OSSA, as applicable, in each case to the extent the same relate to the Shared Facilities and Shared Services.

4.2.2 Payment of Costs. Commencing on the Service Commencement Date of the I-95 Project and continuing each month of the Term thereafter, each Party shall pay a percentage equal to its Allocated Interest of the aggregate costs (prior to the application of any margin as provided under each respective OSSA) payable under the Beltway OSSA and the I-95 OSSA in respect of the Shared Facilities and Shared Services utilized in such month, all as invoiced under its respective OSSA (including for any margin applicable to such aggregate costs under the Party’s respective OSSA) based on information provided by the Shared Facilities Operator. Each Party intends that such Operator (i) if it is the Shared Facilities Operator, shall determine, or (ii) if it has engaged the Shared Facilities Operator under a subcontract as contemplated in Section 4.2.3(a), shall cause the Shared Facilities Operator to determine, the aggregate costs (net of any margin) that are reimbursable under the OSSAs collectively in respect of the Shared Facilities and Shared Services, and then invoice such Party only for its share of such aggregate costs based on its Allocated Interest plus any margin on such aggregate costs applicable under that Party’s OSSA. The Parties, acting through their Designated Representatives, shall regularly communicate to confirm that such aggregate costs, and each Party’s respective share thereof, have been calculated accurately, and if it is determined (whether by mutual agreement of the Parties or as a result of dispute resolution pursuant to Section 10.3) that costs have not been calculated and allocated accurately, then each Party agrees to (i) promptly make such true-up payments to each other as may be necessary such that each Party pays its share of the aggregate costs, and (ii) provide such additional direction to their respective Operator as may be necessary or appropriate to avoid inaccuracies in the future.
4.2.3 Termination of OSSAs. If either the Beltway OSSA or the I-95 OSSA is terminated or amended such that the Operator thereunder is no longer the Shared Facilities Operator for whatever reason, then:

(a) subject to subsection (c) below, the Party whose OSSA was terminated or amended shall cause its replacement Operator to subcontract with the Shared Facilities Operator to operate the Shared Facilities and perform the Shared Services (and the Parties agree that any such subcontract shall be on an arms’ length basis and contain fair and commercially reasonable terms) unless the Party whose OSSA was not terminated or amended elects not to retain the Shared Facilities Operator, in which case a new Shared Facilities Operator shall be selected as provided in subsection (b) below;

(b) if a new Shared Facilities Operator must be selected, then the Parties shall in good faith meet to select a replacement Shared Facilities Operator. Any replacement Shared Facilities Operator shall, to the extent required by a Comprehensive Agreement or the applicable Financing Documents, be subject to the approval of the Department and/or the applicable Lenders. If the Parties fail to agree on a replacement Shared Facilities Operator, then either Party may elect to proceed as provided in Section 10.3; or

(c) solely if the OSSA was terminated or amended in connection with the exercise by a Party’s Lenders of their rights under the applicable Financing Documents, then if the replacement Operator elects not to retain the Shared Facilities Operator but the Party whose OSSA was not terminated or amended does desire to retain the Shared Facilities Operator, then the Parties shall proceed in accordance with Article 9 to end the Shared Services and divide the Shared Facilities, except that the entire cost of implementing such division, including modifications contemplated in Section 9.3, shall be borne by the Party whose Lenders authorized or directed the termination or amendment of the OSSA.

4.3 Standard of Performance. All work undertaken as contemplated in this Article 4 shall be performed in good faith and in accordance with (a) the terms of this Agreement, (b) all Laws, (c) all relevant Governmental Approvals, (d) Good Industry Practice, (e) the Comprehensive Agreements and the Beltway Project Documents and the I-95 Project Documents, as applicable, and (f) the terms of each Party’s insurance policies to the extent applicable to such work.

4.4 No Liens or Encumbrances. Each Party shall keep and maintain the Shared Facilities free and clear of all liens and encumbrances that are attributable to it, other than liens in favor of the Lenders under the Financing Documents and the rights of the Department under the Comprehensive Agreements.

ARTICLE 5

DECISION-MAKING
5.1 **Designated Representatives.** As soon as practicable after Financial Close, each Party will provide Notice to the other of its Designated Representative and any authorized substitute Designated Representative authorized to act if the primary Designated Representative is unavailable. The Designated Representatives shall hold regular meetings at times of their choosing, and meetings of the Designated Representatives will be held upon the prior reasonable request of any Designated Representative and may be held in person or by electronic means. The expenses of each Designated Representative shall be borne by the Party it represents. Each Designated Representative will be fully authorized to act on behalf of its Party with respect to all matters contemplated by this Agreement but will not be authorized to alter, amend or waive provisions of this Agreement, such authority being reserved to the Parties themselves. Each Party’s Designated Representative (and any substitute therefor) may be changed by prior Notice to the other Party, which change may be effective immediately upon receipt of the Notice. The Parties further agree that (a) a Party’s Designated Representative may not be the same person as the other Party’s Designated Representative, (b) such Party’s Designated Representative must make its decisions hereunder in the best interests of such Party and its respective Project, and (c) all decisions made by the Designated Representatives hereunder must be on an arm’s length basis.

5.2 **Responsibilities.** The Designated Representatives shall be responsible for decisions between the Parties with respect to the following matters, except to the extent provided otherwise herein: (a) the procedure for coordinating each Party’s ongoing activities in the Express Operations Center; (b) making decisions to be implemented under the OSSAs with respect to the Shared Facilities and Shared Services and in accordance with Article 4, (c) making decisions regarding maintenance of, improvements to or replacements of the Shared Facilities for the collective benefit of the Beltway Project and the I-95 Project in accordance with Section 4.1; (d) coordinating and implementing decisions made by each Party under, in the case of CBE, the Beltway Project Documents, and in the case of 95 Express, the I-95 Project Documents, in each case to the extent any such activities could reasonably be expected to affect the operation of the Shared Facilities or performance of the Shared Services; (e) coordination of budgeting in respect of the Shared Facilities and the Shared Services as provided in Section 5.3; (f) directing the Shared Facilities Operator to break out the Operation and Maintenance costs in accordance with Section 4.2.2, including by detailed line items when necessary, from the other reimbursable costs under the OSSAs; and (g) such other matters pertaining to the Shared Facilities or the Shared Services as are provided for in this Agreement or referred to the Designated Representatives by either Party in writing. Subject to Section 4.1.7, the Designated Representatives shall in all events, after duly considering all alternatives proffered by either of them, take all actions as may be required for the Shared Facilities and the Shared Services to comply with Law (including any Change in Law), the Comprehensive Agreements and the Financing Documents.

5.3 **Budgeting.** The Designated Representatives shall coordinate the budgeting of the costs of operating and maintaining the Shared Facilities and performing the Shared Services under the OSSAs such that the Operator under each OSSA receives consistent direction regarding matters relating to the Shared Facilities and the Shared Services, including, as appropriate, capital maintenance and capital improvement items as may be required for the Shared Facilities to comply with Law (including any Change in Law), the Comprehensive Agreements and the Financing Documents. If either Party believes that an agreed budget may
become inaccurate in any material respect, it shall direct its Designated Representative to convene a meeting with the other Designated Representative for the purposes of addressing the inaccuracy.

ARTICLE 6

EVENTS OF DEFAULT; REMEDIES; CANCELLATION

6.1 Events of Default. Each of the following occurrences shall constitute an event of default on the part of either Party (each, an “Event of Default”) under this Agreement:

(a) a Party fails to pay within thirty (30) days following the date on which such payment is due to the other Party hereunder, any amount that is due to such other Party under this Agreement that is not subject to a dispute under this Agreement;

(b) Willful Action by a Party that has a Material Adverse Effect on the other Party;

(c) a Party commits a material breach of its obligations under this Agreement, including a breach resulting from its negligence (other than a payment default as set forth in Section 6.1(a) or a breach that constitutes Willful Action as set forth in Section 6.1(b)), and either (i) such breaching Party fails to commence and diligently pursue to cure such breach upon delivery of Notice from the non-breaching Party of such breach, or (ii) the effects of the breach are not cured within thirty (30) days of delivery of such Notice; provided, however, that if (A) such breach is not, by its nature, capable of being cured within such 30-day period, (B) the breaching Party is diligently and in good faith proceeding to attempt to cure such breach, and (C) such uncured breach has not resulted in a Material Adverse Effect with respect to the other Party, then the breaching Party shall be allowed such additional time as reasonably may be required to cure such breach, which shall in no event exceed one hundred eighty (180) days from the initial delivery of Notice of the breach; or

(d) a Party commences a voluntary Winding-Up, is generally unable to pay its debts when due, or an involuntary Winding-Up is instituted against a Party which is not stayed, dismissed or terminated within sixty (60) days after commencement, or a Party ceases to carry on its business.

6.2 Remedies. Upon the occurrence of an Event of Default by a Party, the non-defaulting Party shall have the right, in its sole and absolute discretion, subject to Sections 8.4 and 10.3, to pursue by all proper and legal suits and other means, any and all other remedies available at law or in equity, but without terminating this Agreement; provided, however, that if the defaulting Party or one of its Lenders has notified the other Party that this Agreement has been collaterally assigned and has provided such other Party with an address to which notices to such Lender may be given, in the case of an Event of Default by such defaulting Party, the non-defaulting Party shall provide such Lender (if any) with written notice of such Event of Default.
to the address given and the Lender shall each have the right (but not the obligation) for one hundred eighty (180) days after receipt of such notice either to cure the Event of Default on behalf of the Party in default, or, upon payment to the non-defaulting Party of any amounts due from the defaulting Party under this Agreement but not paid by such defaulting Party, to assume, or cause its designee or a lessee or purchaser of the defaulting Party’s interests under its Comprehensive Agreement to assume, all of the rights and obligations of the Party in default under this Agreement arising from and after the date of such assumption; provided, however, that if the Lenders are precluded by Law or order of a Governmental Authority from seeking to effect a cure, such 180-day period shall commence from the date the Lenders are no longer precluded from seeking to effect a cure. In the event that any Lender or its designee assumes this Agreement in accordance with this Section 6.2: (i) the Party in default shall be released and discharged from any obligations to the non-defaulting Party arising or accruing hereunder from and after the date of such assumption other than the obligation to pay any amounts due but unpaid; and (ii) the non-defaulting Party shall continue this Agreement with any of the Lenders or its designee, as the case may be, substituted in the place of the defaulting Party hereunder.

6.3 Specific Performance and Injunctive Relief. Each Party shall be entitled to seek a decree compelling specific performance with respect to, and shall be entitled, without the necessity of filing any bond, to seek the restraint by injunction of, any actual or threatened breach of any material obligation of the other Party under this Agreement, it being acknowledged and agreed that relief available at law (including the right to damages) may be inadequate to remedy the harm that is or may be suffered by the Party seeking specific performance or restraint by injunction. The Parties in any action for specific performance or restraint by injunction agree that they shall each request that all expenses incurred in such proceeding, including reasonable counsel fees, be apportioned in the final decision based upon the respective merits of the positions of the Parties.

6.4 Non-Termination. Except as otherwise expressly provided in this Agreement, this Agreement shall not terminate, nor shall either Party’s interest in the Shared Facilities be extinguished, lost, conveyed or otherwise impaired, in whole or in part, by any cause or for any reason whatsoever, including (a) any damage to or destruction of all or any part of the Shared Facilities or the taking of the Shared Facilities or any portion thereof by condemnation, requisition, eminent domain or otherwise, (b) any default in the performance or the observance by any Party of any of their respective covenants and agreements to be performed and observed by such Party hereunder, (c) the insolvency, bankruptcy, reorganization or similar proceedings by or against any Party, or (d) any other reason whatsoever, whether similar or dissimilar to any of the foregoing.

6.5 New Agreement if Rejected or Terminated in Bankruptcy. In the event that this Agreement is rejected or terminated by a trustee or debtor-in-possession in any bankruptcy or insolvency proceeding of either Party and within one hundred-eighty (180) days after such rejection or termination, if any Lender for such Party authorized to do so under the terms of such Party’s Financing Documents (and any intercreditor arrangements related thereto), as such Lender so certifies to the other Party, or any of its respective designees or assignees, shall so request, the non-bankrupt Party shall execute and deliver to such Lender or such designee or assignee a new contract or contracts, as the case may be, which shall be for the balance of the obligations and services remaining to be performed under this Agreement before giving effect to
such rejection or termination and shall contain the same conditions, agreements, terms, provisions and limitations as this Agreement. If the approval of any such trustee or debtor-in-possession or any regulatory approvals are necessary in order for the non-bankrupt Party to enter into or perform under any such new contract, such Party shall cooperate with the Lender or such designee or assignee in obtaining such approvals as rapidly as possible. The Lender or such designee or assignee shall not be liable for performing or be required to perform or cause to be performed any of the bankrupt Party’s obligations that were wholly or partially unperformed at the time of such rejection or termination, except as provided below in this Section 6.5. The Lender or such designee or assignee shall be liable only for any payments that are due but unpaid under the rejected or terminated Agreement and obligations arising or accruing on or after the date such new contract is entered into, and for the performance of obligations of the bankrupt Party to be performed while the Lender or such designee or assignee is performing under and seeking the benefit of such new contract. The Lender or such designee or assignee shall have the right to assign any interest it may acquire in such new contract so long as such assignment is consistent with the applicable terms of any consent to assignment or similar agreement that may exist between the non-bankrupt Party and the Financing Parties of the bankrupt Party.

ARTICLE 7

AMENDMENT, ASSIGNMENT

7.1 Amendments. No amendment or modification of this Agreement or the terms hereof shall (i) be valid or binding on either Party except by a writing duly executed by each of the Parties and (ii) be effective unless and until each Party shall have obtained any required Lender approval(s) pursuant to the terms of the relevant Financing Documents. In the case of CBE, the Parties agree that this Agreement shall be considered a “Project Agreement” for purposes of the Amended and Restated Credit and Reimbursement Agreement dated as of December 14, 2010 or any replacement thereof that is a Beltway Financing Document (notwithstanding any failure of this Agreement to be considered a “Project Agreement” thereunder), and no amendment or modification of this Agreement shall be effective unless CBE has certified to 95 Express that it has obtained approval from its Lenders to the extent required with respect to amendments or modifications to a “Project Agreement” thereunder.

7.2 Assignment. Except as provided in this Section 7.2 and in Section 7.3, this Agreement may be assigned by either Party only upon the prior written consent of the other Party. Notwithstanding the foregoing, either Party may, with prior notice to the other Party but without need for the other Party’s approval:

(a) collaterally assign its rights under this Agreement to any Lender (or agent thereof), and any Lender or its agent may further assign such rights; provided, however, that in connection with any such further assignment of this Agreement by a Lender or its agent:

(i) such assignment shall be in connection with the exercise of remedies by the Lenders (or agent thereof) under the Financing Documents;
(ii) the non-assigning Party shall have received all amounts then due and payable to it under this Agreement; and

(iii) the assignee shall contemporaneously be assigned and shall assume, or shall otherwise be a party to and have assumed, in the event that CBE is the assignor, all of the other Beltway Project Documents, and in the event that 95 Express is the assignor, all of the other I-95 Project Documents;

(b) assign all (but not a portion) of its rights and all (but not a portion) of its obligations under this Agreement to any other Person who assumes in writing all obligations of the assigning Party under this Agreement; provided, however, that in connection with any such assignment:

(i) the non-assigning Party shall have received all amounts then due and payable to it under this Agreement;

(ii) the assignee shall have demonstrated to the reasonable satisfaction of the non-assigning Party the assignee’s ability to perform all of its obligations under this Agreement; and

(iii) the assignee shall contemporaneously be assigned and shall assume, or shall otherwise be a party to and have assumed, in the event that CBE is the assignor, all of the Beltway Project Documents, and in the event that 95 Express is the assignor, all of the I-95 Project Documents;

(c) assign all (but not a portion) of its rights and all (but not a portion) of its obligations under this Agreement to any other Person; provided, however, that the assigning Party shall remain liable for all of its obligations under this Agreement.

The Parties agree that as a condition to any assignment by a Lender (or its agent) pursuant to subsection (a) above and as a condition to any assignment permitted pursuant to subsections (b) or (c) above, the assignee or the assigning Lender shall have cured any then-existing monetary Event of Default on the part of the assigning Party, and the assignee shall agree in writing to assume all obligations of the assignor under this Agreement and thereafter shall be deemed to be and shall have all the rights and obligations of the assigning Party hereunder, subject to all limitations of liability contained in this Agreement, and from and as of such date the assignor and its guarantor, if any, shall, except as provided in subsection (c) above with respect to an assignment permitted thereunder, be released of all its obligations hereunder arising from and after the effective date of such assignment.

7.3 Assumption by the Department. If either Party’s Comprehensive Agreement is terminated and the Department assumes the terminated Party’s obligations under this Agreement pursuant to a separate written agreement under which the Department assumes all of such obligations arising from and after the date of the assumption, then this Agreement shall continue in full force and effect with the Department substituted in place of the terminated Party.
7.4 Successors and Assigns. This Agreement shall inure to the benefit of and shall be binding upon the Parties and their respective successors and assigns.

ARTICLE 8

INDEMNITIES; LIMITATION OF LIABILITIES

8.1 Indemnification of CBE. 95 Express shall fully indemnify, hold harmless and defend CBE and each of its subsidiaries and Affiliates, and the members, directors, officers, agents, employees, successors and assigns of each of them (the “CBE Indemnified Parties”) from and against any and all Claims arising while 95 Express remains a party to this Agreement:

(a) paid or payable (or asserted to be payable) by a CBE Indemnified Party to an employee of a CBE Indemnified Party or a Person unaffiliated with the Beltway Project, in each case directly or indirectly arising out of, resulting from or related to third-party claims in respect of any damage to or destruction of property of, or death of or bodily injury to, any Person (whether such person is an employee of a CBE Indemnified Party or is a Person unaffiliated with the Beltway Project), but only to the extent caused by or contributed to by 95 Express’s fault, tortious act, negligence or strict liability in the performance of 95 Express’s obligations hereunder or by any breach by 95 Express of its obligations hereunder, or

(b) resulting from 95 Express’s Willful Action;

and in any event excluding damages to the extent attributable to any matters covered by CBE’s indemnity under Section 8.2. 95 Express's indemnity under this Section 8.1 is for the exclusive benefit of the CBE Indemnified Parties and in no event shall inure to the benefit of any other Person. Any indemnification payable with respect to a Claim by a CBE Indemnified Party shall be net of any insurance proceeds paid to such Person under its or 95 Express’s insurance policies with respect to the circumstances giving rise to 95 Express’s indemnification of such Person hereunder.

8.2 Indemnification of 95 Express. CBE shall fully indemnify, hold harmless and defend 95 Express, each of its subsidiaries and Affiliates, and the members, directors, officers, agents, employees, successors and assigns of each of them (the “95 Express Indemnified Parties”) from and against any and all Claims arising while CBE remains a party to this Agreement:

(a) paid or payable (or asserted to be payable) by a 95 Express Indemnified Party to an employee of a 95 Express Indemnified Party or a Person unaffiliated with the I-95 Project, in each case directly or indirectly arising out of, resulting from or related to third-party claims in respect of any damage to or destruction of property of, or death of or bodily injury to, any Person (whether such person is an employee of a 95 Express Indemnified Party or is a Person unaffiliated with the I-95 Project), but only to the extent caused by or contributed to by CBE's fault, tortious act, negligence or strict liability in the performance of
CBE’s obligations hereunder or by any breach by CBE of its obligations hereunder, or

(b) resulting from CBE’s Willful Action;

and in any event excluding damages to the extent attributable to any matters covered by 95 Express’s indemnity under Section 8.1. CBE’s indemnity under this Section 8.2 is for the exclusive benefit of the 95 Express Indemnified Parties and in no event shall inure to the benefit of any other Person. Any indemnification payable with respect to a claim by a 95 Express Indemnified Party hereunder shall be net of any insurance proceeds paid to such Person under its or CBE’s insurance policies with respect to the circumstances giving rise to CBE’s indemnification of such Person hereunder.

8.3 Indemnity Claim Procedures.

8.3.1 Notice of Claim. If any Person not a party to this Agreement shall make any demand or claim or file or threaten to file or continue any lawsuit, which demand, claim or lawsuit may result in a Claim for any Person indemnified under Section 8.1 or Section 8.2, then, in any such event, within ten (10) Business Days after Notice by the indemnified party (the “Indemnity Claim Notice”) to the indemnifying Party of such demand, claim or lawsuit, the indemnifying Party shall have the option, at its sole cost and expense, to retain counsel for the indemnified party (which counsel shall be selected by or be reasonably satisfactory to the indemnified party), to defend any such demand, claim or lawsuit. Thereafter, the indemnified party shall be permitted to participate in such defense at its own expense; provided, however, that, if the named parties to any such proceeding (including any impleaded parties) include both the indemnifying Party and the indemnified party, or if the indemnifying Party proposes that the same counsel represent both the indemnified party and the indemnifying Party and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interests between them, then the indemnified party shall have the right to retain its own counsel at the cost and expense of the indemnifying Party. If the indemnifying Party fails to respond within ten (10) Business Days after receipt of the Indemnity Claim Notice, the indemnified party may retain counsel and conduct the defense of such demand, claim or lawsuit, as it may in its sole discretion deem proper, at the sole cost and expense of the indemnifying Party. The failure to give any Indemnity Claim Notice within the time period required therefor shall not relieve the indemnifying Party of its obligations under this Agreement unless, and only to the extent that, such failure caused the Claim for which the indemnifying Party is obligated to be greater than they would otherwise have been had the indemnified party given the Indemnity Claim Notice within the required time period.

8.3.2 Access to Records. The indemnified party shall provide reasonable assistance to the indemnifying Party and provide access to its books, records and personnel as the indemnifying Party reasonably requests in connection with the investigation or defense of the indemnified Claims. The indemnifying Party shall promptly upon receipt of reasonable supporting documentation reimburse the indemnified party for out-of-pocket costs and expenses incurred by the latter in providing the requested assistance.
8.3.3 Payment of Claims. With regard to Claims for which indemnification is payable under Section 8.1 or Section 8.2, such indemnification shall be paid by the indemnifying party upon: (i) the entry of a judgment against the indemnified party and the expiration of any applicable appeal period; (ii) the entry of a nonappealable judgment or final appellate decision against the indemnified party; or (iii) a settlement with the consent of the indemnifying Party, which consent shall not be unreasonably withheld, provided that no such consent need be obtained if the indemnifying Party fails to respond to the Indemnity Claim Notice as provided in Section 8.3.1. Any consent required under the preceding clause (iii) shall be given or withheld only upon such Person’s examination of the proposed settlement agreement.

8.4 Certain Limitations of Liability.

8.4.1 Exclusion of Consequential Damages. Neither Party, its Affiliates nor their respective employees, agents or subcontractors shall be liable to the other Party, its Affiliates or their respective employees, agents or subcontractors, whether based in contract, in tort (including negligence and strict liability), under warranty, or otherwise, for any consequential, indirect, punitive, incidental, exemplary or special loss or damage whatsoever, including without limitation, loss of use, loss of productive resources, loss of opportunity or anticipated profits, damages to good will or reputation or punitive or speculative damages, in each case relating to the Shared Facilities or its acts or failures to act under this Agreement.

8.4.2 No Effect on Indemnity Payments. Nothing in this Section 8.4 is intended to limit the payment of indemnities pursuant to Sections 3.4, 3.5 or 8.3.3.

8.4.3 No Effect on Payment of Insurance Proceeds. Nothing in this Section 8.4, or in any other provision of this Agreement, shall be construed so as to relieve any insurer of its obligation to any proceeds in accordance with the terms and conditions of any insurance policies maintained by or for the benefit of either Party.

ARTICLE 9

DIVISION OF SHARED FACILITIES

9.1 Notice of Proposed Division of Shared Facilities. If the Parties are unable to select a replacement Shared Facilities Operator as provided in Section 4.2.3, or if a Party demonstrates that continuing to use the Shared Facilities, or a portion of the Shared Facilities, as contemplated in this Agreement would cause it to suffer a Material Adverse Effect, then a Party may, upon not less than 180 days prior written notice to the other Party, propose that the Parties end the shared use of the Shared Facilities, or a portion of the Shared Facilities, and instead divide the Shared Facilities such that a discrete portion thereof is available for use exclusively by the Beltway Project and a discrete portion thereof is available for use exclusively by the I-95 Project. Any notice delivered pursuant to this Section 9.1 shall include sufficient detail regarding the division and subsequent use of the Shared Facilities as the receiving Party shall request.

9.2 Actions After Receipt of Notice. Within 30 days after receipt of a notice delivered pursuant to Section 9.1, the Parties shall meet to discuss the proposed division of the
Shared Facilities, including which specific components of the Shared Facilities are to be divided and how such division shall take place so as to minimize the impacts on each Party and its respective HOT Lanes Project. Thereafter, if the Party receiving the notice accepts the proposal to divide the Shared Facilities, or a portion thereof, then the Parties shall diligently seek to implement and complete the proposed division by not later than the date specified in the notice. If the Party receiving the notice rejects the proposal, it shall send a written response to the proposing Party explaining the reasons for the rejection, whereupon the dispute shall be resolved pursuant to Section 10.3.

9.3 Division of Shared Facilities. The Parties acknowledge that the installation of the additional TTMS components of the Shared Facilities pursuant to Section 4.1.2 is intended to result in the creation of a combined system. Such combined system will be designed as the primary system serving both HOT Lanes Projects and is intended to supplant the system serving the Beltway Project as of the Service Commencement Date of the I-95 Project. In the event of a division of the Shared Facilities, the primary system would be dedicated exclusively to one of the HOT Lanes Project, and the back-up system would be dedicated exclusively to serve the other HOT Lanes Project. In the absence of a different arrangement by the Parties, because 95 Express will pay the cost of obtaining and installing the additional TTMS components of the Shared Facilities, the primary system shall be made available to 95 Express, and the back-up system shall be made available to CBE. Except as otherwise provided in Section 4.2.3(c), in the event any modifications to either system are required as a result of the division of the Shared Facilities, the costs thereof shall be shared as the Parties agree in writing; provided, however, that the cost of discretionary modifications that are not necessary for a system to function to serve its respective HOT Lanes Project shall be paid by the Party desiring such modification.

9.4 Disputes. Any disputes regarding the division of the Shared Facilities that cannot be resolved by the Parties shall be resolved pursuant to Section 10.3.

9.5 Consequences of Division. Following the division of the Shared Facilities or any portion thereof, the provisions of this Agreement regarding shared use of the Shared Facilities (or of the portion thereof so divided) shall be null and void, and neither Party shall have any responsibility for operation or maintenance of the Shared Facilities that have been allocated to the other Party. Each Party shall cause its Lenders to release any lien or encumbrance as to any portion of the Shared Facilities that has been allocated to the other Party as a result of such division, but the lien of the Lenders as to a Party’s rights and obligations under this Agreement may remain in effect.

9.6 Express Operations Center. Notwithstanding any division of the Shared Facilities, the Parties’ obligations with respect to common costs for the Express Operations Center itself (excluding the other Shared Facilities), such as utilities and insurance, shall remain in full force and effect.

9.7 Amendments. The Parties shall amend this Agreement as may be necessary or appropriate to reflect the division of the Shared Facilities and use their best efforts to obtain VDOT and Lender approvals as required under the Comprehensive Agreement and Financing Documents applicable to each Party.
ARTICLE 10

MISCELLANEOUS

10.1 Insurance. Each of CBE and 95 Express shall maintain the insurance coverage required of each of them pursuant to its respective Comprehensive Agreement in respect of its HOT Lanes Project. Each liability insurance policy acquired and maintained by each Party, or caused to be acquired and maintained pursuant thereto, shall, from and after the date of Financial Close, be endorsed naming the other Party hereto and each of its respective employees, agents and Affiliates, as their interests may appear, as additional insureds with respect to any and all third party bodily injury or property damage claims arising from said primary insured’s performance of this Agreement. If either Party fails to maintain the insurance required pursuant to this Section 10.1 and the other Party at its own expense furnishes or arranges for all or any part of such insurance for the non-compliant Party, the non-compliant Party shall fully reimburse the other Party for any premiums or other sums paid with respect to obtaining and maintaining such insurance within thirty (30) days of being invoiced for such amounts. In the event of any damage or destruction to the Express Operations Center or the other Shared Facilities, all insurance proceeds received by either Party shall be used proportionately based on the amount of the respective awards to restore the Express Operations Center and the other Shared Facilities. If such proportionate contribution of insurance proceeds is insufficient to restore the Express Operations Center and the other Shared Facilities but insurance proceeds remain available to either Party, such Party shall contribute such proceeds as may be necessary for the restoration. Any insurance proceeds received by a Party that are not needed for the restoration of the Express Operations Center and the other Shared Facilities may be retained by the Party to which they were paid. If the proceeds of insurance are insufficient to restore the Express Operations Center and the other Shared Facilities, each Party shall be obligated to contribute an additional amount toward such restoration (such amount being referred to as the “Additional Contribution”) equal to the difference between (x) its then-current Allocated Interest of the aggregate cost of restoring the Express Operations Center and the other Shared Facilities, minus (y) the insurance proceeds received by such Party that are applied to restore the Express Operations Center and the other Shared Facilities; provided, however, that if a Party exercises its right to terminate its Comprehensive Agreement as a result of the occurrence of a “Significant Force Majeure Event” (so defined) under such Comprehensive Agreement, then such Party shall remit insurance proceeds for restoration of the Express Operations Center and the other Shared Facilities, but such Party shall not be obligated to make the Additional Contribution otherwise required by this sentence.

10.2 Force Majeure. If either Party is rendered wholly or partially unable to perform its obligations hereunder because of a Force Majeure Event (other than obligations of such Party to pay money hereunder when such payment is due), that Party will be excused from whatever performance is affected by the Force Majeure Event to the extent so affected, provided, however, that: (a) the affected Party gives the other Party Notice describing the particulars of the occurrence promptly after the occurrence of the Force Majeure Event, and, in no event more than three (3) days after the affected Party becomes aware of such occurrence; (b) within five (5) days after giving the Notice described in clause (a) above, the affected Party gives the other Party its best estimate of the occurrence’s expected duration and probable impact on the performance of such Party’s obligations hereunder, and continues to furnish timely regular reports with respect
thereto during the continuation of the Force Majeure Event; (c) the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure Event; (d) no default of either Party which arose before the occurrence of the Force Majeure Event causing the suspension of performance shall be excused as a result of the occurrence, but so long as the affected Party shall have commenced and is diligently continuing to attempt to cure such default prior to the occurrence of the Force Majeure Event, the cure period (if any) with respect to such default shall be extended on a day-for-day basis to the extent a cure actually is prevented as a result of the Force Majeure Event; (e) the affected Party shall exercise all reasonable efforts to mitigate or limit damages to the other Party; and (f) the affected Party shall use all reasonable efforts to continue to perform its obligations hereunder and to correct or cure the event or condition excusing performance. In resolving any dispute between the Parties under Section 10.2, the burden of proof as to whether a Force Majeure Event has occurred and whether the Force Majeure Event excuses the Party from performance under this Section 10.2 shall be upon the Party claiming such Force Majeure Event.

10.3 Dispute Resolution. The Parties agree to attempt to resolve informally all disputes arising in connection with the interpretation or application of the provisions of this Agreement or in connection with the determination of any other matters arising under this Agreement (each, a “Dispute”). Prior to commencing any litigation, a Party believing there is a Dispute shall notify senior management of the other Party by Notice delivered pursuant to Section 10.6 and offer to hold a meeting of senior management of both Parties. If there is no resolution within thirty (30) days after such meeting (or if no such meeting occurs within thirty (30) days after such notification of senior management of the other Party), the Parties may agree on specific dispute resolution procedures to be followed with respect to the Dispute in question or may commence litigation with respect to the dispute exclusively in the Circuit Court for the City of Alexandria, Virginia. During the pendency of any Dispute, the Parties shall continue to perform their respective obligations hereunder. Notwithstanding any other provision in this Agreement to the contrary, if any issue in dispute between the Parties is also the subject of, or relates to, a dispute being or to be determined under either Comprehensive Agreement, the Parties shall seek to cause the Dispute hereunder to be consolidated with the dispute resolution process or litigation occurring under such Comprehensive Agreement, and the Parties shall meet with the Department to coordinate such consolidation. If such consolidation does not occur, then any ongoing proceeding regarding the Dispute hereunder shall be stayed pending final resolution of the dispute under such Comprehensive Agreement, which resolution shall be binding on the Parties for all purposes of this Agreement.

10.4 Confidentiality and Publicity. Except as set forth in this Section 10.4, each of the Parties shall hold in confidence for the Term and for a period of five (5) years from the date of termination any confidential information (designated as such in writing) supplied to it by the other Party or otherwise related to this Agreement or the its HOT Lanes Project or any part thereof. Each Party shall inform its Representatives to whom confidential information must be provided in connection with such Party’s performance of this Agreement of its obligations under this Section 10.4 and shall apply the same safeguards used with respect to its own internal confidential information. Notwithstanding the foregoing, each Party may disclose the following categories of information or any combination thereof:
(a) information contained in and required to be included in any filing required to be made with any Governmental Authority or required to be furnished to the Department under either Comprehensive Agreement;

(b) information which was in the public domain prior to receipt thereof by such Party or which subsequently becomes part of the public domain by publication or otherwise except by a wrongful act of such Party;

(c) information that such Party can show was lawfully in its possession prior to receipt thereof from the other Party through no breach of any confidentiality obligation to the other Party;

(d) information received by such Party from a third party having no obligation of confidentiality to the other Party with respect thereto;

(e) information at any time developed independently by such Party providing it is not developed from otherwise confidential information; and

(f) information required to be disclosed under securities laws applicable to publicly traded companies and their subsidiaries.

In addition, each Party may disclose information regarding this Agreement, including the material terms hereof and information regarding performance hereunder, to (i) its employees, agents, independent accountants, attorneys and other professional advisors and consultants, in each case who have a need to know such information and have agreed in writing or are otherwise legally bound to keep such information confidential; and (ii) its Lenders and financial institutions and other Persons providing or expressing interest in providing debt financing, refinancing, or other credit support to such Party, and the agent or trustee of any of them, to rating agencies, and to Persons to which offering statements or other disclosure documents associated with the private or public offering of securities by or on behalf of such Party or the Beltway Project or the I-95 Project, as the case may be, are provided. Notwithstanding the foregoing, (i) each Party may publish information regarding this Agreement with the express written consent of the other Party, which consent shall not be unreasonably withheld, and (ii) each Party may provide information with respect to this Agreement and its respective HOT Lanes Project to its board (or equivalent) members and members consistent with its internal governance practices. Subject to the foregoing, neither Party shall issue any press or publicity release or otherwise release, distribute or disseminate any information for publication concerning this Agreement or the participation of the other Party in the transactions contemplated hereby without the prior written consent of the other Party, which consent shall not be unreasonably withheld. A Party making any disclosures or reporting required by a governmental or regulatory authority shall use reasonable efforts to maintain, and cause the governmental or regulatory authority to which disclosure is made to maintain, the confidentiality of confidential information, including through use of a protective order or other available mechanism.

10.5 Representations and Warranties. Each Party represents and warrants to the other Party that, as of the Effective Date: (i) it is duly organized and validly existing under the laws of its jurisdiction of formation and has all requisite power and authority to own its property and
assets and to conduct its business as presently conducted or as proposed to be conducted under this Agreement; (ii) it has the power and authority to execute and deliver this Agreement, to consummate the transactions contemplated hereby and to perform its obligations hereunder; (iii) it has taken all necessary action to authorize its execution, delivery and performance of this Agreement, and this Agreement constitutes the valid, legal and binding obligation of such Party enforceable against it in accordance with its terms, except as such enforcement may be limited by bankruptcy, insolvency, moratorium or similar laws affecting the rights of creditors or by general equitable principles (whether considered in a proceeding in equity or at law); (iv) no Governmental Approval is required for (a) the due and valid execution and delivery of this Agreement, or (b) the performance by such Party of its obligations under this Agreement, except such Governmental Approvals as have been duly obtained or made; (v) none of the execution or delivery of this Agreement, the performance by such Party of its obligations in connection with the transactions contemplated hereby, or the fulfillment of the terms and conditions hereof shall conflict with or violate any provision of its constituting documents, or conflict with, violate or result in a breach of any Law currently in effect, or conflict with, violate or result in a breach of or constitute a default under or result in the imposition or creation of any lien or security interest under any agreement or instrument to which it is a party or by which it or any of its properties or assets are bound, including the I-95 Project Documents and the Beltway Project Documents to which such Party is a party; (vi) no meeting has been convened for its Winding-Up and, so far as its officers are aware, no petition, application or the like is outstanding or threatened for its Winding-Up; (vii) it is not a party to any legal, administrative, arbitral or other proceeding, investigation or controversy pending, or, to the best knowledge of such Party, threatened, that would adversely affect such Party’s ability to perform its obligations under this Agreement; and (viii) it holds or will hold when required all intellectual property rights necessary to utilize the Shared Facilities.

10.6 Notice. A notice, consent, approval or other communication (each a “Notice”) under this Agreement shall be delivered in writing, addressed to the Person to whom it is to be delivered, and shall be (a) personally delivered to that Person’s address (which shall include delivery by a nationally recognized overnight courier service), or (b) transmitted by facsimile to that Person’s address, with a duplicate Notice sent by a nationally recognized overnight courier service to that Person’s address. A Notice given to a Person in accordance with this Section 10.6 shall be deemed to have been delivered (a) if personally delivered to a Person’s address, on the day of delivery if such day is a Business Day, or otherwise on the next Business Day, or (b) if transmitted by facsimile to a Person’s facsimile number and a correct and complete transmission report is received, or receipt is confirmed by telephone, on the day of transmission if a Business Day, otherwise on the next Business Day; provided, however, that such facsimile transmission shall be followed on the same day with the sending to such Person of a duplicate Notice by a nationally recognized overnight courier to that Person’s address. For the purpose of this Section 10.6, the address of a Party is the address set out below or such other address which that Party may from time to time deliver by Notice to the other Party in accordance with this Section 10.6:
If to CBE:

President
Capital Beltway Express LLC
6440 General Green Way, Room 495
Alexandria, VA 22312

If to 95 Express:

President
95 Express Lanes LLC
6440 General Green Way, Room 95
Alexandria, VA 22312

10.7 Interest. Any amount owed hereunder to either Party beyond the date that such amount first becomes due and payable under this Agreement shall accrue interest from and including the date that it first became due and payable until, but excluding, the date that it is paid at the applicable Default Rate.

10.8 Set-off. Each Party may deduct and set-off against any part of the balance due or to become due to the other under this Agreement, any amounts due from the other Party under or in connection with this Agreement.

10.9 Cooperation. The Parties acknowledge that they are entering into a long-term arrangement in which the cooperation of both of them will be required. The Parties shall each construct, repair, operate and maintain, and conduct their activities associated with, the Shared Facilities in good faith, in accordance with the terms of this Agreement, in accordance with Good Industry Practice, and in a manner that minimizes interference with the operations of the other Party’s HOT Lanes Project; provided, however, that notwithstanding anything to the contrary contained herein, neither Party shall be required to act in any manner that would interfere in any material respect with or cause a violation or breach of its obligations under, in the case of CBE, any of the Beltway Project Documents or, in the case of 95 Express, any of the I-95 Project Documents. If, during the Term, changes in the operations, facilities or methods of either Party will materially benefit a Party without detriment to the other Party, the Parties commit to each other to make reasonable efforts to cooperate and assist each other in making such change.

10.10 Books and Records. For a period of three (3) years after the issuance of any invoice or other request for payment of costs, payments, settlements or other amounts due under this Agreement, each Party shall have the right to audit, during regular business hours of the Party to be audited, at its own expense, all agreements, books and records regarding such costs, payments, settlements or other amounts and other supporting information pertaining to this Agreement, subject to the auditing Party maintaining the confidentiality of any applicable third party contracts or agreements. The Parties shall cooperate in any such audits. The Parties shall maintain accurate records for all agreements, books and records regarding such costs, payments, settlements or other amounts and other supporting information pertaining to this Agreement in
accordance with GAAP. All of the foregoing records shall be retained for three (3) years beyond the date of the invoice or other request for payment, or for such longer date required in accordance with GAAP. Adjustments to any costs, payments, settlements or other amounts paid under this Agreement that are discovered by any audit shall be payable by the responsible Party to the other Party within sixty (60) days after completion of the audit or, if the results thereof are disputed, within sixty (60) days after final resolution of the dispute, and shall include interest accrued on such adjustment for each calendar day from the original due date to the date of payment of such adjustment by the responsible Party at the rate and computation method specified in Section 10.7.

10.11 Governing Law; Waiver of Jury Trial. This Agreement shall be governed by and construed in accordance with the Laws of the Commonwealth of Virginia applicable to contracts executed and to be performed within the Commonwealth of Virginia. The Parties irrevocably waive the right to a jury trial with respect to any matter arising under or with respect to this Agreement.

10.12 Severability and Renegotiation. Should any provision of this Agreement for any reason be declared invalid or unenforceable by a final and nonappealable order of any court or regulatory body having jurisdiction, such decision shall not affect the validity of the remaining provisions, and the remaining provisions shall remain in force and effect as if this Agreement had been executed without the invalid provision. In the event any term or provision of this Agreement is declared invalid or unenforceable, the Parties shall promptly renegotiate in good faith new provisions to eliminate such invalidity or unenforceability and to restore this Agreement as nearly as possible to its original intent.

10.13 Entire Agreement. This Agreement constitutes the entire Agreement between the Parties relating to the subject matter hereof, there being no other agreements or understandings written or oral other than those contained in this Agreement. This Agreement supersedes any and all oral or written agreements and understandings, written or oral, between the Parties concerning such subject matter.

10.14 Captions and Section Headings. The headings used throughout this Agreement are inserted for reference purposes only, and are not to be considered or taken into account in construing the terms or provisions of any article or section nor to be deemed in any way to qualify, modify or explain the effect of any such provisions or terms.

10.15 Survival. All provisions of this Agreement which expressly or by implication survive or come into or continue in force and effect following the expiration or termination of this Agreement shall remain in effect and be enforceable following such expiration or termination. Expiration, cancellation or termination of this Agreement shall not affect any rights or obligations which have arisen or accrued before such expiration, cancellation or termination, including any in respect of antecedent breach.

10.16 Further Assurances. The Parties shall execute such additional documents including a consent to assignment, legal opinions, estoppel letters or similar documents, and shall cause such additional actions to be taken as may be required or, in the reasonable judgment of
any Party, be necessary or desirable, to effect or evidence the provisions of this Agreement and the transactions contemplated hereby.

10.17 **Counterparts.** This Agreement may be executed in any number of counterparts, which together shall constitute but one and the same instrument and each counterpart shall have the same force and effect as if they were one original.

10.18 **No Partnership.** Nothing contained in this Agreement shall be construed as creating a joint venture or partnership between the Parties or constitute an agency or employment relationship between the Parties. Neither Party shall be deemed to be under the control of, nor be deemed to control, the other Party. Each Party shall remain solely responsible for the actions of its own employees.

10.19 **No Third Party Beneficiary.** This Agreement is intended solely for the benefit of the Parties hereto. Except for references to the Department, the Lenders and as set forth in Sections 8.1 and 8.2, nothing in this Agreement shall be construed to create any duty to, or standard or care with reference to, or any liability to, or any benefit for, any Person not a Party to this Agreement.

10.20 **No Effect on Lenders’ Rights.** Nothing in this Agreement is intended to, or will, diminish or otherwise alter the rights a Party’s respective Lenders have with respect to such Party or the relevant HOT Lanes Project under the terms of such Party’s Financing Documents or otherwise.

[SIGNATURE PAGE FOLLOWS]
IN WITNESS WHEREOF, the Parties hereto, intending to be legally bound hereby, have caused this Agreement to be signed by their respective officers thereunto duly authorized as of the day and year first set forth above.

CAPITAL BELTWAY EXPRESS LLC

By: _____________________________

Name: ___________________________
Title: ___________________________

95 EXPRESS LANES LLC

By: _____________________________

Name: ___________________________
Title: ___________________________
### Exhibit A

**Initial Allocated Interests**

<table>
<thead>
<tr>
<th>Project</th>
<th>Interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>CBE</td>
<td>50 percent</td>
</tr>
<tr>
<td>95 Express</td>
<td>50 percent</td>
</tr>
</tbody>
</table>

The Initial Allocation Interest has been determined based on the ratio of forecast vehicle gantry passages (toll transactions) for both the Beltway Project (CBE) and the I-95 Project (95 Express).
**Exhibit B-1**

**Shared Facilities and Shared Services**

<table>
<thead>
<tr>
<th><strong>Tolling System Maintenance &amp; Support</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Back Office Support and IT Ops</td>
</tr>
<tr>
<td>Back Office TMS Maintenance</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Tolling and Customer Management</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Channel Support of Web (Network Cost)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Traffic Management Systems Support</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>TMS Modifications and Enhancements</td>
</tr>
<tr>
<td>Express Operations Center – Equipment Maintenance &amp; Repair</td>
</tr>
<tr>
<td>Express Operations Center – Building Maintenance</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Other Items</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Tolling System Modifications and Enhancements</td>
</tr>
<tr>
<td>TMS Telecom &amp; Consumables</td>
</tr>
<tr>
<td>Plant Management and Facility Monitoring</td>
</tr>
<tr>
<td>Tolling System Telecom &amp; Consumables</td>
</tr>
</tbody>
</table>
## Exhibit B-2

### Additional Shared Facilities

<table>
<thead>
<tr>
<th><strong>Electrical</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Generator - Bifuel with Automatic Transfer Switches ¹</td>
</tr>
<tr>
<td>Gas feed for Generator ¹</td>
</tr>
<tr>
<td>Concrete Generator Pad ¹</td>
</tr>
<tr>
<td>Masonry wall enclosure at Generator for sound attenuation ¹</td>
</tr>
<tr>
<td>Gate at Generator Enclosure ¹</td>
</tr>
<tr>
<td>40 KVA expansion of the existing UPS</td>
</tr>
<tr>
<td>Electric connections for new furniture</td>
</tr>
<tr>
<td>Misc power modifications for server equipment</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>HVAC</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Air conditioning unit in UPS Room including additional glycol piping and electrical</td>
</tr>
<tr>
<td>CRAC unit in server room</td>
</tr>
<tr>
<td>Drycooler for the new CRAC unit</td>
</tr>
<tr>
<td>Misc HVAC modifications</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Furniture</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Control Room - Monitor arms, chairs, filing cabinets</td>
</tr>
<tr>
<td>Maintence Tech Area Workstations</td>
</tr>
<tr>
<td>Image Viewer Area Workstations</td>
</tr>
<tr>
<td>CSR Workstations</td>
</tr>
<tr>
<td>Operations Open Area Workstations</td>
</tr>
<tr>
<td>Chairs for Maintenance, Image Viewer, CSR and Operations</td>
</tr>
<tr>
<td>Misc shelving and storage for Maintenance Area</td>
</tr>
</tbody>
</table>

Notes:

1. CBE will be responsible for 50% of these costs related to the back-up generator.
Exhibit C-1

CBE and 95 Express Dedicated Space
Exhibit C-2

Plans Showing Communications Lines, Fiber Optic Cables and Other Improvements
**Schedule 1**

**Wiring Instructions**

<table>
<thead>
<tr>
<th>CTS Incoming Fed Wire Instructions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Attention</strong></td>
</tr>
<tr>
<td><strong>Routing Transit Number</strong></td>
</tr>
<tr>
<td><strong>Beneficiary Account Number</strong></td>
</tr>
<tr>
<td><strong>Beneficiary Account Name</strong></td>
</tr>
<tr>
<td><strong>OBI</strong></td>
</tr>
<tr>
<td><strong>F/F/C: Account #22662144</strong></td>
</tr>
<tr>
<td><strong>Attn:</strong></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>