

**PUBLIC-PRIVATE PARTNERSHIP AGREEMENT**

**PURPLE LINE PROJECT**

**BETWEEN**

Maryland Department of Transportation and the  
Maryland Transit Administration

and

Purple Line Transit Partners LLC

**DATED [ \_\_\_\_\_ ]**

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# PUBLIC-PRIVATE PARTNERSHIP AGREEMENT

## PURPLE LINE PROJECT

This Public-Private Partnership Agreement (the "Agreement") is entered as of the [ ] day of [ ], 2016 by THE STATE OF MARYLAND (the "State") acting by and through the Maryland Department of Transportation ("MDOT") and the Maryland Transit Administration ("MTA") (collectively "Owner"), and PURPLE LINE TRANSIT PARTNERS LLC, a Delaware limited liability company ("Concessionaire"), with reference to the following facts:

A. Owner wishes to finance, develop, design, construct, equip, supply light rail vehicles ("LRVs") for, operate and maintain the Purple Line Light Rail Project (the "Project") as a public-private partnership under §§ 10A-101 through 10A-402, and § 11-203(h) of the State Finance and Procurement Article of the Annotated Code (the "Act").

B. On November 8, 2013, Owner issued a Request for Qualifications (as amended, the "RFQ"), received six statements of qualifications on or before the due date of December 9, 2013, and subsequently shortlisted four proposers.

C. On July 28, 2014, Owner issued a Request for Proposals to finance, develop, design, construct, equip, supply LRVs for, operate and maintain the Project through this Agreement (as amended, the "RFP").

D. On November 17, 2015, Concessionaire submitted a technical proposal and on December 8, 2015 it submitted a financial proposal to Owner offering to finance, develop, design, construct, equip, supply LRVs for, operate and maintain the Project. Owner received three additional responses to the RFP.

E. On January 4, 2016, Owner selected Concessionaire as the best value proposer, and Owner and Concessionaire proceeded with negotiations.

F. On March 1, 2016, following conclusion of negotiations, the Secretary of the Maryland Department of Transportation determined that Concessionaire's Proposal offered the best value to the State, and Owner proceeded with the final agreement review process required by the Act and implementing regulations.

G. On [ ], 2016, the Maryland Board of Public Works approved this Agreement in accordance with the provisions of the Act and implementing regulations.

H. This Agreement and the other Contract Documents collectively constitute a public-private partnership agreement as contemplated under the Act, and are entered into in accordance with the provisions of the RFP.

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

**ARTICLE 1. DEFINITIONS; CONTRACT DOCUMENTS;  
ORDER OF PRECEDENCE; OTHER DOCUMENTS**

**1.1 Definitions**

Definitions for certain acronyms, abbreviations and terms used in this Agreement and the other Contract Documents are contained in Exhibit 1.

**1.2 Contract Documents; Rules to Reconcile Conflicting Provisions**

**1.2.1** The term "Contract Documents" shall mean the documents listed in this Section 1.2. Each of the Contract Documents is an essential part of the agreement between the Parties. The Contract Documents are intended to be complementary and to be read together as a complete agreement.

**1.2.2** Subject to Sections 1.2.3 and 1.2.4, in the event of any conflict, ambiguity or inconsistency within the Contract Documents, the order of precedence, from highest to lowest, shall be as follows:

1. Change Orders and other Modifications, and all exhibits, appendices, annexes and attachments to such Change Orders and other Modifications, as applicable;
2. This Agreement, including Exhibits 1 through 16, and the executed originals of Exhibits that are contracts, except that Sections 1, 2, 4, 5, 6 and 7 of Exhibit 2 have lower priority as specified below;
3. Concessionaire's Proposal commitments identified in Section 1 to Exhibit 2;
4. Deviations from requirements of the Technical Provisions approved by Owner in accordance with the Instructions to Proposers, with respect to the ATCs identified in Section 2 of Exhibit 2;
5. Sections 4, 5, 6 and 7 of Exhibit 2;
6. Technical Provisions (Book 2), including all exhibits and attachments to the Technical Provisions;
7. Codes and Standards (Book 3);
8. Contract Drawings (Book 4);
9. Engineering Data (Book 5); and
10. Those portions of the Proposal identified and incorporated by reference in Exhibit 17.

**1.2.3** In the event of any conflict, ambiguity or inconsistency within the Contract Documents, the following rules of interpretation shall apply.

**1.2.3.1** Notwithstanding the order of precedence in this Section 1.2, if the Contract Documents contain differing provisions on the same subject matter, the provisions that

provide greater detail or establish a higher quality, manner or method of performing the Work, exceed Good Industry Practice or use more stringent standards shall prevail.

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

**1.2.3.3** If the Contract Documents contain differing provisions on the same subject matter that cannot be reconciled by applying the rules in Section 1.2.3.1 or 1.2.3.2, then the provisions contained in the document of higher order of precedence shall prevail over the provisions contained in the document of lower order of precedence, unless Owner, in its discretion, approves or directs otherwise in writing.

**1.2.3.4** In the event of an irreconcilable conflict between specific provisions of the Contract Documents and any standards, criteria, requirements, conditions, procedures, specifications or other provisions applicable to the Project established by reference to a manual or publication within a lower priority Contract Document, the specific provision of the higher priority Contract Document shall prevail over said standards or other provisions established by reference, to the extent of the irreconcilable conflict.

**1.2.3.5** In the event of a conflict among any standards, criteria, requirements, conditions, procedures, specifications or other provisions applicable to the Project, established by reference to a manual or publication within a Contract Document or set of Contract Documents with the same order of priority, the standard, criterion, requirement, condition, procedure, specification or other provision offering the higher quality, manner or method or performing will apply unless Owner, in its discretion, approves or directs otherwise in writing.

**1.2.3.6** In the event of a conflict among the standards, criteria, requirements, conditions, procedures, specifications or other provisions of the Technical Provisions and those established by reference to a manual or publication, the Technical Provisions shall prevail.

**1.2.3.7** In all other respects, in the event of a conflict, ambiguity or inconsistency within the Contract Documents, general rules concerning construction of contracts shall be applicable.

**1.2.4** This Section 1.2 shall not apply to provisions in Books 2 through 5 that are erroneous, create a potentially unsafe condition, or may be inconsistent with Good Industry Practice or applicable Law. Instead, such provisions shall be reconciled under Section 7.2.4.

### **1.3 Conflicts, Ambiguities or Inconsistency in Concessionaire's Management Plans**

In the event of any conflict between the Concessionaire's Project Management Plan or O&M Management Plan and any of the Contract Documents, or if any provisions in Concessionaire's Project Management Plan or O&M Management Plan are in conflict, ambiguous or inconsistent, Concessionaire shall modify the Project Management Plan or O&M Management Plan, as applicable, to be consistent with the Contract Documents or cure the ambiguity or inconsistency in a manner satisfactory to Owner.

## 1.4 Reference Documents

**1.4.1** Owner has provided the Reference Documents to Concessionaire. Reference Documents are not Contract Documents and may be relied upon by Concessionaire only to the extent that the Contract Documents incorporate specific provisions of the Reference Documents by reference or refer to the Reference Documents as a baseline for determining Relief Events. In all other respects, the Reference Documents are provided solely for the purposes of disclosure and, in the case of general industry and general governmental manuals and publications, of guidance regarding Good Industry Practice.

**1.4.2** Owner does not represent, warrant or guarantee the accuracy or completeness of the Reference Documents or the information contained in the Reference Documents or that such information is in conformity with the requirements of the Contract Documents, Governmental Approvals or Laws. However, Owner represents that it has not intentionally withheld material information in its possession relevant to conditions of the Site. Owner shall not be responsible or liable in any respect for any causes of action, claims or Losses by any Concessionaire-Related Entity by reason of any use of information, opinions or recommendations contained in, any conclusions Concessionaire may draw from, or any action or forbearance in reliance on, the Reference Documents, except to the extent that the Contract Documents incorporate specific provisions of the Reference Documents by reference or refer to the Reference Documents as a baseline for determining Relief Events.

**1.4.3** Concessionaire is obligated to conduct any and all studies, analyses, and investigations as it deems advisable to verify and supplement information in the Reference Documents. Any use of information in the Reference Documents in performance of the Work, without verification or supplement, is entirely at Concessionaire's own risk. To the extent Concessionaire or anyone on Concessionaire's behalf uses any of the information in Reference Documents in any way, such use is made on the basis that Concessionaire, not Owner, has approved and is responsible for said information.

**1.4.4** The Parties acknowledge and agree that general industry or general government manuals and publications that are part of the Reference Documents may be revised, changed, added to or replaced from time to time by the agencies or organizations that issue such manuals and publications. Owner shall have no obligation to notify Concessionaire regarding any such revisions, changes, additions or replacements, but Owner may notify Concessionaire regarding Changed D&C Standards under Sections 7.2.5 and 7.2.6. Concessionaire shall independently maintain awareness of such changes as they are published or made public.

**1.4.5** Where the Technical Provisions expressly require compliance with specified general industry or general government manuals and publications or portions thereof, then the manual, publication or portion thereof to be complied with is not considered a Reference Document and instead is considered to be incorporated by reference into the Technical Provisions.

**1.4.6** Nothing contained in this Section 1.4 is intended to diminish or to derogate from the rights of Concessionaire for compensation or time relief in connection with Relief Events under Article 15.

## ARTICLE 2. CONCESSION; TERM

### 2.1 Concession

In accordance with the Act and subject to the terms of the Contract Documents, Owner hereby grants to Concessionaire the exclusive right, and Concessionaire accepts the obligation and agrees, during the Term, to finance, develop, design, construct, equip, supply LRVs for, operate and maintain the Project, including performance of Renewal Work and handback of the Project at the end of the Term, and perform such other activities relating to the foregoing not specifically retained by Owner for the Project.

### 2.2 Right of Entry

Subject to Section 7.5, Concessionaire and Concessionaire-Related Entities shall have the right to enter onto Project ROW during the Term to carry out Concessionaire's obligations under this Agreement. After the Termination Date, Concessionaire and Concessionaire-Related Entities may enter onto Project ROW to perform post-termination obligations either based on the right of entry granted in Section 19.7.3 or on a separate right of entry provided by Owner in writing. Concessionaire shall comply with, and shall ensure that Concessionaire-Related Entities comply with, all agreements, easements, rights of entry, covenants, conditions, restrictions and other instruments under which Owner has received or will receive title or rights of entry or rights of access to said property.

In accordance with Section 7.5.4, Owner will provide reasonable assistance to Concessionaire in seeking approval for access to any parcel in advance of the date specified in the Property Acquisition Schedule (or, with respect to the properties listed therein, Exhibit 2, Section 7).

### 2.3 Title

**2.3.1** The Parties acknowledge and agree that:

- (a) Concessionaire is not the legal or equitable owner or lessee of the Project ROW or the Project improvements for any purpose;
- (b) Concessionaire's rights under this Agreement are derived solely from its status as an independent contractor under this Agreement, and not as tenant, lessee, easement holder, optionee, lienor, mortgagee, purchaser or owner of any other interest in real property;
- (c) The payments to be received by Concessionaire under this Agreement are for services to be performed by Concessionaire, and are not payments in the nature of rent, fees with respect to real property, or purchase price of real property.

**2.3.2** Title to each LRV included in the D&C Work shall pass to Owner, free and clear of all liens or other charges of any kind or nature, upon payment by Owner to Concessionaire, under Section 13.1.1.1(d), which final payment shall be made following satisfactory completion of all acceptance testing for such LRV, as more fully described in Part 2C of the Technical Provisions. Title to each of the Option LRVs and the O&M Spare LRV shall pass upon delivery to Owner under ARTICLE 12 and Section 8.4.1, respectively. Title to all other materials, equipment, tools and supplies furnished under the Contract Documents for incorporation into the Project or that are required for operation or maintenance of the Project shall pass to Owner, free and clear of all liens or other charges of any kind or nature, upon the

earlier of (a) incorporation into the Project or, for items that will not be incorporated into the Project, delivery to the Site or (b) the date of payment by Owner to Concessionaire for such item, including payments in the form of Progress Payments, RSA Payments, payments for Change Orders and Availability Payments.

**2.3.3** Except for Concessionaire Intellectual Property, title to any Intellectual Property to the extent made, conceived, prepared or reduced to practice as part of the Work, incorporated into the Project, including any improvements, modifications, enhancements or derivative works to or of the Owner Intellectual Property shall vest in Owner at the earliest of creation, conception, preparation or reduction to practice.

**2.3.4** Concessionaire shall furnish or execute all necessary documents of title within 90 days of receiving a written request from Owner.

**2.3.5** Passage of title to Owner shall not affect Concessionaire's care, custody and control responsibilities. Except as provided in Section 2.3.6, Concessionaire shall be responsible for care, custody and control of all components of the Project, including all materials, equipment, tools and supplies described in Section 2.3.2, until the Termination Date.

**2.3.6** Concessionaire is responsible for care, custody and control of all elements of the Project (including the Third Party Work) that will be owned by third parties until acceptance of such elements by the relevant third party. As described in the Technical Provisions, during the O&M Period Concessionaire is also responsible for maintenance of certain improvements within the O&M Limits owned by third parties.

## **2.4 Term**

The Term ends 30 years after the earlier of the RSA Deadline and the date of issuance of the Certificate of Revenue Service Availability by the Independent Engineer, subject to (a) the right of the Parties to terminate this Agreement early in accordance with this Agreement or otherwise at law and (b) the effect of Extended Delays on the Term under Section 15.9.2.5.

## **2.5 Fare Setting**

Owner retains the right and discretion to set and adjust fares and all other charges payable by Users.

## **2.6 Limitation on Concessionaire's Rights**

Notwithstanding any delegation of rights under any Utility Agreement or anything else to the contrary in the Contract Documents, Concessionaire has no power or authority to make any commitments on Owner's behalf or to execute agreements in the name of or on behalf of Owner. Concessionaire shall not enter into any agreement with any Governmental Entity, Utility Owner, property owner or other third party having regulatory jurisdiction over any aspect of the Project or Work or having any property interest affected by the Project or the Work that in any way purports to obligate Owner, or states or implies that Owner has an obligation, to the third party to carry out any installation, design, construction, maintenance, repair, operation, control, supervision, regulation or other activity after the end of the Term, unless Owner otherwise approves.

## **ARTICLE 3. FINANCIAL MODEL AND FINANCIAL MODEL UPDATES**

### **3.1 Financial Model; Financial Model Updates; Financial Modeling Data**

#### **3.1.1 Receipt, Examination and Inventory**

**3.1.1.1** Owner acknowledges receipt of the Base Case Financial Model and Financial Modeling Data included in the Proposal.

**3.1.1.2** The Parties shall, within 10 business days after the Effective Date, diligently examine and inventory all the Financial Modeling Data to verify that the Financial Modeling Data is authentic, legible and in accordance with the terms of this Section 3.1. A similar examination and inventory shall occur for the Financial Model and the Financial Modeling Data at Financial Close and subsequent updates to the Financial Model and Financial Modeling Data, within 10 business days after delivery.

**3.1.1.3** Owner's participation in any examination or inventory, whether before or after the Effective Date:

(a) Does not include review, nor constitute approval, of proposed construction methods, estimating assumptions, or demonstrate compliance with the Contract Documents; and

(b) Does not alter any terms of the Contract Documents.

**3.1.1.4** Upon completion of said examination and inventory, Concessionaire shall provide a written certification stating:

(a) With respect to the materials initially submitted to Owner, that such materials constitute the Base Case Financial Model and all the Financial Modeling Data included in or used in preparation of the Proposal;

(b) With respect to the materials submitted to Owner at the Effective Date and at Financial Close, that such materials constitute the Financial Model and all the Financial Modeling Data considered in connection with the Initial Project Debt; and

(c) With respect to all materials, that the individual executing the certification has personally examined the contents of the container and that the Base Case Financial Model, Financial Model or Financial Model Update, as applicable, and the Financial Modeling Data are complete and in accordance with the terms of the Contract Documents.

#### **3.1.2 Updates of Financial Model and Financial Modeling Data**

**3.1.2.1** Concessionaire shall run new projections and calculations under the Financial Model Formulas to produce a Financial Model Update in accordance with this Section 3.1.2 as follows:

- (a) In connection with Financial Close, as provided in Section 4.4.8;
- (b) With respect to a Relief Event for which Owner owes a Compensation Amount;
- (c) With respect to a Relief Event or Force Majeure Event resulting in an extension of the Term;
- (d) With respect to an event for which Owner is entitled to compensation under Section 17.2;
- (e) With respect to a Refinancing with Refinancing Gain in which Owner participates; and
- (f) With respect to any other event which requires the Contract Documents to be amended, if the Parties agree that the amendment has a material effect on the Financial Model.

**3.1.2.2** If an update is required under Section 3.1.2.1, Concessionaire shall:

- (a) Deliver the Financial Model Update and related Financial Modeling Data in accordance with Section 3.1.4, as and when prepared;
- (b) Participate in the examination and inventory under Section 3.1.1.2; and
- (c) Provide the certifications required under Section 3.1.1.4.

**3.1.2.3** Financial Model Updates under Section 3.1.2.1(a) require the approval of the Parties.

**3.1.3** For Financial Model Updates under Section 3.1.2.1(b), 3.1.2.1(c), 3.1.2.1(d) or 3.1.2.1(e), Owner may challenge the validity, accuracy or reasonableness of any Financial Model Update or the related updated Financial Modeling Data by submitting the issue to the Financial DRB. Any such challenge will be subject to the Dispute Resolution Procedures if the Parties do not agree to accept the Financial DRB's recommendation. Owner may not make any challenge based solely on a belief that future changes in interest rates or credit spreads may be favorable to Owner. In the event of a challenge, the immediately preceding Financial Model Update that has not been challenged (or, if there has been no unchallenged Financial Model Update, the Financial Model) shall remain in effect pending the outcome of the challenge or until a new Financial Model Update is issued and not challenged.

### **3.1.4 Form of Financial Model, Financial Model Updates and Financial Modeling Data**

Concessionaire shall deliver the Financial Model, Financial Model Updates and Financial Modeling Data both as a paper copy and on electronic storage media with enabled accounting formulas, such as Excel™ software, in a sealed container, clearly marked with Concessionaire's name, date of submittal, Project contract number and the words, "Financial Model and Financial Modeling Data to Be Held by MDOT/MTA".

## **3.2 Model Audits**

**3.2.1** Within two business days after Financial Close, Concessionaire shall deliver to Owner an update of the audit and opinion obtained from the independent model auditor that shall (a) be co-addressed to Owner, (b) expressly identify Owner as an entity entitled to rely thereon, and (c) take into account only the change in the Monthly Availability Payments and differences between the financial terms assumed in the Financial Model and the financial terms obtained through negotiations with the Lender(s) and/or Lead Underwriter as described in Section 4.4.2, as provided for in Section 4.4.7, and (d) take into account the final terms of the Initial Funding Agreements and Initial Security Documents.

**3.2.2** Owner may require that Financial Model Updates be audited by an independent audit firm satisfactory to Owner before the Financial Model Update becomes effective under this Agreement. The Parties shall initially bear equally the cost of such an audit. If the audit results in a material correction to the Financial Model, Concessionaire shall be responsible for the audit costs and shall reimburse Owner for reasonable amounts advanced by Owner. If the audit does not result in a material correction to the Financial Model, Owner shall be responsible for the audit costs and shall reimburse Concessionaire for reasonable amounts advanced by Concessionaire. Notwithstanding the foregoing, if the audit of the Financial Model Update is the same one required by the Lenders, Owner shall have no liability for the cost of the audit.

**3.2.3** Additional audit rights apply under Section 23.2 and Exhibit 16.

## **3.3 Financial Model Formulas**

In no event shall the Financial Model Formulas be changed except with the prior approval of both Parties, each in its discretion.

## **3.4 Additional Provisions**

Refer to Article 23 for additional provisions relevant to the Financial Model and accompanying materials.

## ARTICLE 4. CONCESSIONAIRE FINANCING; REFINANCING; EQUITY

### 4.1 Concessionaire Right and Responsibility to Finance

**4.1.1** Concessionaire may grant security interests in or assign the entire Concessionaire's Interest (but not a portion of such interest) to Lenders for purposes of securing the Project Debt, subject to the terms of the Contract Documents. Concessionaire shall not pledge or encumber the Concessionaire's Interest, or any portion of such interest, to secure any indebtedness of any Person other than (a) Concessionaire, (b) any special purpose entity that owns Concessionaire but no other assets and has purposes and powers limited to the Project and Work, (c) a special purpose entity subsidiary owned by either Concessionaire or an entity described in Section 4.1.1(b), or (d) the PABs Issuer.

**4.1.2** Concessionaire shall obtain and repay, at its own risk and without recourse to Owner, all financing obtained by Concessionaire relating to the Project, including all financing needed to pay for costs of the D&C Work not covered by scheduled Owner payments. Concessionaire shall take all appropriate action to obtain the necessary financing as described in the Financial Proposal on or before the Financial Close Deadline.

**4.1.3** Subject to Section 4.4.6, if Concessionaire's Financial Proposal includes PABs, Concessionaire bears all risks relating to a delay in receiving the necessary approvals and for compliance with all Federal Requirements. At Concessionaire's written request, Owner will use reasonable efforts to assist Concessionaire's efforts to obtain necessary federal approvals for PABs, including a modification of the PABs allocation obtained by Owner for the Project to increase the principal amount of such allocation.

**4.1.4** Subject to Section 4.4.6, if Concessionaire's Financial Proposal includes TIFIA financing:

(a) Concessionaire bears all risks relating to such TIFIA financing including any delay in receiving the necessary approvals, compliance with all TIFIA requirements, satisfying any conditions placed on any TIFIA financing by USDOT and complying with any other requirements of State and federal tax laws, if applicable;

(b) Concessionaire will be responsible for closing TIFIA financing (including any TIFIA Loan); and

(c) Owner will bear the risk of, and be entitled to the benefit of, changes in the TIFIA Structuring Assumptions to the extent that the TIFIA Joint Program Office requires changes after the Proposal Date that have adverse or beneficial effects on the Financial Proposal. Furthermore, notwithstanding the provisions of this Section 4.1.4, Owner will not bear the risk of changes in the TIFIA Structuring Assumptions to the extent such changes are required by a Rating Agency to obtain an investment grade rating or by any Person providing financing (excluding the TIFIA Loan) to obtain such financing.

**4.1.5** If Concessionaire's Financial Proposal includes PABs:

(a) Concessionaire bears all risks relating to, and shall obtain ratings, bond counsel opinions and credit enhancement, as well as satisfying any conditions placed on the use of the allocation by USDOT or complying with any other requirements of state and federal tax laws, if applicable; and

(b) Owner will:

(i) Enter into a continuing disclosure agreement with respect to the PABs in substantially the form attached as Exhibit 5F;

(ii) Authorize Concessionaire to include, in the preliminary and final official statement for the PABs, the "Financial and Economic Statement for the State of Maryland" in the form posted on the "Electronic Municipal Market Access" ("EMMA") website at the time of the publication of such offering materials;

(iii) Provide the Owner Certificate Regarding PABs Official Statement with respect to such official statement in substantially the form attached as Exhibit 5E; and

(iv) Provide an opinion of the Attorney General of the State of Maryland that the portion of the "Financial and Economic Statement for the State of Maryland" entitled "Litigation" does not contain any untrue statement of a material fact or omit to state any material fact necessary to make the statements made in Exhibit 5E, in light of the circumstances under which they were made, not misleading.

**4.1.6** Except as otherwise provided in Section 4.4.7, Concessionaire bears all risk of any changes in the interest rate, payment provisions, collateral requirements, financing charges, breakage charges or the other terms of its financing.

**4.1.7** Notwithstanding the foreclosure or other enforcement of any security interest created by a Security Document, Concessionaire shall remain liable to Owner for the payment of all sums owing to Owner under this Agreement and the performance and observance of all of Concessionaire's covenants and obligations under the Contract Documents.

## **4.2 Owner Cooperation; No Owner Liability**

### **4.2.1 Implementation of the Financial Proposal**

(a) Owner will reasonably assist Concessionaire in obtaining approvals for issuance of debt by other Governmental Entities required by the Financial Proposal, including by providing documents and information required to comply with any requirements under applicable Laws in connection with such issuance or approvals. Notwithstanding the foregoing, but subject to Section 19.4.3, Owner does not bear any risk for the failure of Concessionaire to obtain funding from these potential sources, and such failure, if any, shall not diminish Concessionaire's obligations under this Agreement.

(b) If the Financial Proposal includes a TIFIA Loan and USDOT requires execution of the "New Starts Full Funding Grant Agreement" as a requirement for draw on such TIFIA Loan, then, without limiting Concessionaire's rights under Section 19.4.3, Owner will execute, and use commercially reasonable efforts to cause USDOT to execute, such "New Starts Full Funding Grant Agreement" prior to May 17, 2018.

**4.2.2** Except in the case of PABs issued for the Project:

(a) None of the State, Owner or any other agency, instrumentality or political subdivision of the State, and no member, director, officer, employee, agent or representative of any of them, shall have any obligation to pay: (i) debt service or principal sums on any Project Debt; (ii) obligations described in Section 25.2.4 issued or incurred by any Person in connection with this Agreement or the Project; (iii) any interest accrued on the amounts in items (i) and (ii); or (iv) any other sum secured by or accruing under any Funding Agreement or Security Document; and

(b) Owner shall have no obligation to join in, execute or guarantee any note or other evidence of indebtedness incurred in connection with the Project or the Contract Documents, any other Funding Agreement or any Security Document.

**4.2.3** In the case of PABs issued for the Project, the PABs are special and limited obligations of the PABs Issuer, payable solely from and secured exclusively by the revenues and other amounts pledged under the relevant indenture, including the payments to be made by Concessionaire under the loan agreement entered into between the PABs Issuer and Concessionaire in connection with the loan of the proceeds from the sale of the PABs by the PABs Issuer to Concessionaire and are not payable from taxes or from appropriations made by the Maryland General Assembly.

**4.2.4** PABs do not constitute an indebtedness, or a pledge of the faith and credit, of Owner, the State or any political subdivision of the State within the meaning or application of any constitutional provision or limitation. The obligation of the PABs Issuer to pay the amount of the principal of, premium, if any, and interest on the PABs does not constitute a pledge of the faith, credit or taxing power of the State or any political subdivision of the State within the meaning or application of any constitutional provision or limitation. The holders or owners of the PABs have, individually or collectively, no right to have taxes levied or compel appropriations by the Maryland General Assembly or any political subdivision of the State for the payment of any or all of the amount of such principal of, premium, if any, and interest on the PABs.

**4.2.5** Except in the case of a default under a Funding Agreement by the PABs Issuer with respect to its express obligations in such Funding Agreement with respect to the PABs and except for a violation by Owner of its express obligations to Lenders in any Direct Agreement, no Lender is entitled to seek any damages or other amounts from Owner or any other agency, instrumentality or political subdivision of the State, whether for Project Debt or any other amount.

**4.2.6** Section 4.2.5 does not affect Owner's liability to Concessionaire under Article 19 and Exhibit 13B for Termination Compensation that is measured in whole or in part by reference to outstanding Project Debt.

**4.2.7** Owner shall have no obligation to any Lender under the Contract Documents, except to the extent of any express obligations of Owner to Lenders under any Direct Agreement or in any other instrument or agreement signed by Owner in favor of such Lender or Collateral Agent. This Section 4.2.7 does not preclude Lender enforcement of this Agreement against Owner where the Lender has succeeded to the Concessionaire's Interest, whether by way of assignment or subrogation.

### **4.3 Mandatory Terms of Project Debt, Funding Agreements and Security Documents**

Project Debt, Funding Agreements and Security Documents (including any amendments or supplements), shall comply with the following:

**4.3.1** The Security Documents may only secure Project Debt if the funds advanced are obligated to be used exclusively for the purposes of:

- (a) Developing, designing, constructing, supplying and equipping the Project (including LRVs), and operating and maintaining the Project, including making payments to Utility Owners, or performing other Work;
- (b) Paying interest and principal on Project Debt;
- (c) Paying reasonable development fees to Concessionaire-Related Entities for services related to the Project;
- (d) Paying fees and premiums to any Lender of the Project Debt or such Lender's agents;
- (e) Paying costs and fees in connection with the closing and administering of any permitted Project Debt;
- (f) Making payments due under the Contract Documents to Owner or any other Person;
- (g) Making payment of Taxes;
- (h) Funding reserves required under this Agreement, Funding Agreements or Security Documents, applicable securities laws, or Environmental Laws;
- (i) Making permitted Distributions; and
- (j) Refinancing any Project Debt under Sections 4.3.1(a) through 4.3.1(i).

**4.3.2** All rights concerning Concessionaire's Interest acquired by Lenders under any Funding Agreement or Security Document (e.g., foreclosure and step-in rights) shall expressly state that, upon exercise of such rights, the Lender will be acting as Concessionaire under the Direct Agreement, in its own capacity or by and through the Collateral Agent, and thus be subject to the provisions of the Contract Documents. Project Debt (excluding Subordinate Debt) must be issued and held only by Institutional Lenders determined at the date the Security Document is executed and delivered (or, if later, at the date any such Institutional Lender becomes a party to the Security Document), except that (a) qualified investors other than Institutional Lenders may acquire and hold interests in Project Debt, but only if an Institutional Lender acts as Collateral Agent for such Project Debt and (b) PABs may be issued, acquired and held by parties other than Institutional Lenders but only if an Institutional Lender acts as indenture trustee for the PABs.

**4.3.3** The Security Documents collectively must encumber the entire Concessionaire's Interest, but this shall not affect Concessionaire's ability to enter into Subordinate Security Documents as permitted by the Funding Agreements or equipment lease financing.

**4.3.4** No Security Document or other instrument purporting to mortgage, pledge, encumber, or create a lien, charge or security interest on or against Concessionaire's Interest shall extend to or affect the interest of Owner in (a) the Project (including the LRVs), (b) the Project ROW or (c) the Contract Documents.

**4.3.5** Each note, bond or other negotiable or non-negotiable instrument evidencing Project Debt or any other obligations owed to any Person described in Section 4.3.2 in connection with the Project must include, or refer to a document controlling or relating to any such note, bond or other such instrument that includes, a conspicuous recital and provisions:

(a) in the case of Project Debt other than PABs, stating that payment of the principal of and interest on such Project Debt is a valid claim only as against the obligor and the security pledged by Concessionaire or the obligor is not an obligation, moral or otherwise, of the State, Owner, any other agency, instrumentality or political subdivision of the State, or any elected official, member, director, officer, employee, agent or representative of any of them, and neither the full faith and credit nor the taxing power, and no assets, of the State, Owner, or any other agency, instrumentality or political subdivision of the State is pledged to the payment of the principal thereof and interest thereon; and

(b) with respect to PABs, stating that (i) the PABs are special and limited obligations of the PABs Issuer, payable solely from and secured exclusively by the revenues and other amounts pledged under the relevant indenture, including the payments to be made by Concessionaire under the loan agreement entered into between the PABs Issuer and Concessionaire in connection with the loan of the proceeds from the sale of the PABs by the PABs Issuer to Concessionaire and are not payable from taxes or appropriations made by the General Assembly, (ii) the PABs do not constitute an indebtedness, or a pledge of the faith and credit, of Owner, the State or any political subdivision of the State within the meaning or application of any constitutional provision or limitation, (iii) the PABs are limited, special obligations of the PABs Issuer payable solely from amounts paid by the Concessionaire pursuant to the relevant Funding Agreement, and (iv) the PABs do not constitute a charge against the faith, credit or taxing power of the State or any political subdivision of the State within the meaning or application of any constitutional provision or limitation.

**4.3.6** Each Funding Agreement and Security Document subject to any Direct Agreement shall require the Collateral Agent to deliver any hard copy written notice it gives to Concessionaire under any Funding Agreement or Security Document relating to any "Event of Default" (or its equivalent, as defined in any Funding Agreement or Security Document that is subject to any Direct Agreement) to Owner concurrently with delivery of such notice to Concessionaire. Each Funding Agreement and Security Document, in either case not subject to any Direct Agreement, shall require the Lender to deliver a copy of any default-related notice to Owner concurrently with delivery of such notice to Concessionaire. Each Funding Agreement and Security Document that provides Lender remedies for default by Concessionaire under such Funding Agreement or Security Document, shall require the Collateral Agent to deliver notice concurrently to Owner, Concessionaire and any other Person, for every notice of election or enforcement of remedies under such Funding Agreement or Security Document, including an election to sell or foreclose, notice of sale or foreclosure or other notice required by Law or by the Security Document in connection with the exercise of remedies under the Funding Agreement or Security Document.

**4.3.7** Each relevant Funding Agreement and Security Document that may be in effect during any part of the period that the Handback Requirements apply shall expressly

permit, without condition or qualification except as allowed under this Section 4.3.7, Concessionaire to (a) issue additional Project Debt, secured by Concessionaire's Interest, for the added limited purposes of funding work in accordance with the Handback Requirements and Safety Compliance under Section 10.4 and (b) otherwise comply with its obligations in the Contract Documents regarding Renewal Work, the Asset Management Plan, Safety Compliance and the Handback Requirements. For the avoidance of doubt:

(a) Lenders then holding Project Debt may limit additional Project Debt if other funds are then, in Owner's determination, readily available to Concessionaire for the purpose of funding the Work;

(b) No Lender then holding Project Debt is required to grant senior or *pari passu* lien or payment status to any such additional Project Debt;

(c) The Lenders then holding Project Debt may impose reasonable and customary requirements as to performance and supervision of the Work, provided that such requirements may not be more onerous than the requirements in their respective existing Funding Agreements or Security Documents; and

(d) No Funding Agreement for such additional Project Debt may grant to any Lender the right to apply monies in any account funded by other Project Debt towards payment of any Handback Requirements costs. Notwithstanding the preceding sentence, following foreclosure or transfer in lieu of foreclosure, any Lender or Substituted Entity that succeeds to the entire Concessionaire's Interest in accordance with the Direct Agreement may use monies in any account funded to pay Handback Requirements costs, consistent with restrictions in any Direct Agreement.

**4.3.8** Each Funding Agreement and Security Document shall expressly state that:

(a) The Lender shall not name or join Owner, any other agency, instrumentality or political subdivision of the State, or any elected official, member, director, officer, employee, agent or representative of any of them in any legal proceeding seeking collection of the Project Debt or other obligations secured thereby or the foreclosure or other enforcement of the Funding Agreement or Security Document, except, in each case, (i) to the extent that an agency, instrumentality or political subdivision of the State is being named in its capacity as the conduit issuer of PABs under Section 10-101 *et seq.* of the Economic Development Article of the Annotated Code of Maryland and (ii) as such language may be modified in the Funding Agreements or the Security Documents approved by Owner as provided in any Direct Agreement.

(b) The Lender shall not seek any damages or other amounts from Owner, any other agency, instrumentality or political subdivision of the State, or any elected official, member, director, officer, employee, agent or representative of any of them, whether for Project Debt or any other amount, except (i) damages from Owner only for a violation by Owner of its express obligations to Lenders in any Direct Agreement, if applicable, and (ii) damages and other amounts due from Owner under this Agreement where the Lender has succeeded to the rights and interests of Concessionaire under the Contract Documents, whether by way of assignment or subrogation, or (iii) to the extent such damages or other amounts are being sought from an agency, instrumentality or political subdivision of the State in its capacity as the conduit issuer of PABs under Section 10-101 *et seq.* of the Economic Development Article of the Annotated Code of Maryland. Owner shall be entitled to take reasonable steps to

ensure Concessionaire's compliance with this clause (b), including contacting the Lender before execution of the Funding Agreement and Security Document.

(c) The Lender and the Collateral Agent shall respond to any request from Owner or Concessionaire for consent to a modification or amendment of any of the Contract Documents within a reasonable period of time.

The foregoing does not affect Owner's liability to Concessionaire under Article 19 and Exhibit 13B for Termination Compensation that is measured in whole or in part by reference to outstanding Project Debt.

**4.3.9** Each Security Document shall expressly state that the Collateral Agent shall have the right to take all actions, and shall perform all obligations, assigned to Collateral Agent under any Direct Agreement.

#### **4.4 Financial Close**

##### **4.4.1 Financial Close Security**

Concurrently with execution of this Agreement, Concessionaire shall deliver, or has delivered, to Owner the Financial Close Security, a copy of which is in Exhibit 6A.

##### **4.4.2 Schedule for Financial Close; Payment Adjustments**

**4.4.2.1** Concessionaire shall provide notice (the "Concessionaire FC Notice") to Owner regarding the date scheduled for Financial Close at least 45 days before the scheduled date for Financial Close, which scheduled date may not be any earlier than 150 days after the Proposal Date unless otherwise agreed in writing by Owner before delivery of the Concessionaire FC Notice. Owner may require Concessionaire to defer Financial Close in accordance with a notice (the "Owner FC Notice") delivered at least 21 days before the date identified for Financial Close in the Concessionaire FC Notice. The Owner FC Notice will specify a revised date for Financial Close, but (a) may not require deferral of Financial Close beyond 365 days after the Proposal Date and (b) except as otherwise provided in Section 4.4.2.2, Concessionaire's inability to achieve Financial Close by the Financial Close Deadline in effect on the date of the Concessionaire FC Notice due solely to such deferral shall be excused under Section 4.4.6.9.

**4.4.2.2** Concessionaire shall not be excused from achieving Financial Close by the Financial Close Deadline in effect on the date of the Concessionaire FC Notice and shall have no right to additional compensation due to an extension under Section 4.4.2.1 if (a) the date identified in the Owner FC Notice is seven or more days before such Financial Close Deadline in effect on the Concessionaire FC Notice or (b) Concessionaire is otherwise able to close before expiration of the commitments in the Financial Proposal, even if the close occurs after such Financial Close Deadline.

**4.4.2.3** The following provisions shall apply if achievement of Financial Close is excused under Section 4.4.6.9:

(i) the Financial Model and Availability Payments will be adjusted at Financial Close to account for Breakage Costs and commercially reasonable work fees, if any, payable to the Lenders who provided the commitments in the Financial Proposal and did not renew or extend such commitments after the expiration of such commitments before the new date for

Financial Close, provided that the total amount of such Breakage Costs and work fees for each such commitment shall not exceed 1% of the principal amount of the commitment; and

(ii) the Financial Model and amount of the Availability Payment will be adjusted at Financial Close to account for the increase in Concessionaire's reasonable and actual costs (without markup or profit) to achieve Financial Close and satisfactorily documented to the Owner, directly attributable to the delay in Financial Close, including external and internal costs but excluding costs covered under item (i) above, provided that such costs shall not exceed \$3,000,000.

**4.4.2.4** Except as otherwise provided under Section 4.4.2.2, if the date of Financial Close occurs more than 180 days after the Proposal Date due to a delay in Financial Close excused under Section 4.4.6 or an Owner FC Notice under Section 4.4.2.1, then the value of the D&C Work excluding Allowances and incentives (that is, the amounts shown in Exhibit 4A, Part A, items D, G and J) shall be adjusted based on the percentage change between (a) the average of the previous 12 months of monthly index values determined by reference to the most recently published Escalation Index 1 monthly index value as of 180 days after the Proposal Date, and (b) the average of the previous 12 months of monthly index values determined by reference to the most recently published Escalation Index 1 monthly index value as of seven business days before the date on which Financial Close is achieved. Notwithstanding the foregoing, no escalation shall be allowed with respect to any portion of the delay in Financial Close that was caused by the negligence, recklessness, willful misconduct, fault, breach of contract, fraud, or breach by any of Concessionaire-Related Entities of the requirements of the Contract Documents, or violation of Law or a Governmental Approval by any Concessionaire-Related Entity. The adjustment under this Section 4.4.2.4 will be accounted for through modifications to the Schedule of Values and a corresponding change in Owner's payments under Section 13.1.1 and/or an adjustment to the Financial Model and corresponding adjustment to Availability Payments.

**4.4.2.5** The payment adjustments under Sections 4.4.2.3 and 4.4.2.4, along with the provisions regarding changes in interest rates and/or credit spreads under Section 4.4.7, are the sole and exclusive amount payable to Concessionaire as compensation for delay in Financial Close excused under Section 4.4.6.

#### **4.4.3 Unconditional Obligation and Compliance with PABs Issuer MOU**

**4.4.3.1** Except as excused under Section 4.4.6, or as provided in Section 4.4.2.3, (a) Concessionaire is unconditionally obligated to enter into the Initial Funding Agreements and Initial Security Documents and to complete closing on or before the Financial Close Deadline of all of the Initial Project Debt (including any sub-debt), and (b) the Initial Project Debt must be sufficient to fund all capital requirements associated with the D&C Work in the Financial Model, when combined with all direct payments for D&C Work to be made by Owner under this Agreement and all unconditional equity commitments by the Equity Members (which equity commitments must be acceptable to the Collateral Agent).

**4.4.3.2** If Concessionaire's Financial Proposal includes PABs, Concessionaire shall perform the obligations delegated by Owner to Concessionaire, as set forth in Article 1 of the PABs Issuer MOU, and the Concessionaire shall cause the Funding Agreements and Security Documents to comply with the requirements, in said Article.

#### **4.4.4 Conditions to Financial Close**

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

**4.4.4.1** No less than 30 days before the scheduled date for Financial Close, Concessionaire has delivered to Owner for review and comment drafts of (a) the Initial Funding Agreements and Initial Security Documents containing the proposed commercial terms relating to the Initial Project Debt and (b) if not previously provided, the Design-Build Contract, Vehicle Supply Contract and any other Key Contracts that are ready for execution;

**4.4.4.2** Concessionaire has delivered to Owner a true and complete executed copy of each Direct Agreement (if any) requested by Lenders, each substantially in form and substance specified under Exhibit 5B;

**4.4.4.3** All applicable parties have entered into and delivered the Initial Funding Agreements, Initial Security Documents and Key Contracts (except to the extent that such documents are not required to be executed on the Financial Close date) meeting the requirements of Section 4.3, and Concessionaire has delivered to Owner true and complete copies of the executed Initial Funding Agreements, Initial Security Documents (other than minor ancillary documents customarily delivered after Financial Close and containing no new material commercial terms) and Key Contracts; and

**4.4.4.4** Concessionaire has delivered to Owner

(a) updates to the legal opinions provided by Concessionaire to Owner prior to Commercial Close regarding (i) the existence and good standing of the Concessionaire, (ii) due execution, authorization and delivery of the Agreement by Concessionaire, and (iii) enforceability of the Agreement against Concessionaire;

(b) a written opinion or opinions regarding (i) the existence and good standing of the parties to any Direct Agreement (other than Owner), (ii) due execution, authorization and delivery of the Direct Agreement by the parties thereto (other than Owner), and (iii) enforceability of the Direct Agreement against Concessionaire; and

(c) written opinions and/or, with respect to clauses (i) and (ii)(A), duly authorized officer's certificate(s), (i) regarding the existence and good standing of entity that is a party to each of the Key Contracts and each entity acting as guarantor under a guaranty subject to Section 11.4 and (ii) that each of the Key Contracts and each guaranty subject to Section 11.4: (A) has been duly executed, authorized and delivered by such entities, (B) is enforceable against such entities, and (C) does not conflict with (1) any agreement to which any such entity is a party, (2) any orders, judgments or decrees by which any such entity is bound, (3) any organizational documents of such entities or (4) any statute, rule or regulation applicable to such entities that are valid and in effect as of the date of Financial Close.

All opinions shall be in form and substance reasonably acceptable to Owner. The opinions described in clause (c) may be provided by naming Owner as an addressee to any opinion(s) delivered to Lenders and/or Collateral Agent in connection with Financial Close, giving Owner and its permitted assigns express permission to rely upon such opinion(s).

#### **4.4.5 Notice of Financial Close**

Concessionaire shall deliver to Owner notice of Concessionaire's satisfaction of the conditions in Section 4.4.4 within one business day after all such conditions are satisfied.

#### **4.4.6 Excused Obligation to Achieve Financial Close by the Financial Close Deadline**

Concessionaire's obligation to achieve Financial Close by the Financial Close Deadline is excused only if such failure is directly attributable to one of the following (in which case the Parties shall proceed under Section 4.4.12):

**4.4.6.1** If Concessionaire's Financial Proposal includes PABs, the withdrawal, rescission or reduction by either USDOT or PABs Issuer of the principal amount of the PABs allocation obtained by Owner before the Proposal Date below the principal amount of PABs as shown in Concessionaire's Financial Proposal and the Financial Model, due to no negligence, recklessness, willful misconduct, fault, breach of contract, fraud, or breach by any of Concessionaire-Related Entities of the requirements of the Contract Documents, or violation of Law or a Governmental Approval by any Concessionaire-Related Entity relating to such allocation;

**4.4.6.2** If Concessionaire's Financial Proposal includes PABs, the refusal or unreasonable delay of the PABs Issuer to comply with the PABs Issuer's obligations set forth in Article 1 of the PABs Issuer MOU and to issue bonds in the amount identified by Concessionaire's underwriters in the Initial Funding Agreements, provided that such refusal or delay is not due to any negligence, recklessness, willful misconduct, fault, breach of contract, fraud or breach by any of Concessionaire-Related Entities of the requirements of the Contract Documents, or violation of Law or a Governmental Approval by any Concessionaire-Related Entity, including Concessionaire's failure to comply with all obligations and requirements that it is obligated to comply with under Article 1 of the PABs Issuer MOU. Delay by the PABs Issuer shall not be considered unreasonable if the Concessionaire's financing schedule fails to provide normal and customary time periods for the PABs Issuer to carry out the ordinary and necessary functions of a conduit issuer of tax-exempt bonds;

**4.4.6.3** If Concessionaire's Financial Proposal includes PABs:

(a) the refusal of counsel to the PABs Issuer to allow closing of the PABs if the bond counsel is ready to give an unqualified opinion regarding both the validity of the issuance of the PABs and the tax exempt status of interest paid on the PABs, unless the basis for such refusal is that it would be unreasonable for bond counsel to deliver the opinion; or

(b) the delay of the PABs Issuer's counsel in authorizing closing of the PABs beyond the date specified in the Concessionaire FC Notice (or the Owner FC Notice, if applicable), except to the extent that the financing schedule established by Concessionaire does not provide the PABs Issuer's counsel normal and customary time periods for carrying out the ordinary and necessary functions of such counsel to a conduit issuer of tax-exempt bonds;

**4.4.6.4** If Concessionaire's Financial Proposal includes PABs, Owner fails to timely provide both (a) a certificate substantially in the Form of Certificate regarding PABs Official Statement (Exhibit 5E) and (b) an executed Continuing Disclosure Agreement substantially in the form of Exhibit 5F;

**4.4.6.5** If Concessionaire's Financial Proposal includes a TIFIA Loan, either (a) a TIFIA Event occurs, or (b) in the opinion of Owner following consultation with Concessionaire a TIFIA Event is likely to occur;

**4.4.6.6** If Concessionaire's Financial Proposal includes a TIFIA Loan, Owner fails to (a) execute the "New Starts Full Funding Grant Agreement" and USDOT requires execution of the "New Starts Full Funding Grant Agreement" as a requirement for Financial Close on such TIFIA Loan, (b) provide evidence to USDOT of eligible project costs previously incurred by Owner meeting the requirements of 23 USC §§ 134 & 135, et seq.; or (c) include the Project in State and metropolitan transportation improvement plans (all as required in the TIFIA Term Sheet);

**4.4.6.7** Owner fails to timely deliver to Concessionaire (a) a certificate, substantially in the form of Exhibit 5D and (b) a letter from the Maryland Office of the Attorney General, substantially in the form attached as Exhibit 5I, addressed to Concessionaire and the Lenders, and incorporating necessary modifications acceptable to Owner;

**4.4.6.8** The occurrence of a Severe Market Disruption that directly causes a delay in the financing or that constitutes a basis for rescission by any Lender of its original, or as-modified, commitments in the Financial Proposal or otherwise excuses performance under, such commitments under their terms; provided that Concessionaire has exercised good faith efforts to prevent a delay or any such rescission or excused performance by such Lenders; or

**4.4.6.9** By an Owner FC Notice, Owner defers Financial Close to a date later than 173 days after the Proposal Date and as a result Concessionaire is unable to close on or before the deferred date due to expiration of commitments in the Financial Proposal under their terms, provided that Concessionaire has undertaken commercially reasonable efforts to extend or renew such commitments before expiration but has been unable to do so.

#### **4.4.7 Changes in Interest Rates and Credit Spreads**

Subject to Owner's rights to terminate under Section 19.6.1, Owner will bear the risk and have the benefit of the following:

**4.4.7.1** With respect to the Initial Project Debt, 100% of the impact (either positive or negative) on the Monthly Availability Payment of changes in the Benchmark Interest Rates between the Proposal Interest Rates and the relevant Financial Close Interest Rates. The Parties shall adjust the Financial Model at Financial Close to reflect differences between the Proposal Interest Rates and the Financial Close Interest Rates, any changes in the TIFIA Structuring Assumptions allowed under Section 4.1.4(c) and any revisions approved by the Parties but not any potential errors identified as part of the updated audit opinion provided under Section 3.2.2.

**4.4.7.2** 85% of the impact (either positive or negative) on the Monthly Availability Payment of the differences between the Proposal Credit Spread(s) for any bond debt instrument (whether PABs or taxable bonds) and the Financial Close Credit Spread(s) for the same debt instrument as obtained at Financial Close or the date of the execution of the bond purchase agreement relating to the purchase and sale of the PABs or taxable bonds. Following expiration of the commitments, as they may have been extended, renewed or renegotiated under this Section 4.4, Owner bears 100% of the impact described in the preceding sentence and 100% of the impact on the other components of Initial Project Debt, including bank facilities.

Except for any adjustments that may be made under Section 4.4.12, Owner will bear no risk (and have no benefit) with regard to differences in Concessionaire's costs relating to credit spreads, fees or hedge credit charges assessed for Project Debt incurred through a bank loan.

#### **4.4.8 Financial Model Update**

The Parties will use the Financial Model to calculate the change under Section 4.4.7, positive or negative, in the Monthly Availability Payment. The Parties shall make such calculation and produce the Financial Model and Equity IRR at Financial Close as follows:

**4.4.8.1** The Financial Modeling Data will be updated with the Base Interest Rates and the Credit Spread(s) as adjusted in Section 4.4.7. The Financial Model constraints will be updated with the revised TIFIA Structuring Assumptions, if any, allowed under Section 4.1.4(c).

**4.4.8.2** The Monthly Availability Payment and, if necessary, the debt-to-equity ratio will be adjusted in the Financial Model to restore both the Equity IRR and the Debt Service Coverage Ratio to the same levels as in the Base Case Financial Model if the Equity IRR and the Debt Service Coverage Ratio have changed as a result of any changes to (a) the Base Interest Rate and Credit Spread under Section 4.4.7, and/or (b) the TIFIA Structuring Assumptions under Section 4.1.4(c). Any change in the total debt amount resulting from a change in the debt-to-equity ratio will be allocated to the TIFIA Loan amount, unless this amount is constrained by the terms of the TIFIA Term Sheet or the constraints described in Exhibit 10 (except that the Financial Close date in the Base Case Financial Model shall be adjusted consistent with the requirements of this Section 4.4.8.2).

**4.4.8.3** The foregoing procedure to adjust the Financial Model is detailed in the instructions included in Exhibit 10. Such procedure shall be performed on Concessionaire's audited Financial Model.

**4.4.8.4** The as-adjusted Financial Model shall constitute a Financial Model Update, and the resulting internal rate of return on equity invested shall be the Equity IRR as of the date of Financial Close.

#### **4.4.9 Modification of Agreement**

The Parties shall prepare and execute an amendment to this Agreement updating Exhibit 5A at Financial Close to reflect changes arising from the process set out in Section 4.4.8.

#### **4.4.10 Return of Financial Close Security**

Within two business days after the date of Financial Close, Owner will return to Concessionaire the Financial Close Security.

#### **4.4.11 Delivery of Documents**

Concessionaire shall deliver copies of any minor ancillary documents customarily delivered (e.g., UCC financing statements) to Owner within 30 days after the date of Financial Close.

#### **4.4.12 Excused Delay in Financial Close**

The following provisions apply if delay in Financial Close is excused under Section 4.4.6:

##### **4.4.12.1 Extension of Commitments**

Within the 30-day period following any extension of the Financial Close Deadline, or any occurrence excusing Concessionaire from its obligation to achieve Financial Close by the Financial Close Deadline, Concessionaire shall (a) use commercially reasonable efforts to cause the Lenders and secured parties under the Initial Funding Agreements and Initial Security Documents to renew or extend their respective commitments, on the terms in such Initial Funding Agreements and Initial Security Documents, so as to enable Concessionaire to complete closing for all of the Initial Project Debt (including any sub-debt) by a date agreed to by Owner and (b) obtain an extension of the Financial Close Security to such date and deliver to Owner evidence of the extension.

##### **4.4.12.2 Unconditional Obligation; Modification**

(a) If Concessionaire is able to obtain renewal or extension of all such commitments so as to enable Concessionaire to complete Financial Close and Concessionaire is able to extend the Financial Close Security, as described in Section 4.4.12.1, then Concessionaire shall be unconditionally obligated (i) to enter into the Initial Funding Agreements and Initial Security Documents (as each may be amended to reflect the renewal or extension of all such commitments) and (ii) to complete closing for all of the Initial Project Debt (including any sub-debt) in a total amount sufficient to fund all capital requirements associated with the D&C Work in the Financial Model, when combined with all direct payments for D&C Work to be made by Owner under this Agreement and all unconditional equity commitments by the Equity Members (which equity commitments must be acceptable to the Collateral Agent).

(b) If, however, after such commercially reasonable efforts and within said 30-day period, Concessionaire is unable to obtain all such commitments, or Concessionaire is only able to obtain commitments on terms that differ materially (and adversely to Concessionaire) from those in the Initial Funding Agreements and Initial Security Documents, then Owner may, by written notice to Concessionaire and subject to Section 4.4.12.3, terminate this Agreement under Section 19.6.1, and Owner will return to Concessionaire the Financial Close Security. If Owner does not elect to terminate this Agreement under Section 19.6.1, then, by written notice to Concessionaire, Owner may direct actions to modify the Financial Proposal and the Financial Model to the minimum extent possible so as not to deviate materially from the Board of Public Works' approval of this Agreement and to conform to the applicable constraints in Exhibit 10, without, however, abrogating Concessionaire's rights under Section 4.4.12.6. Actions that the Owner may direct include:

- (i) Changing the amount, timing, or structure of the Progress Payments;
- (ii) Adjusting the Availability Payments;
- (iii) Lowering the equity requirement; and/or

(iv) Introducing alternative sources of debt financing and/or debt structures into Concessionaire's financial plan through a competition among eligible prospective lenders to provide Initial Project Debt in conformance with the applicable constraints in Exhibit 10.

Alternatively, Owner may request the Parties to meet during the ensuing 30 days to seek to reach agreement on modifications to the Financial Proposal and the Financial Model to the minimum extent possible so as not to deviate materially from the Board of Public Works' approval of this Agreement and to conform to the applicable constraints set forth in Exhibit 10.

#### **4.4.12.3 Conditional Termination by Owner**

(a) If Owner elects to terminate this Agreement under Section 19.6.1, then Owner will give Concessionaire 15 business days' written notice of Owner's intent to so terminate.

(b) Notwithstanding an election by Owner to terminate this Agreement under Section 19.6.1, Owner will not terminate this Agreement if, within 10 business days after Concessionaire's receipt of such written notice, Concessionaire confirms in writing to Owner that Concessionaire is prepared to conduct a timely, transparent and competitive process to identify and arrange for the lowest-priced debt financing commercially available on terms reasonably satisfactory to Owner and Concessionaire, consistent with Section 4.4.12.2(b)(iv). If Concessionaire fails to provide a response confirming its intention to conduct such a process, then in connection with termination of this Agreement under Section 19.6.1, Owner will return the Financial Close Security to Concessionaire.

(c) If Concessionaire timely responds, confirming its intention to conduct such debt financing process (under Section 4.4.12.3(b)), thereafter conducts such process, obtains commitments in writing from eligible prospective lenders (who are not Restricted Persons) to provide sufficient Project Debt, and stands ready to complete Financial Close under the resulting alternative sources of debt and/or debt structures, then Concessionaire shall submit such revised financing plan to Owner. Upon Owner's receipt of the revised financing plan, Owner will review the plan and determine whether such alternative committed finance deviates materially from the Board of Public Works' approval of this Agreement and conforms to the applicable constraints set forth in Exhibit 10. If Owner determines that such alternative committed finance does not deviate materially from the Board of Public Works' approval of this Agreement and conforms to the applicable constraints set forth in Exhibit 10, then Owner and Concessionaire shall work diligently to achieve Financial Close under such revised financing plan. If, however, Owner determines that such alternative committed finance deviates materially from the Board of Public Works' approval of this Agreement or does not conform to the applicable constraints set forth in Exhibit 10, then either Owner or Concessionaire may elect to terminate this Agreement under Section 19.6.1, in which case (subject to Section 4.4.12.6, if applicable) Owner will return the Financial Close Security to Concessionaire.

(d) If Concessionaire timely responds confirming its intention to conduct such debt financing process, thereafter conducts such process, and either fails to obtain commitments in writing from eligible prospective lenders (who are not Restricted Persons) to provide sufficient Project Debt, or is otherwise not in a position to complete Financial Close under such lender commitments, then either Owner or

Concessionaire may elect to terminate this Agreement under Section 19.6.1, in which case (subject to Section 4.4.12.6, if applicable) Owner will return the Financial Close Security to Concessionaire.

#### **4.4.12.4 Action Upon Modification**

If Owner directs modification of Concessionaire's Financial Proposal (and Financial Model) under Section 4.4.12.2(b), or if Owner and Concessionaire agree to take other alternative action, then:

(a) This Agreement, including elements of Concessionaire's Financial Proposal and Financial Model, if applicable, will be amended as mutually agreed by the Parties to reflect the corresponding action(s) taken, and deadlines set, under Section 4.4.12.2;

(b) Owner will extend the Financial Close Deadline as reasonably requested by Concessionaire to allow sufficient time for Concessionaire to take the action(s) required under Section 4.4.12.1(b); provided that Concessionaire causes the Financial Close Security to remain valid until the extended deadline; and

(c) Concessionaire shall otherwise take all actions required to achieve Financial Close in accordance with the requirements of this Section 4.4.

#### **4.4.12.5 Action Absent Modification**

If (a) Concessionaire and Owner are unable to agree on an alternative course of action during the 30-day period identified under Section 4.4.12.1 or (b) any of the Lenders and secured parties under the Initial Funding Agreements and Initial Security Documents fail to agree to a modification directed by Owner under Section 4.4.12.2(b) or an agreed-upon alternative course of action, within 30 days after either receipt by Concessionaire of such Owner direction or agreement between Owner and Concessionaire on such alternative course of action, then Owner may terminate this Agreement under Section 19.6.1, in which case Owner will return the Financial Close Security to Concessionaire.

#### **4.4.12.6 Non-Forfeiture of Financial Close Security**

If Concessionaire's obligation to achieve Financial Close is excused under Section 4.4.6, then Concessionaire may terminate this Agreement under Section 19.6.1 without forfeiting its Financial Close Security (with Owner subject to an affirmative obligation to timely return the Financial Close Security to Concessionaire) only if:

(a) Owner notifies Concessionaire that it will not take any action under Section 4.4.12.2;

(b) Owner directs modification of Concessionaire's Financial Proposal under Section 4.4.12.2(b), or if Owner and Concessionaire agree to take other alternative action, and the effect of any such action will change the Equity IRR and the Debt Service Coverage Ratio to different levels than are reflected in the Base Case Financial Model, unless Owner, using the adjustment provisions in Section 4.4.8.2, restores the Equity IRR and the Debt Service Coverage Ratio to the same levels as in the Base Case Financial Model;

(c) Within 30 business days after receiving a written request to terminate from Concessionaire, Owner fails to take action under Section 4.4.12.2; or

(d) If either condition (a) or (b) in Section 4.4.12.5 occurs and within 30 business days after receiving a written request to act from Concessionaire, Owner fails to notify Concessionaire that Owner is terminating the Agreement under Section 4.4.12.5.

#### **4.4.12.7 Incremental Costs of Seeking Commitment Extensions**

As between Owner and Concessionaire, Owner and Concessionaire shall bear equally all actual and direct Incremental Costs incurred by Concessionaire in Concessionaire's use of commercially reasonable efforts to cause the Lenders and secured parties under the Initial Funding Agreements and Initial Security Documents to extend their respective commitments. Concessionaire may elect either to invoice Owner, following Financial Close, for half of all such actual and direct Incremental Costs incurred or to account for Owner's portion as among costs owed to Concessionaire in connection with termination of this Agreement under Section 19.6. Notwithstanding the foregoing sentence, (a) Owner shall bear all such Incremental Costs for Owner-caused conditions under Section 4.4.6; and (b) Concessionaire shall bear all such Incremental Costs for conditions under Section 4.4.6 that are caused by any negligence, recklessness, willful misconduct, fault, breach of contract, fraud or breach by any of Concessionaire-Related Entities of the requirements of the Contract Documents, or violation of Law or a Governmental Approval by any Concessionaire-Related Entity.

#### **4.4.12.8 Forfeiture of Financial Close Security**

Nothing in this Section 4.4.12 shall be construed to supersede Owner's rights to draw upon the Financial Close Security under Section 19.6.2.

### **4.5 Refinancing**

#### **4.5.1 Right of Refinancing**

Owner's prior written approval is required for all Refinancings other than Exempt Refinancings and Rescue Refinancings. Owner shall have no obligations or liabilities in connection with any Refinancing other than its obligations relating to Lender's rights in any Direct Agreement. If the Refinancing is with a new Lender, the new Lender may be added to an existing Direct Agreement or Owner shall enter into a new Direct Agreement with the new Lender, if such Lender so elects.

#### **4.5.2 Notice of Refinancing**

**4.5.2.1** In connection with any proposed Refinancing (except an Exempt Refinancing under clause (b), (c) or (d) of the definition of Exempt Refinancing), Concessionaire shall promptly submit to Owner a summary of the proposed Refinancing, together with a schedule setting forth the various activities, each with schedule durations, to be accomplished from commencement through the close of the proposed Refinancing.

**4.5.2.2** At least 30 days (five days with respect to subsection (c) of this Section 4.5.2.2) before the proposed date for closing any Refinancing (except an Exempt Refinancing under clauses (b), (c) or (d) of the definition of Exempt Refinancing, in each case subject to subsection (c) of this Section 4.5.2.2), Concessionaire shall:

(a) Provide draft proposed Funding Agreements and Security Documents and initial versions of available Pre-Refinancing Data, and any other submittals required by Exhibit 5G;

(b) If Concessionaire believes the Refinancing is a Rescue Refinancing or an Exempt Refinancing (other than an Exempt Refinancing under clause (b) of the definition of Exempt Refinancing), provide notice to Owner setting out the facts to support the basis for characterization of the transaction as an Exempt Refinancing or Rescue Refinancing; and

(c) With respect to any TIFIA Loan, provide notice to Owner of any dilution, syndication or transfer of interest of the TIFIA Joint Program Office in any such TIFIA Loan; provided, however, that Concessionaire shall use good faith efforts to provide such notice earlier than 5 days before the proposed date for closing any transaction to effect such dilution, syndication or transfer of interest.

**4.5.2.3** Within 15 days after receipt of the materials required under Section 4.5.2.2, Owner will review and determine (a) whether the proposed Refinancing is an Exempt Refinancing or Rescue Refinancing, and if neither, (b) whether to approve or disapprove the proposed Refinancing, (c) whether the proposed Refinancing will result in a Refinancing Gain, and (d) if applicable, the means for payment of Owner's portion of the Refinancing Gain. Owner's failure to deliver to Concessionaire notice of such determination and selection within such time period shall not prejudice Owner's right to disapprove the proposed Refinancing, to receive any portion of Refinancing Gain, or its selection of the means for payment of such portion.

**4.5.2.4** At least seven days before the proposed date for closing the Refinancing, Concessionaire shall deliver to Owner final drafts of the proposed Funding Agreements and Security Documents, together with updated versions of the Pre-Refinancing Data.

**4.5.2.5** Within five business days after close of the Refinancing, Concessionaire shall deliver to Owner copies of all signed Funding Agreements and Security Documents in connection with the Refinancing, and the final Refinancing Data.

**4.5.2.6** With each submission of Pre-Refinancing Data and Refinancing Data Concessionaire shall include an update to Concessionaire's Financial Model showing how Concessionaire has calculated the Refinancing Gain, if any, following the procedures in Exhibit 5G, and any other submittals required by Exhibit 5F.

**4.5.2.7** Within 10 business days after close of the Refinancing, Owner and Concessionaire shall meet and confer to agree upon the final calculation of the Refinancing Gain. Once the final calculation is made, Concessionaire shall pay Owner its portion of the Refinancing Gain if the selected means of payment is a lump sum payment. If there is any dispute regarding the amount owing, Concessionaire shall pay the undisputed amount to Owner and the amount in dispute shall be subject to resolution under the Dispute Resolution Procedures.

### **4.5.3 Refinancing Limitations, Requirements and Conditions**

**4.5.3.1** Other than an Exempt Refinancing and a Rescue Refinancing, no Refinancing is permitted before the Final Completion Date, except to the extent Concessionaire demonstrates to Owner's reasonable satisfaction that (a) the Committed Investment will not

decrease as a result of the Refinancing to a level below that required by Section 4.7, and (b) the Refinancing will produce Refinancing Gain that will be shared with Owner under Exhibit 5G.

**4.5.3.2** If Owner renders any assistance or performs any requested activity in connection with a Refinancing apart from delivering a consent and estoppel certificate under any Direct Agreement, then concurrently with close of the Refinancing, and as a condition precedent to Concessionaire's right to close the Refinancing, Concessionaire shall reimburse Owner all of Owner's Recoverable Costs incurred in connection with the Refinancing. Owner will deliver to Concessionaire a written invoice and demand before the scheduled date of closing. If for any reason the Refinancing does not close, Concessionaire shall reimburse such Owner's Recoverable Costs within 10 days after Owner delivers to Concessionaire a written invoice and demand for such costs.

**4.5.3.3** Concessionaire shall bear all risks for any Refinancing that negatively affects its Equity IRR, debt service coverage ratios or financial performance.

## **4.6 Refinancing Gain Sharing**

**4.6.1** Owner shall be entitled to receive a payment equal to 50% of any Refinancing Gain attributable to any Refinancing other than an Exempt Refinancing, calculated in accordance with Exhibit 5G.

**4.6.2** The Parties shall negotiate in good faith to determine the Refinancing Gain; and if the Parties fail to agree, the Dispute shall be subject to resolution under the Dispute Resolution Procedures.

## **4.7 Equity Requirements**

Throughout the period between the date of Financial Close and the RSA Date, Concessionaire shall maintain Committed Investments totaling not less than 10% of an amount equal to the sum of the Committed Investment (less dividends or return of capital) and the total debt principal outstanding after the RSA Payment (less any debt principal repaid with the Final Completion Payment), each expressed in year-of-expenditure terms, except to the extent:

(a) Concessionaire must reduce the amount of Committed Investments below 10% as part of a workout of a breach or default under the Initial Funding Agreements or Initial Security Documents; or

(b) The amount of Committed Investments is reduced below 10% because Concessionaire incurs additional Project Debt in connection with a Rescue Refinancing.

## ARTICLE 5. MANAGEMENT SYSTEMS AND OVERSIGHT

### 5.1 Submittal, Review and Approval Terms and Procedures

#### 5.1.1 General

**5.1.1.1** This Section 5.1 sets forth uniform terms and procedures for Submittals. In the event of any conflict between the provisions of this Section 5.1 and any other provisions of the Contract Documents, Project Management Plan or O&M Management Plan concerning procedures with respect to submission, review, comment, approval, consent, determination, decision or other actions with respect to Submittals, this Section 5.1 shall exclusively govern and control, except to the extent that the conflicting provision expressly states that it supersedes this Section 5.1.

#### 5.1.2 Submittal Requirements

**5.1.2.1** Each Submittal provided by Concessionaire to Owner for review, comment, approval, consent to, determination or decision shall:

- (a) Be accurate, complete and in conformity with the Contract Documents;
- (b) Include a completed transmittal form in form agreed between Owner and Concessionaire; and
- (c) Include all necessary information and documentation concerning the subject matter and any additional information reasonably requested by Owner under Section 5.1.3.4.

**5.1.2.2** If Owner determines that a Submittal is not complete, it will notify Concessionaire of such determination on or before the due date for approval or comments.

#### 5.1.3 Time Periods

**5.1.3.1** Subject to Sections 5.1.3.2 and 5.1.3.3, upon receipt of a Submittal which complies with the requirements of Section 5.1.2.1, (a) for any Submittal subject to Review and Approval or Review and Comment by Owner, Owner shall have 15 business days to act and (b) for any Submittal requiring review by a Third Party or by a Utility Owner, Owner shall have the greater of (1) 20 business days (15 business days plus five business days) or (2) the period specified in the Third Party Agreement or Utility Agreement, as applicable, plus five business days, to receive and reconcile the response from the Third Party or Utility Owner and deliver it to Concessionaire. The Parties shall agree in good faith upon any necessary extensions of the review period to accommodate particularly complex or comprehensive Submittals.

**5.1.3.2** If any other provision of the Contract Documents expressly provides a longer or shorter period for Owner to act, stating that it supersedes Section 5.1.3.1, then such period shall prevail. If the number of Submittals delivered simultaneously to Owner exceeds the limits specified in Part 2A, Section 10.4.3 of the Technical Provisions, then Owner may extend the applicable period for it to act with respect to such Submittals to allow Owner a reasonable period to respond, and no such extension shall constitute an Owner-Caused Delay, Owner Change, Relief Event, Force Majeure Event or other basis for any Claim.

**5.1.3.3** Submittals are considered “delivered simultaneously” if the review time periods available to Owner under this Section 5.1.3 for two or more Submittals entirely or partially overlap.

**5.1.3.4** Whenever Owner is in receipt of Submittals delivered simultaneously, Concessionaire may provide notice to Owner including a requested order of priority for processing such Submittals. Upon receipt of such notice Owner will use reasonable efforts to accommodate the requested order of priority; provided, however, that Owner will not be obligated to shorten the review times otherwise applicable under this Section 5.1.3.

**5.1.3.5** All time periods for Owner to act under this Section 5.1.3 shall be extended by the period of any delay in Owner’s review caused by any Relief Event or Force Majeure Event or any act, omission, breach, fault or negligence of Concessionaire or any Concessionaire-Related Entity.

**5.1.3.6** During any time that Owner is entitled under Section 5.5.2 to increase the level of its Oversight of Concessionaire’s compliance with its obligations under the Contract Documents, the applicable period for Owner to act on any Submittals received during such time and not related to curing Concessionaire Default(s) that instigated the Section 5.5.2 action shall be extended as reasonably needed due to the increased level of Oversight, but not to exceed 10 business days (e.g., if Owner would normally have 15 business days to act on a particular Submittal, then during a period of increased Oversight, Owner may take up to 25 business days to act). No such extension shall constitute an Owner-Caused Delay, Owner Change, Relief Event, Force Majeure Event or other basis for any Claim.

**5.1.3.7** Concessionaire may, by notice to Owner, request expedited action on a specific Submittal. Owner has no obligation to expedite any Submittal but upon receipt of such a request will use reasonable efforts to accommodate such request within the practical limitations (a) on availability of Owner personnel relevant to the request or (b) imposed by restrictions upon Owner’s rights under agreements with Third Parties and Utility Owners. However, Owner’s obligation to use reasonable efforts to accommodate such a request shall not apply with respect to the review periods described in Section 5.1.3.6.

**5.1.3.8** Owner will be responsible for coordinating the review process with Third Parties. If any Third Party fails to provide approval within the review period under Section 5.1.3.1, Concessionaire may request Owner to permit the Work to proceed without the Third Party’s approval.

**5.1.3.9** Approvals by Owner or third parties do not relieve Concessionaire from compliance with the requirements of the Contract Documents.

#### **5.1.4 Owner Discretionary Approvals**

Certain Submittals are subject to Owner’s approval. If the Contract Documents indicate approval of a Submittal is required from Owner, then Owner’s lack of approval, determination, decision or other action within the applicable time period under the Contract Documents shall be deemed a disapproval. No approval, rejection, disapproval or failure to approve by Owner shall be deemed to relieve Concessionaire of its obligation to perform in accordance with the Contract Documents.

#### **5.1.5 Owner Actions Relevant to Submittals**

Whenever the Contract Documents indicate that:

(a) A submittal is subject to Owner's review and comment but that Owner's approval is not required, and Owner delivers no comments, exceptions, objections, rejections or disapprovals within the applicable time period under the Contract Documents, or

(b) Concessionaire is to deliver a Submittal to Owner for its information,

then Concessionaire may proceed with the Work contemplated by the Submittal at Concessionaire's sole election and risk, without prejudice to Owner's rights to later object to, reject or disapprove the Work on the basis that the Work is not in accordance with the requirements of the Contract Documents. No failure or delay by Owner in taking action within the applicable time period under the Contract Documents (including reviewing Submittals and delivering comments, exceptions, objections, rejections or disapprovals) shall constitute a Relief Event, Force Majeure Event or other basis for any Claim except to the extent such failure or delay constitutes an Owner-Caused Delay. In accordance with Part 2A, Section 10.4.4 of the Technical Provisions, Submittals are subject to Owner's Review and Approval unless the Contract Documents or the Owner-approved Submittal List provide(s) that the Submittal is to be provided for Owner's information or for Owner's Review and Comment.

### **5.1.6 Owner Objection, Rejection Binding**

**5.1.6.1** Any exception, objection, rejection or disapproval by Owner shall be deemed reasonable if based on any of the following grounds:

(a) The Submittal or subject provision fails to comply, or is inconsistent, with any applicable Codes and Standards or any covenant, condition, requirement, term or provision of the Contract Documents, Project Management Plan or O&M Management Plan;

(b) The Submittal or subject provision does not meet or exceed Good Industry Practice;

(c) Concessionaire has not provided all necessary information and documentation concerning the subject matter and any additional information reasonably requested relating to the Submittal (provided that Concessionaire may subsequently resubmit the Submittal with the required or reasonably requested content or information); or

(d) Adoption of the Submittal or subject provision, or of any course of action proposed in the Submittal, would result in a conflict with or violation of any Law or Governmental Approval.

**5.1.6.2** Except with respect to those comments that Owner has expressly identified as not requiring a response from Concessionaire, Concessionaire shall respond in writing to all of Owner's comments (including any exceptions, objections, rejections and disapprovals) relating to a Submittal, and shall make modifications to the Submittal as necessary to fully reflect and resolve all such comments in accordance with the review processes in this Section 5.1.

**5.1.6.3** Concessionaire shall undertake reasonable efforts, as part of the review processes described in this Section 5.1 and the Technical Provisions, to accommodate or otherwise resolve any of Owner's comments on Submittals, except to the extent that such accommodation or resolution would cause either (a) a delay to the Critical Path without the right

to receive a time extension or (b) a material increase in Concessionaire's costs without the right to receive additional compensation.

**5.1.6.4** If Concessionaire does not accommodate or otherwise resolve any Owner comment, Concessionaire shall, within 10 business days after receipt of Owner's comments, provide an explanation setting out:

(a) Why modifications based on Owner's comments are not required;

(b) The facts, analyses and reasons that support Concessionaire's conclusion; and

(c) The basis for any belief that incorporating Owner's comments or resolving exceptions, objections, rejections or disapprovals that would render the Submittal erroneous, defective or reflective of less than Good Industry Practice.

**5.1.6.5** Promptly following delivery of Concessionaire's explanation under Section 5.1.6.4, Concessionaire shall meet with Owner with the goal of reaching agreement regarding changes to be made to the Submittal. Owner may at any time issue a Directive Letter under Section 14.3, in which case Concessionaire shall proceed in accordance with Owner's Directive Letter with the right to seek resolution of the Dispute under the Dispute Resolution Procedures.

**5.1.6.6** If Concessionaire fails to provide an explanation to Owner in accordance with Section 5.1.6.4, Owner may deliver to Concessionaire a notice setting out comments that have not been addressed and relevant dates for Concessionaire to respond. If Concessionaire's fails to address such comments within five business days after receipt of the notice, Concessionaire shall make all changes necessary to accommodate and resolve the comment and will be fully responsible for such changes without right to assert an Owner Change, Owner-Caused Delay or other basis for a Claim that Owner has assumed design or other liability.

### **5.1.7 Limitations on Concessionaire's Right to Rely**

**5.1.7.1** No action or failure to take action by or on behalf of Owner relating to Oversight (including review and approval of the Project Management Plan) or other act or omission of Owner or the Independent Engineer shall:

(a) Constitute an approval or acceptance by Owner of Concessionaire's performance of its obligations in accordance with the Contract Documents;

(b) Alter, waive, diminish or otherwise prejudice any rights, remedies or powers that Owner has under the Contract Documents or otherwise; and

(c) Limit Concessionaire's obligation to perform the Work in accordance with the Contract Documents; and Concessionaire's liabilities and obligations to fulfill the requirements of the Contract Documents (including its indemnity obligations).

**5.1.7.2** Concessionaire acknowledges and agrees that review, comment, exception, objection, rejection, approval, disapproval, acceptance, concurrence, certification or failure to conduct any such activity by Owner:

- (a) Is solely for the benefit and protection of Owner;
- (b) Does not relieve Concessionaire of its responsibility for the selection and the competent performance of all Concessionaire-Related Entities;
- (c) Does not create or impose upon Owner any duty or obligation toward Concessionaire to cause it to fulfill the requirements of the Contract Documents;
- (d) Shall not be deemed or construed as any kind of warranty, express or implied, by Owner;
- (e) May not be relied upon by Concessionaire or used as evidence in determining whether Concessionaire has fulfilled the requirements of the Contract Documents;
- (f) Shall not relieve Concessionaire from liability for, and responsibility to replace Nonconforming Work (including Work based on Design Documents to the extent that they include a change, deviation, modification, alteration or exception from the Technical Provisions or Technical Documents not approved as a Deviation) and to cure Concessionaire Defaults;
- (g) Shall not be deemed or construed as any assumption of risk by Owner as to design, construction, equipping, supply, operations, maintenance, performance or quality of the Project or performance of the Work; and
- (h) May not be asserted by Concessionaire against Owner as a defense, legal or equitable, to, or as a waiver of or relief from, Concessionaire's obligation to fulfill the requirements of the Contract Documents.

**5.1.7.3** Notwithstanding the provisions of Sections 5.1.7.1 and 5.1.7.2, Concessionaire shall be entitled to rely on Owner's written approval of specific Deviations under Section 7.2.3 or 8.1.3 and will be entitled to rely on Interpretive Engineering Decisions to the extent specified in Section 5.8.3.

## **5.2 Project Management Plan; O&M Management Plan**

**5.2.1** Concessionaire shall develop the Project Management Plan and its component parts, plans and other documentation in accordance with the requirements in Part 2A, Section 1 of the Technical Provisions and Good Industry Practice including those for Quality Assurance and Quality Control, and all FTA oversight requirements.

**5.2.2** Concessionaire shall develop the O&M Management Plan and its management plans, manuals, policies and procedures in accordance with the requirements in Part 3, Section 1.1 of the Technical Provisions and Good Industry Practice including those for Quality Assurance and Quality Control, and all FTA oversight requirements.

**5.2.3** The Project Management Plan and O&M Management Plan shall be consistent with the preliminary project management plan (and component parts, plans and other documentation) in the Proposal.

**5.2.4** Concessionaire shall submit to Owner, in accordance with the procedures and timeline described in the Technical Provisions, each component part, plan and other documentation of the Project Management Plan and O&M Management Plan, and any proposed changes or additions to or revisions of any such component part, plan or other documentation.

**5.2.5** Concessionaire shall not commence any aspect of the design of the Project or authorize work to commence on LRVs before approval of the relevant component parts, plans and other documentation of the Project Management Plan applicable to such Work under Part 2A, Section 14.2 of the Technical Provisions. Concessionaire shall not commence any aspect of the O&M Work before approval of the relevant component parts, plans and other documentation of the O&M Management Plan applicable to such Work.

**5.2.6** If any part, plan or other documentation of the Project Management Plan or O&M Management Plan refers to, relies on or incorporates any manual, plan, procedure or like document, then all such referenced or incorporated materials shall be submitted to Owner for review, marked to identify relevant provisions; provided that, for any such documents which are publicly available, Concessionaire may provide a statement regarding how to obtain a copy, and detailed information regarding relevant provisions, in lieu of submitting a copy.

**5.2.7** Concessionaire shall monitor the Work and prescribe times for internal audits of the Project Management Plan and O&M Management Plan, and Concessionaire shall carry out such internal audits at the times prescribed.

**5.2.8** Concessionaire shall cause all Contractors to comply with the applicable requirements of the Project Management Plan and O&M Management Plan.

**5.2.9** The Quality Program Manager shall, irrespective of his or her other responsibilities, have:

(a) Authority to ensure the establishment and maintenance of the Project Management Plan and O&M Management Plan;

(b) A duty to report to Owner on the performance of the Project Management Plan and O&M Management Plan;

(c) Authority independent of the Project Manager and at least equivalent in level of authority to that of the Project Manager;

(d) Direct reporting obligations to superiors that are above the level of the Project Manager; and

(e) Satisfied the other requirements in Part 2A, Sections 2 and 14 of the Technical Provisions.

### **5.3 Maintenance of Traffic; Liquidated Damages**

Concessionaire shall maintain traffic so as to ensure the safe and efficient passage of all pedestrians, bicycles and vehicular traffic through and around work areas, while maintaining

safety and accessibility for all workers on the Project and minimizing adverse impacts on residents, visitors, businesses and road users, as more specifically described in Part 2A, Section 20 of the Technical Provisions. Concessionaire shall conduct the work at all times in such a manner and in such sequence as will assure the least practicable obstruction to all forms of traffic and minimal interference with the public. Concessionaire shall be liable for and pay to Owner liquidated damages in accordance with Exhibit 11 with respect to low traffic control ratings received by Concessionaire during the Design-Build Period and for any failure of Concessionaire to restore full traffic capacity as described in said Exhibit 11. For the avoidance of doubt, the liquidated damages provided for under this Section 5.3 are not intended to compensate Owner, or liquidate Concessionaire's liabilities, for any costs or damages incurred by Owner resulting from such failure (including costs of repair, renewal or replacement, costs to correct Nonconforming Work or failure to meet Safety Standards, costs of Safety Compliance Work, and damages related to termination for Concessionaire Default) or third party claims related to such failure. Further, such liquidated damages are not in lieu of any termination or other express rights of Owner as set forth in this Agreement. Such liquidated damages shall otherwise constitute Owner's sole right to damages for reduced roadway traffic capacity and for any failure of Concessionaire to restore full traffic capacity.

#### **5.4 Quality Assurance, Quality Control, Generally**

Concessionaire is responsible for all Quality Assurance and Quality Control activities (including self-monitoring activities) necessary to manage the Project. Concessionaire shall undertake all aspects of Quality Assurance and Quality Control for the Project and the Work in accordance with the Project Management Plan, the O&M Management Plan, the Technical Provisions, other applicable provisions of the Contract Documents, Good Industry Practice and applicable Law.

#### **5.5 Oversight, Inspection and Testing**

##### **5.5.1 Oversight by Owner, FTA; Assistance with Federal Financial Plan Requirement**

**5.5.1.1** Owner shall have the right at all times to conduct Oversight as provided in this Section 5.5, in Part 2A, Section 14.4 of the Technical Provisions and in Part 3, Section 1.14.3 of the Technical Provisions. Such Oversight may include assessments regarding compliance with the Contract Documents, Project Management Plan, the O&M Management Plan and requirements of federal agencies and applicable Law. Owner may designate any Person or Persons to carry out any Oversight on Owner's behalf.

**5.5.1.2** Owner's Oversight rights shall include the following:

(a) Monitoring and auditing Concessionaire and its Books and Records to determine compliance with requirements of the Contract Documents, the Project Management Plan and O&M Management Plan, including (i) audit review of compliance with quality procedures and processes under Concessionaire's Design Quality Plan, Construction Quality Plan and O&M Quality Management Plan, and (ii) audit review of Design Documents, Construction Documents, field work plans, land surveys, mapping, other data collection tasks, other Submittals and other Books and Records;

(b) Conducting audits of all design and pre-design activities for the Project as needed to ascertain and evaluate Concessionaire's design quality and safety control processes, including (i) review of engineering calculations, engineering reports, and findings, (ii) review of the work of Concessionaire's environmental

compliance personnel with the Comprehensive Environmental Protection Program, and (iii) review of certifications that Concessionaire's Quality Control checks of final Construction Documents have been performed and documented, and that the Construction Documents conform to the requirements of the Contract Documents;

(c) Conducting audits of all construction-related activities for the Project as needed to audit Concessionaire's construction quality and safety control processes, including (i) auditing the services of Concessionaire's accredited laboratories and associated testing devices and equipment, (ii) reviewing Concessionaire's construction quality procedures, including conducting field monitoring and inspections as needed for audit purposes of construction activities, materials, and system components, as indicated in the Contract Documents, (iii) auditing Concessionaire's records of all materials, materials tests, materials certifications, and performance tests for Project systems, (iv) reviewing and investigating Project progress, Project quality, Deviations, Defects, and repair and replacement of Nonconforming Work, and (v) conducting field monitoring and inspections;

(d) Conducting periodic reviews of Project documentation and files;

(e) Conducting material tests in accordance with the requirements of the Contract Document to verify Concessionaire's compliance with all testing frequencies and requirements, including (i) performance and acceptance testing, in the Contract Documents, the Project Management Plan and O&M Management Plan, (ii) the accuracy of the tests, inspections and audits performed by or on behalf of Concessionaire in accordance with Concessionaire's Design Quality Plan and Construction Quality Plan, and (iii) compliance of materials incorporated into the Project with the applicable requirements, conditions and standards of the Contract Documents, Governmental Approvals, the Project Management Plan, the O&M Management Plan, O&M Quality Management Plan and applicable Law;

(f) Reviewing and commenting on Submittals, and approving Submittals as applicable;

(g) Reviewing and commenting on the Asset Management Plan and revisions to said plan, as provided in Section 8.8.2;

(h) Participating in meetings, including meetings to discuss design progress, construction progress, Renewal Work progress, operations (Service Plan) progress, Concessionaire's Quality Control processes, audit activities, Third Party Work progress and other Project Management Plan and/or O&M Management Plan issues;

(i) Accompanying Concessionaire on physical inspections associated with Concessionaire's Performance Inspections, conducting its own Performance Inspections, assessing and scoring Concessionaire's O&M Records, and assessing and rating the condition of elements;

(j) Attending and witnessing Concessionaire's other tests and inspections, including system start-up and acceptance tests and inspections, subject to the obligation to observe all applicable safety standards and requirements;

- (k) Reviewing Concessionaire's certification of Record Documents and surveys;
- (l) Auditing the Books and Records of Key Contractors to confirm compliance with this Agreement and applicable Law;
- (m) Investigating, analyzing and reporting on Safety Compliance and performance of Safety Compliance Orders; and
- (n) Monitoring and auditing Concessionaire's detection, reporting, response times and time to respond to and rectify breaches and failures (1) for which Noncompliance Points may be assessed under Section 16.3 or (2) constituting Noncompliance Events in accordance with Exhibit 4D.

**5.5.1.3** Owner has the right to conduct formal reviews of every Design Document and Construction Document, but has no obligation to do so, except to the extent necessary to comply with FTA or other applicable federal agency requirements. Owner also has the right, but not the obligation, to conduct "over-the-shoulder" reviews of Design Documents and other Submittals.

**5.5.1.4** Nothing in the Contract Documents shall preclude, and Concessionaire shall not interfere with, any review, inspection or oversight of Submittals or of Work that FTA or any other regulatory agency with jurisdiction may desire to conduct in accordance with their agreements with Owner and applicable Law.

**5.5.1.5** To assist Owner in the preparation of its financial plan to be delivered to FTA, by July 31 of each year, starting on the July 31 following the Effective Date and ending upon delivery of the final plan after the RSA Date, Concessionaire shall:

- (a) Before the RSA Date: (1) provide to Owner the current estimate of the total cost of the Project and the remaining cost to complete the Project, identify any significant cost changes since the previous submission, discuss reasons for and implications of the cost changes, and include a summary table showing the history of Concessionaire's total Project costs by major activity or category since the preceding submission; (2) provide to Owner the current schedule and implementation plan for completing the D&C Work, including a date on which Revenue Service Availability is expected to occur, identify major milestones for the Project and compare current milestone dates with milestone dates in the Baseline Schedule and the preceding submission, and discuss reasons for changes in such milestones; (3) provide to Owner current estimates of sources and uses of funds for the Project, identify any significant funding changes since the preceding submission, discuss reasons for and implications of the funding changes, and include a summary table showing the history of funding since the prior submission; (4) provide to Owner an updated cash flow schedule showing annual cash needs versus available revenue and funding to meet those needs and identify any potential revenue and funding shortfalls, addressing contingency measures that will or may be taken to address any shortfalls; (5) provide to Owner cost containment strategies and risk mitigation plans that have been or may be implemented to address factors that are affecting or could affect the scheduled completion or financial viability of the Project; and (6) provide to Owner, in form and substance satisfactory to Owner, a written report on the progress of design, permitting, acquisition and construction of the Project since Concessionaire's previous submission to Owner, describing in reasonable detail all significant activities concerning status.

(b) During the O&M Period: (1) provide to Owner an updated cash flow schedule showing annual cash inflows (revenues, interest and other income) and outflows (operating costs, capital costs, Project Debt service, replenishment of reserves and other uses) with a narrative identifying any potential revenue or funding shortfall and discussing contingency measures that will or may be taken to address any shortfalls; (2) provide to Owner current and estimated amounts of revenues received and the amounts deposited into each fund and account held under this Agreement and the Funding Agreements and the amount disbursed from such funds and accounts and the balance in each of the funds and accounts; and (3) provide to Owner a narrative report explaining any material variances in costs or revenues since Concessionaire's previous submission to Owner and describing in reasonable detail any material issues that may affect the future performance of Concessionaire's obligations under this Agreement and the causes thereof to include all operational contracts and third party transactions.

## **5.5.2 Increased Oversight, Testing and Inspection**

**5.5.2.1** In addition to other remedies available under this Agreement, Owner shall, by notice to Concessionaire, be entitled to change the type and/or increase the level of its Oversight of the Project and Concessionaire's compliance with its obligations under the Contract Documents, in such manner and to such level as Owner reasonably sees fit, if at any time:

(a) Over the course of three consecutive Payment Periods (determined on a rolling basis), Concessionaire has accumulated 2,400 or more Noncompliance Points for Operations Availability Noncompliance Events or 960 or more Noncompliance Points for Activity Noncompliance Events;

(b) There exists a Remedial Plan Default; or

(c) Concessionaire receives one or more Notices of Concessionaire Default that may become a Default Termination Event under Section 19.3.1.

**5.5.2.2** If Owner changes the type or increases the level of its Oversight under Section 5.5.2.1, then Concessionaire shall pay and reimburse Owner within 30 days after receipt of written demand and reasonable supporting documentation all reasonable increased costs and fees Owner incurs in connection with such action, including Owner's Recoverable Costs. Such obligation to pay and reimburse shall apply to all changes in the type or increases in the level of Owner's Oversight occurring until Concessionaire has:

(a) Fully and completely cured the breaches and failures that are the basis for a potential Default Termination Event and any other then-existing Concessionaire Defaults;

(b) Submitted and complied with any remedial plan approved under Section 16.6.2;

(c) If applicable, reduced the number of uncured Noncompliance Points below the thresholds identified in Section 5.5.2.1(a); and

(d) If applicable, reduced by 50% the number of uncured Noncompliance Points outstanding on the date Owner delivers the notice under Section 5.5.2.1.

**5.5.2.3** Owner may, at its discretion and at its own expense, increase its level of monitoring, inspection, sampling, measuring, testing, auditing and other Oversight at other times.

## **5.6 Coordination, Cooperation and Access**

**5.6.1** Concessionaire at all times shall coordinate and cooperate, and require its Contractors to coordinate and cooperate, with:

(a) Owner, Third Parties, adjacent property owners, Authorities Having Jurisdiction and any of their contractors performing work on or around the Project ROW (including transit-oriented development work in the vicinity of Stations owned or operated by WMATA), Utility Owners and other Governmental Entities; and

(b) Owner and its Authorized Representative to facilitate Owner's Oversight activities.

**5.6.2** Concessionaire shall provide Owner, its representatives, designees and contractors, and the Independent Engineer (once selected) with, (a) safe and unrestricted access to the Project at all times, (b) safe access during normal business hours to Concessionaire's Project offices, operations buildings, Project-Specific Locations (including LRV assembly facility and production facilities), and (c) unrestricted access to data respecting the Work. Owner shall provide written notice to Concessionaire at least one business day in advance of visits to production facilities and the LRV assembly facility under this Section 5.6.2.

**5.6.3** Notwithstanding anything to the contrary in this Agreement, whenever Owner, its representatives, designees and any of its contractors are present on the Site (including LRV assembly facility) and LRV production facilities, including while conducting Oversight as described in Sections 5.5.1.1 and 5.5.2.3, they will abide by (as applicable) the Design-Build Contractor's, LRV Supplier's or O&M Contractor's reasonable, non-discriminatory safety policies and practices and will take appropriate measures to avoid unreasonable interference with normal construction activity or normal operation and maintenance activity.

## **5.7 Testing and Test Results**

**5.7.1** All tests shall be carried out in accordance with Part 2C of the Technical Provisions and the Contract Documents (including all requirements of Revenue Service Availability) and this Section 5.7.

**5.7.2** Concessionaire shall develop a test recording system which shall permit ready retrieval of all test readings and shall provide information relating to tests proposed, test methodology, Test Reports and test readings to Owner on request.

**5.7.3** Owner shall have the right to attend and witness any tests and verifications to be conducted as specified in the Technical Provisions or as required by the Codes and Standards or under the Project Management Plan or O&M Management Plan. Concessionaire shall provide to Owner all test results and reports (which shall be provided in electronic format in accordance with the Technical Provisions) within 10 business days after Concessionaire or its Contractor receives them. With respect to continuous testing operations (such as concrete quality, structural concrete strengths, aggregate quality, compaction tests and material quality), Concessionaire shall provide to Owner at regular intervals (not to exceed weekly unless otherwise agreed) test summary sheets and statistical analyses indicating strength and quality trends.

**5.7.4** Owner shall be given timely advance notice (not less than 10 business days) of the date and specific location of such tests.

**5.7.5** The Owner's Authorized Representative and any other designee may attend any test and will give advance notice (not less than one business day) of their intent to attend the test. Any materials or plant that fail(s) such tests shall be rejected.

**5.7.6** Third Parties shall have the same rights as Owner under this Section 5.7 with respect to the Third Party Work, subject to the same obligations that apply to Owner under Section 5.6.3.

**5.7.7** Concessionaire shall arrange and pay for supply of electrical power required for testing.

## **5.8 Interpretive Engineering Decisions**

**5.8.1** Concessionaire may at any time seek an Interpretive Engineering Decision from Owner by delivery of notice requesting such a decision, which may include Concessionaire's proposed interpretation. Owner may approve Concessionaire's proposed Interpretive Engineering Decision (if any), may issue its own Interpretive Engineering Decision or may disapprove any Interpretive Engineering Decision Concessionaire proposes.

**5.8.2** Within 15 business days after Concessionaire applies for an Interpretive Engineering Decision, or within such other time period as Owner and Concessionaire may agree to at the time of such application, Owner shall provide its determination including explanation of any disapproval of such application or any differing interpretation; provided that no presumption of approval or disapproval shall arise by reason of Owner's delay in issuing its determination.

**5.8.3** Accepted Interpretive Engineering Decisions shall constitute provisions of the Technical Provisions and shall not constitute an Owner-Caused Delay, Owner Change, Relief Event or other basis for any Claim. Subsequent Owner orders and directives that are contrary to the Interpretive Engineering Decision shall constitute an Owner Change.

## **5.9 Meetings**

**5.9.1** Concessionaire shall conduct regular progress meetings with Owner, in accordance with Part 2A, Section 12.5.1 of the Technical Provisions, during the course of design and construction, including any design and construction occurring during the O&M Period. At Owner's request, Concessionaire will require the Engineer of Record and Contractors responsible for or affected by such Work to attend the progress meetings.

**5.9.2** The Parties shall hold any other meetings, at such times, frequency and locations, as applicable, stated in the Technical Provisions.

**5.9.3** Owner and Concessionaire, through their respective Authorized Representatives, shall meet from time to time at the other Party's request to discuss and resolve issues relating to the Work.

**5.9.4** Concessionaire shall schedule all meetings with Owner at a date, time and place reasonably convenient to both Parties and, except in the case of urgency, shall provide Owner with notice and a meeting agenda at least five business days in advance of each meeting.

**5.9.5** Concessionaire shall schedule all progress and periodic meetings with its Design-Build Contractor and its O&M Contractor(s) at a date, time and place reasonably convenient for Owner and its designated representatives to attend and, except in the case of urgency, shall provide Owner and Owner's designated representatives with notice and an agenda for such meetings at least five business days in advance of each meeting. Owner and its designated representatives are authorized to attend all such meetings and are permitted to raise any questions, concerns or opinions without restriction.

## **5.10 Independent Engineer**

**5.10.1** The Parties shall select an Independent Engineer to provide services for the Project as described in this Agreement relating to Owner's obligation to make the RSA Payment. The Independent Engineer's role includes verifying whether the conditions to Revenue Service Availability specified in Section 7.10.2 have been met.

**5.10.2** Following Financial Close, Concessionaire shall, in consultation with Owner, establish the schedule and process for selection of an Independent Engineer. Concessionaire shall be responsible for developing the solicitation package and draft contract terms, subject to approval by Owner. The solicitation schedule shall be established with the goal of selecting the Independent Engineer at least 12 months before the scheduled date for Revenue Service Availability.

**5.10.3** The solicitation shall include issuance of a request for competitive proposals from a list of firms approved by Owner, review of proposals by Concessionaire and Owner, a joint determination regarding which firm is the best qualified to provide Independent Engineer services, and negotiation of a fair and reasonable price for performance of such services. If negotiations fail with the highest ranked firm, the Parties may elect to terminate negotiations and proceed with the next highest ranked firm. This process shall be followed until a firm is selected. If the Parties fail to reach agreement regarding selection of the Independent Engineer, or regarding acceptable terms of the agreement with the Independent Engineer, the Dispute shall be subject to resolution under the Dispute Resolution Procedures.

**5.10.4** The Independent Engineer will be appointed jointly by the Parties and will act independently and not as agent of either Party. Owner's Project Management Consultant and the Lender's engineering consultant are each deemed to have an organizational conflict of interest and therefore are not eligible to respond to the solicitation.

**5.10.5** Concessionaire shall be responsible for all costs of conducting the Independent Engineer solicitation, but has no obligation to reimburse Owner for Owner's costs relating to the solicitation. Amounts payable to the Independent Engineer under the terms of its agreement shall be paid by Concessionaire subject to the right to receive reimbursement for 50% of such costs from Owner. Such reimbursement will not be subject to the D&C Payment Cap.

**ARTICLE 6. PROJECT PLANNING; SITE CONDITIONS; GOVERNMENTAL APPROVALS; ENVIRONMENTAL COMPLIANCE; PUBLIC INFORMATION**

**6.1 Preliminary Planning and Engineering Activities**

Concessionaire, through appropriately qualified and licensed design professionals, as identified in the Project Management Plan, shall perform or cause to be performed all preliminary planning and engineering activities appropriate for design and development of the Project in accordance with the Contract Documents and Good Industry Practice.

**6.2 Site Conditions**

**6.2.1** Concessionaire acknowledges and agrees that:

(a) It has investigated and satisfied itself as to the conditions affecting the D&C Work, including those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads and uncertainties of weather, river stages or similar physical conditions at the Site, the conformation and conditions of the ground, and the character of equipment and facilities needed in connection with the D&C Work;

(b) It has satisfied itself as to the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the Site, including the results of exploratory work and other information provided to Concessionaire by Owner;

(c) Any failure by Concessionaire to acquaint itself with the available information relating to the conditions affecting the D&C Work will not relieve Concessionaire from responsibility for estimating properly the difficulty or cost of successfully performing the D&C Work;

(d) Except to the extent that the Contract Documents permit Concessionaire to rely on certain information provided by Owner as a baseline for determining whether a Relief Event has occurred:

(i) Concessionaire shall have no right to rely on surveys, data, reports or other information provided by Owner or other Persons concerning surface or subsurface conditions, including information relating to Utilities, Hazardous Materials, contaminated groundwater, paleontological resources, cultural (including archaeological and historic) resources, flooding conditions and seismic conditions, affecting the Work, the Site or surrounding locations; and

(ii) Such information is for Concessionaire's reference only and has not been verified.

**6.2.2** Differing Site Conditions include certain subsurface or latent physical conditions that are encountered at the Site (excluding Additional Properties and Project-Specific Locations) during the Design-Build Period that differ materially from the conditions indicated in the Contract Documents. With respect to these "Type I" conditions, the term "indicated in the Contract Documents" has a different meaning depending on whether the condition is encountered in the portion of the Site covered by the GBR or in other areas, as follows:

(a) In the area covered by the GBR, the Baseline Conditions, and no other conditions, are considered to be “indicated in the Contract Documents”.

(b) In other areas within the Site (excluding Additional Properties and Project-Specific Locations), the term “indicated in the Contract Documents” means that Concessionaire may rely on the boring data included in the Geotechnical Data Report provided by Owner as an accurate representation of the results of the borings, solely for purposes of determining whether a Differing Site Condition exists as the result of an error in the boring data. Concessionaire may not rely on such report as establishing baseline conditions except to the extent that Concessionaire made reasonable assumptions based on inaccurate data and establishes that its assumptions would have been accurate had the data been accurate.

Concessionaire is responsible for determining site conditions relevant to Work performed during the O&M Period and for advising potential Contractors regarding such site conditions before award of Contracts for such Work. Accordingly, the data provided by Owner in the Contract Documents shall not be considered as “indicated in the Contract Documents” with respect to any Work performed during the O&M Period.

**6.2.3** Differing Site Conditions also include discovery during construction of subsurface physical conditions of an unusual nature at the Site (excluding Additional Properties and Project-Specific Locations), differing materially from those ordinarily encountered and generally recognized as inherent in the work of the character provided for in the Agreement. During the O&M Period, Claims for Differing Site Conditions are allowed only with respect to Work under Major Construction Contracts.

**6.2.4** Concessionaire shall have no right to claim that any condition constitutes a Differing Site Condition or that discovery of any paleontological or cultural (including archaeological and historic) resources, or Threatened or Endangered Species constitutes a Relief Event if:

(a) with respect to the D&C Work, (i) Concessionaire had actual knowledge regarding such conditions or resources as of the Proposal Date; or (ii) such condition or resource would have become known to Concessionaire based on a reasonable investigation of the area before the Setting Date and review of other information available to Concessionaire, consistent with Good Industry Practice; provided that Concessionaire may rely upon the determination of “no effect” on any Endangered Species by federal agencies as included in the Record of Decision; or

(b) with respect to work under any Major Construction Contract awarded during the O&M Period, (i) Concessionaire had actual knowledge regarding such conditions or resources prior to award of such contract, or (ii) such condition or resource would have become known to Concessionaire based on a reasonable investigation of the area in connection with establishment of the scope of work for such contract.

Notwithstanding the foregoing, Owner acknowledges that litigation has been filed in the U.S. District Court in the District of Columbia, captioned Friends of the Capital Crescent Trail v. FTA, Civil Case No. 14-01471 (R.JL), and agrees that a determination by the court in such action, or by an AHJ, that a Threatened or Endangered Species exists at, near or on the Project ROW shall constitute a Relief Event to the extent that Concessionaire is required to stop Work or perform Extra Work as a result.

**6.2.5** During the progress of the D&C Work or, during the O&M Period, during the progress of Work under a Major Construction Contract, if either Party encounters any condition that would entitle Concessionaire to claim that a Relief Event has occurred (including any Differing Site Condition and any Relief Event under clause (c) or (d) of the definition of Relief Event), the Party discovering such condition shall notify the other Party of the specific condition promptly before it is disturbed, or as soon as practicable afterwards, and before the affected Work continues.

**6.2.6** Upon receipt of Concessionaire's notice or, if Owner encounters a condition that it believes may be a Differing Site Condition or other Relief Event as described in Section 6.2.5, Owner's Authorized Representative shall, within a reasonable time, investigate the Site. After such investigation Owner will promptly notify Concessionaire whether it considers that a Differing Site Condition or such other Relief Event may exist.

**6.2.7** Concessionaire shall bear the burden of proving that a Differing Site Condition or other Relief Event exists as described in Section 6.2.5 and that it could not reasonably have designed the Project or worked around the area so as to avoid additional cost, including by resequencing, reallocating or redeploying its forces to other portions of the Work or to other activities unrelated to the Work (with the understanding that any additional costs reasonably incurred in connection with such reallocation or redeployment are allowable).

**6.2.8** Each Request for Change Order that is based on Differing Site Conditions or a Relief Event under clause (c) or (d) of the definition of Relief Event shall be accompanied by a statement signed by a qualified professional:

- (a) Describing the investigations undertaken by Concessionaire to determine Site conditions;
- (b) Setting forth all relevant assumptions made by Concessionaire with respect to the condition of the Site;
- (c) Justifying the basis for such assumptions and explaining exactly how the existing conditions differ from those assumptions; and
- (d) Stating the efforts undertaken by Concessionaire to find alternative design or construction solutions to eliminate or minimize the problem and the associated costs.

**6.2.9** Concessionaire's rights relating to Differing Site Conditions under this Section 6.2 do not excuse Concessionaire from its responsibility to determine what additional geotechnical information is required to support its design and construction activities, to obtain such information and to ensure that such information is accurate throughout the Term.

**6.2.10** Except to the extent that Concessionaire is entitled to relief under Article 15 or to payment from an Allowance, Concessionaire shall bear the risk of all conditions occurring on, under or at the Site, including: (a) physical conditions (surface and/or subsurface) of an unusual nature, differing materially from those ordinarily encountered in the area; (b) changes in surface topography; (c) variations in subsurface moisture content and groundwater levels; (d) Utility facilities; (e) contaminated groundwater; (f) the discovery at, under, near or on the Project ROW of any paleontological resources or cultural (including archaeological or historic) resources; and (g) the discovery at, under, near or on the Project ROW of any Threatened or Endangered Species, and (h) seismic conditions.

## **6.3 Governmental Approvals**

**6.3.1** Owner is responsible for obtaining the Owner-Provided Approvals, as listed in Exhibit 8. As of the Effective Date, all such Owner-Provided Approvals have been issued and Concessionaire acknowledges receipt of said Owner-Provided Approvals. Subject to Sections 6.3.3 and 6.3.7, Owner is responsible for costs of litigation relating to the Owner-Provided Approvals.

**6.3.2** Concessionaire shall provide support to Owner and undertake additional efforts as specified in Section 6.3.13 with respect to any modifications, renewals and extensions of the Owner-Provided Approvals, including those required as the result of Concessionaire's design, Relief Events and Force Majeure Events.

**6.3.3** Owner has initiated the process for obtaining the NPS Special Use Permit. Owner has obtained a permit for access, inspection, surveys, and non-intrusive investigations and has coordinated with NPS in the planning for the Project improvements in the Baltimore Washington Parkway. Concessionaire acknowledges and agrees that the NPS Special Use Permit is required for the Work and that Concessionaire has received and is familiar with NPS ROD and supporting documentation included in the Reference Documents. Concessionaire bears the risk of (a) conditions imposed on performance of the Work by such NPS Special Use Permit and (b) any delay in obtaining the NPS Special Use Permit except to the extent that the delay qualifies as a Force Majeure Event.

**6.3.4** The Parties acknowledge that certain Governmental Approvals are required from Montgomery County, WMATA and the Maryland-National Capital Park and Planning Commission (Montgomery County) with respect to the Silver Spring ATC Work. Although Concessionaire is responsible for obtaining such approvals, material changes in the Work due to conditions imposed by such approvals will be considered an Owner Change under Section 14.1, and certain delays in obtaining such approvals will be considered an Owner-Caused Delay under clause (m) of the definition of Owner-Caused Delay; provided, however, that Concessionaire shall promptly inform Owner of any such conditions imposed by such approvals for Owner's determination whether to proceed with the Silver Spring ATC Work. Any change to the Silver Spring ATC Work resulting from Owner's further determination is also an Owner Change under Section 14.1. Notwithstanding the foregoing, the Governmental Approvals that Concessionaire is required to obtain under this Section 6.3.4 exclude the Owner-Provided Approvals.

**6.3.5** Concessionaire shall obtain all Governmental Approvals required for the Project and the Work, other than the Owner-Provided Approvals, and shall bear the risk of any delay in obtaining such approvals as well as the risk of conditions imposed on performance of the Work by such approvals. Concessionaire shall deliver to Owner true and complete copies of all new or amended Governmental Approvals other than the Owner-Provided Approvals.

**6.3.6** Before submitting any application for a Governmental Approval to a Governmental Entity (or any proposed modification, renewal, extension or waiver of a Governmental Approval or provision thereof), Concessionaire shall submit the same, together with any supporting studies, analyses and data, to Owner for review and approval.

**6.3.7** As between Owner and Concessionaire, Concessionaire shall bear all risk arising out of, relating to or resulting from:

(a) Any differences between Concessionaire's design for any portion of the Project and the design that served as the basis for the application for a Governmental Approval but excluding any differences due to an Owner Change;

(b) Any differences between the means and methods (including temporary works) Concessionaire chooses for performance of the Work and those stated in, referred to or contemplated in any Owner-Provided Approval, but excluding any differences due to an Owner Change, any change in O&M Standards, a Change in Law or a change in any Utility Standards;

(c) Any change in the Project alignment due to Concessionaire's design, except to the extent that the change in alignment was directly attributable to an Owner Change or a Change in Law; and

(d) Cost of litigation associated with Governmental Approvals other than the Owner-Provided Approvals.

**6.3.8** Actions to be taken by Concessionaire relating to Governmental Approvals include:

(a) Conducting all necessary environmental studies and preparing all necessary environmental documents in compliance with applicable Environmental Laws, obtaining all necessary Governmental Approvals other than the Owner-Provided Approvals, and obtaining all necessary modifications, renewals and extensions thereof, and providing support to Owner with respect to the Owner-Provided Approvals; and

(b) Complying with all requirements of Governmental Approvals.

**6.3.9** If Concessionaire wishes to obtain, modify, renew or extend any Governmental Approvals, Concessionaire shall first comply with, and obtain any consent or waiver required in accordance with, then-existing agreements between Owner and other Governmental Entities.

**6.3.10** Concessionaire may, by notice to Owner, request Owner's assistance and cooperation in obtaining modifying, renewing or extending any Government Approvals (including any modification, renewal or extension of an existing Governmental Approval required as the result of Concessionaire's design or construction methods). Upon receipt of such a notice and agreement of the Parties regarding the scope of assistance to be provided as described in Section 6.3.11, Owner will assist and cooperate with Concessionaire in seeking to obtain the Governmental Approvals including:

(a) Joining in conferences and meetings with the Governmental Entities with jurisdiction;

(b) Sharing data, information and documents available to Owner relevant to the application for the Governmental Approvals;

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

(d) Assisting with evaluation and definition of solutions;

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

(f) Otherwise partnering with Concessionaire to facilitate issuance of such Governmental Approvals.

**6.3.11** Owner and Concessionaire shall work jointly to establish a scope of work and budget for Owner's Recoverable Costs related to the assistance and cooperation Owner agrees to provide in connection with modifications to Owner-Provided Approvals under Section 6.3.10. Subject to any agreed scope of work and budget and to any rights of Concessionaire in the case of a Relief Event or Force Majeure Event, Concessionaire shall fully reimburse Owner for Owner's Recoverable Costs incurred in providing such assistance and cooperation, including those incurred to conduct further or supplemental environmental studies.

**6.3.12** Assistance provided by Owner under Section 6.3.10 shall not include any obligation to:

(a) Take a position which Owner believes to be inconsistent with the Contract Documents, the Project Management Plan or O&M Management Plan, applicable Law, Governmental Approval(s), the requirements of Good Industry Practice, or Owner policy;

(b) Take a position that is not usual and customary for Owner to take in addressing similar circumstances affecting its own projects (except for usual and customary arrangements that are incompatible with the Project's public-private contracting methodology); or

(c) Refrain from concurring with a position taken by a Governmental Entity if Owner believes that position to be proper.

**6.3.13** Certain Governmental Approvals are required to be applied for or issued in Owner's name and/or require Owner to directly coordinate with such Governmental Entities in connection with obtaining Governmental Approvals. With respect to such approvals, Owner will assist and cooperate with Concessionaire following receipt of a request under Section 6.3.10, and the Parties shall proceed in accordance with Section 6.3.11. Concessionaire at its expense shall provide all necessary support and efforts to apply for and obtain the Governmental Approval including: (a) conducting necessary field investigations, (b) preparing mitigation analyses and studies and plans, (c) preparing surveys and required reports, applications and other documents in form approved by Owner, and (d) joint coordination and joint discussions and attendance at meetings with the applicable Governmental Entity.

**6.3.14** Concessionaire shall be solely responsible for obtaining all Governmental Approvals required in connection with, and for compliance with applicable Laws with respect to, Project-Specific Locations.

## **6.4 Environmental Compliance**

The Technical Provisions include requirements to be met by Concessionaire to ensure that the Project will comply with the requirements of the Environmental Approvals. Owner hereby delegates to Concessionaire, and Concessionaire accepts, all obligations, commitments and responsibilities of Owner under the Environmental Approvals, except to the extent that Part 2A, Section 5 of the Technical Provisions states that Owner retains certain obligations.

## **6.5 Compliance with Approvals**

Throughout the Term and the course of the Work, Concessionaire shall:

- (a) Comply with all Environmental Laws;
- (b) Comply with all conditions, and requirements imposed by all Governmental Approvals;
- (c) Perform all commitments and mitigation measures in all Environmental Approvals, except to the extent that the Contract Documents specifically state that Concessionaire is not responsible for such commitments and mitigation measures; and
- (d) Undertake all actions required by, or necessary to maintain in full force and effect, (i) all Governmental Approvals to be obtained by Concessionaire and (ii) the Owner-Provided Approvals, to the extent specified in the Technical Provisions and Books 3 through 5.

## **6.6 Community Outreach and Public Information**

As more fully stated in Part 2A, Section 13 of the Technical Provisions and Part 3, Section 1.16 of the Technical Provisions, Concessionaire shall participate in development and administration of the Owner's community and public outreach plan by providing ongoing support, information and public involvement coordination concerning the development, construction, operation and maintenance of the Project.

## **6.7 Alternative Technical Concepts**

**6.7.1** Concessionaire acknowledges and agrees that:

- (a) It has sole responsibility for obtaining, and shall use good faith efforts to obtain, any approvals required to implement ATCs included in its Proposal; and
- (b) If any condition in Owner's pre-approval of an ATC has not been met as of the Effective Date, Concessionaire shall (i) ensure that such condition is satisfied before implementing the ATC and (ii) use its good faith efforts to satisfy such condition.

**6.7.2** If Concessionaire cannot obtain any required approval required to implement ATCs included in its Proposal, fails to satisfy any such condition, or fails in any other way to implement the approved ATC:

- (a) Concessionaire shall provide notice to the Owner's Authorized Representative and shall comply with the corresponding baseline requirements (unmodified by the ATC) at its cost, without any additional compensation, time extension or other basis for any Claim; and
- (b) To the extent an ATC included in the Proposal represented additional Work or higher quality materials from what is otherwise required by the Contract Documents and resulted in a total net increase in amounts payable by Owner under the Contract Documents (accounting both for costs incurred during the Design-Build Period and the O&M Period), Owner shall be entitled to a credit for the net present value of the reduced cost (using the then-applicable yield on two-year U.S. Treasury bonds as the discount rate) to Concessionaire of reverting to the baseline requirements

of the Contract Documents, including reduced costs relating to financing and equity investment.

**6.7.3** Concessionaire acknowledges and agrees that, to the extent that Concessionaire uses any ATCs submitted by any other proposer provided to Concessionaire by Owner, Concessionaire does so at its sole risk and such use shall in no way confer or be deemed to confer liability upon Owner or the unsuccessful proposer.

## ARTICLE 7. DESIGN AND CONSTRUCTION

### 7.1 General Obligations of Concessionaire Concerning D&C Work

Concessionaire shall:

- (a) Expeditiously and diligently progress performance of the D&C Work with the goal of achieving Revenue Service Availability and Final Completion by the applicable Contract Deadlines;
- (b) Carry out or do all things necessary to perform the D&C Work and design and construct the Project in accordance with the Contract Documents and Good Industry Practice;
- (c) Ensure that each of the following is fit for its intended function and uses: (i) all goods, equipment, consumables, and materials used or supplied by each Concessionaire-Related Entity in connection with the Project and the D&C Work and (ii) those LRV components obtained as part of the D&C Work;
- (d) Provide maintenance and other services as described in Part 2A, Section 24 of the Technical Provisions and Section 7.13 of this Agreement;
- (e) Ensure adequate materials, equipment and resources are available to ensure compliance with the requirements of the Contract Documents under normal conditions and reasonable anticipated abnormal conditions;
- (f) Ensure all materials and equipment are of good quality and new unless otherwise expressly stated;
- (g) Ensure the Project shall be free of defects, including design defects, errors and omissions,
- (h) Ensure the Site is kept in a neat and clean condition at all times;
- (i) Cooperate with Owner and AHJs in all matters relating to the D&C Work, including their review, inspection and oversight of D&C Work; and
- (j) Remove and replace Nonconforming Work and/or materials, whether discovered or rejected by Owner or Concessionaire, or otherwise remedy such Nonconforming Work and/or materials in an acceptable manner approved, in advance, by Owner.

### 7.2 Performance, Design and Construction Standards; Deviations

**7.2.1** Concessionaire shall construct and equip the Project in accordance with the Final Design Documents and the Construction Documents, in each case taking into account the Project ROW limits and other constraints affecting the Project.

**7.2.2** The Project design and construction shall be subject to certification in accordance with the procedures contained in the approved Concessionaire's Design Quality Plan and Construction Quality Plan.

**7.2.3** Concessionaire may apply for Owner approval of proposed Deviations from requirements of the Technical Provisions and Technical Documents applicable to the D&C Work, as follows.

**7.2.3.1** Concessionaire shall submit a written application to Owner which:

- (a) Specifically identifies and labels the proposed Deviation;
- (b) Identifies the specific language within the Contract Documents to which the Deviation applies;
- (c) Provides proposed revised language and specifies the exact circumstances and/or limitations in seeking the Deviation; and
- (d) Identifies how the Deviation sought constitutes sound and safe design, engineering and or construction practices consistent with Good Industry Practice and achieves Owner's applicable Safety Standards and criteria and does not jeopardize the quality, integrity, life-cycle performance, service performance or extreme event performance of the Project.

**7.2.3.2** Upon receipt of an application under Section 7.2.3.1, Owner, may approve or reject the application. No request for a Deviation shall be deemed approved or be effective unless and until notice is provided to Concessionaire in writing and signed by Owner's Authorized Representative.

**7.2.3.3** Owner's failure to issue written approval of a Deviation within 15 business days after receipt of an application from Concessionaire shall be deemed a disapproval of such application.

**7.2.3.4** Except with respect to Deviation requests under Section 7.2.4, Owner's denial or disapproval of a requested Deviation shall be final without any right to appeal under the Dispute Resolution Procedures.

**7.2.3.5** Owner may elect to process the application as a Modification Request under Section 14.2 rather than as an application for a Deviation.

**7.2.4** Concessionaire shall use reasonable efforts to identify and provide notice to Owner of any specifications or other provisions in Books 2 through 5 that are erroneous, create a potentially unsafe condition, or may be inconsistent with Good Industry Practice or applicable Law. Such notice must include a request for Owner approval of a Deviation or changes to the provision that Concessionaire believes are necessary to render it correct, safe and consistent with Good Industry Practice and applicable Law. If Concessionaire commences or continues any D&C Work affected by the change after the need for the change was known, or should have been known through the exercise of reasonable care, Concessionaire shall bear any additional costs and time associated with redoing the D&C Work already performed.

**7.2.5** References in the Technical Provisions and Books 3 through 5 to manuals or other publications relating to the D&C Work shall mean the most recent editions in effect as of the Setting Date, unless expressly provided otherwise. Safety Compliance changes shall be in accordance with Section 10.4.

**7.2.6** The Parties anticipate that from time to time after the Setting Date, Owner will adopt changed, added or replacement standards (including Safety Standards), criteria,

requirements, conditions, procedures, specifications and other provisions of general application to design and construction of Owner's transportation facilities ("Changed D&C Standards"), which may be implemented through revisions to existing manuals and publications or through new manuals and publications. By delivery of notice to Concessionaire Owner may modify relevant provisions of Books 2 through 5 to incorporate any Changed D&C Standards, whereupon they shall constitute amendments to, and become part of, Books 2 through 5 and be deemed to replace and supersede inconsistent provisions of Books 2 through 5 without need for further action by either Party. If requested by Concessionaire in writing, Owner will identify superseded provisions. The following provisions shall apply with respect to any such Changed D&C Standards:

**7.2.6.1** To the extent that a Changed D&C Standard requires a change in the D&C Work or in the Work under any Major Construction Contract awarded before delivery of the notice to Concessionaire from Owner regarding the change, the requirement to implement such change with respect to such D&C Work or Work under the Major Construction Contract will be considered an Owner Change under Section 14.1.

**7.2.6.2** In certain cases, Changed D&C Standards may be directly attributable to a change in Law or may require development of capital improvements not required by the Operating Plan, Maintenance Plan or Asset Management Plan. In such case, unless the change qualifies as an Owner Change under Section 7.2.6.1, Concessionaire's entitlement to relief would be governed by the provisions of Article 15 relating to changes in O&M Standards.

**7.2.6.3** Except as otherwise provided in Section 7.2.6.1 or 7.2.6.2 Concessionaire is required to implement Changed D&C Standards without entitlement to additional compensation or relief.

### **7.3 Design Implementation**

Concessionaire, through appropriately qualified professional engineers registered and licensed in the State of Maryland and identified in Concessionaire's Project Management Plan, shall furnish designs, plans and specifications in accordance with the Contract Documents. Concessionaire shall cause the Engineer(s) of Record for the Project to sign and seal all Final Design Documents.

### **7.4 Schedule, Deadlines, Notices to Proceed and Commencement of Work**

#### **7.4.1 Commitment to Meet Deadlines**

**7.4.1.1** As a material consideration for entering into this Agreement, Concessionaire hereby commits, and Owner is relying upon Concessionaire's commitment, to achieve Revenue Service Availability by the Long Stop Date and Final Completion by the Final Completion Deadline. Time is an essential element of this Agreement and it is important that the D&C Work be vigorously prosecuted until completion.

**7.4.1.2** Concessionaire represents that the Initial Baseline Schedule represents a practical schedule for Concessionaire to complete performance of the Work through Final Completion (absent Relief Events or Force Majeure Events that may irretrievably delay such performance), and is consistent with the Contract Deadlines. Concessionaire shall use the Initial Baseline Schedule as a foundation to prepare a Baseline Schedule for Owner's review, comment and approval in accordance with Part 2A, Section 9.1 of the Technical Provisions. The Parties shall use the Baseline Schedule, as approved by Owner, for planning

and monitoring the progress of the D&C Work. The Baseline Schedule shall include the RSA Deadline in the Initial Baseline Schedule. In the event that Concessionaire fails to provide an acceptable Baseline Schedule or Project Schedule update within the time required under Part 2A, Section 9 of the Technical Provisions, Concessionaire shall have no right to receive payments under this Agreement until Concessionaire has prepared and Owner has approved such schedule or update.

**7.4.1.3** Concessionaire acknowledges and agrees that the Contract Deadlines provide reasonable and adequate time to perform the Work required within the Contract Deadlines, subject only to Concessionaire's rights to obtain time extensions under Article 15. The relief and the compensation amounts specified in Article 15 represent Concessionaire's sole and exclusive remedy and right against MTA, MDOT and their respective successors, assigns, agencies, divisions, officeholders, officers, directors, commissioners, agents, representatives, consultants and employees for adverse financial and schedule effects of any Relief Event or Force Majeure Event affecting the Work, the Project or Concessionaire during the Design-Build Period. Nothing in this Section 7.4.1.3 shall preclude Concessionaire's exercise of rights under Article 19 pertaining to Extended Delays.

#### **7.4.2 Float**

All Float contained in the Project Schedule, as shown in the Initial Baseline Schedule or as generated during the course of the Work, shall be considered a shared, jointly owned Project resource available to both Owner and Concessionaire, and shall not be considered as time for exclusive use or benefit of either Owner or Concessionaire. Concessionaire shall cause all Contracts with each Design-Build Contractor to acknowledge Project Float to be a shared, jointly owned resource available to Owner as well as Concessionaire as needed to absorb delay caused by Relief Events, Force Majeure Events or other events, achieve interim completion dates and achieve Contract Deadlines. All Float shall be identified as such in the Project Schedule on each affected schedule path. Owner shall have the right to examine the identification of (or failure to identify) Float on the Project Schedule in determining whether to approve the Project Schedule. Once identified, Concessionaire shall monitor, account for and maintain Float in accordance with critical path methodology.

#### **7.4.3 Work Before Financial Close**

Before Financial Close, Concessionaire shall perform all Work required to achieve Financial Close and may also proceed with other non-Construction Work at its own risk, including undertaking efforts to satisfy the conditions in Section 7.4.4 so as to enable the remaining D&C Work to commence promptly following Financial Close. Owner may issue one or more limited NTPs authorizing Concessionaire to perform elements of the D&C Work for which Owner will provide reimbursement on the terms of each such limited NTP. If Financial Close fails to occur, Owner shall have no obligation to reimburse Concessionaire for any of its costs incurred relating to this Agreement, other than payments authorized by a limited NTP and payments allowed under Section 5 of Exhibit 13B.

#### **7.4.4 Commencement of Non-Construction Work After Financial Close**

After Financial Close occurs, the following conditions must be satisfied before Concessionaire may commence any D&C Work (excluding Work required to satisfy said conditions):

**7.4.4.1** Owner has approved the updated Initial Baseline Schedule as specified in Part 2A, Section 9.1.1 of the Technical Provisions;

**7.4.4.2** All Insurance Policies required to be provided as of Financial Close under Section 11.1 have been obtained, have an effective date at or before the date of Financial Close and remain in full force and effect, and Concessionaire has delivered to Owner, within 15 business days before the date for commencement of D&C Work, true and certified copies of insurance policies and all endorsements to such policies verifying required coverages from the issuers of such policies;

**7.4.4.3** Concessionaire has certified to Owner that all personnel who will perform D&C Work either hold all licenses, certifications, registrations, permits or approvals necessary for performance of the D&C Work or will obtain them before starting work; and

**7.4.4.4** Owner has approved Concessionaire's proposed final DBE Participation Plan submitted under Section 9.10.1.5(h).

Upon satisfaction of the conditions precedent in this Section 7.4.4, Concessionaire's Authorized Representative shall execute and deliver a certificate, in form acceptable to Owner certifying to the same, and Owner will provide a countersigned certificate to Concessionaire acknowledging receipt.

#### **7.4.5 Commencement of Construction Work**

Construction Work may not commence until the following conditions precedent have been satisfied:

**7.4.5.1** The Performance Security and Payment Bond required under Section 11.2.1 have been obtained and are in full force and effect, and Concessionaire has delivered to Owner certified and conformed copies of the applicable bond(s) (or the original letter of credit, if applicable) and the original multiple obligee rider(s); provided that if Concessionaire procures the surety bonds directly, Concessionaire shall deliver to Owner the originals of the applicable bond(s);

**7.4.5.2** Insurance Policies required under Section 11.1 for the Construction Work have been obtained and are in full force and effect, and Concessionaire has delivered to Owner, within 15 business days before the scheduled date for commencement of Construction Work, written binders of insurance verifying coverages from the relevant issuers of such Insurance Policies;

**7.4.5.3** All Governmental Approvals necessary to begin the applicable portions of the Construction Work have been obtained and Concessionaire has furnished to Owner fully executed copies of such Governmental Approvals other than the Owner-Provided Approvals;

**7.4.5.4** All rights of access necessary for commencement of Construction Work on the applicable portion of the Site have been obtained;

**7.4.5.5** All applicable pre-construction requirements contained in the Record of Decision and other Governmental Approvals for the applicable portion of the Construction Work have been satisfied;

**7.4.5.6** The following requirements of the Technical Provisions have been satisfied:

(a) Concessionaire has obtained Owner approval of the Baseline Project Schedule as specified in Part 2A, Section 9.1.2 of the Technical Provisions;

(b) a safety and security work initiation meeting has occurred in accordance with Part 2A, Section 12.4.5 of the Technical Provisions;

(c) Concessionaire has obtained Owner approval of all components of the Project Management Plan relevant to the Construction Work to be performed, in accordance with Part 2A of the Technical Provisions;

(d) In accordance with Part 2A of the Technical Provisions, Concessionaire has obtained Owner approval of: the Protection of Existing Structures Plan (Section 4.6), the Comprehensive Environmental Protection Program (Section 5.4), the Concessionaire's Quality Program (Section 14.1), the Pest and Rodent Control Plan (Section 5.9), the Concessionaire Safety & Health Plan (Section 15.4), the Site Security Plan (Section 16.3), the Noise Control, Monitoring and Mitigation Plan (Section 17.3.1); the Transportation Management Plan (Section 20.3), and the Construction Access and Mobility Plan (Section 20.4.5);

(e) Concessionaire has caused to be developed and delivered to Owner the Release for Construction Documents for the affected Construction Work in accordance with Part 2A, Section 3.7 of the Technical Provisions and pre-construction surveys in accordance with Part 2A, Section 4.6 of the Technical Provisions;

(f) Concessionaire has completed and documented completion of necessary training required to allow full access to the Site to those individuals designated by Owner in accordance with Part 3, Section 1 of the Technical Provisions; and

(g) Concessionaire has (i) obtained any approvals and/or releases from Utility Owners and Third Parties (A) needed to begin Construction Work under Part 1 of the Technical Provisions or (B) required for the Silver Spring ATC Work, and (ii) has furnished to Owner fully executed copies of all such approvals and/or releases; provided that Concessionaire may commence construction of specific elements of the Work based on approvals and releases covering such elements, so long as Concessionaire does not proceed with any additional Construction Work until after it obtains all approvals and releases required for the additional work;

**7.4.5.7** Concessionaire has obtained approvals from Authorities Having Jurisdiction required for, as well as Owner approval of, any proposed lane closures, and has taken other appropriate measures to ensure maintenance of traffic in the area affected by the Work;

**7.4.5.8** Concessionaire has delivered to Owner, and Owner has accepted or approved, as applicable, all other Submittals relating to the applicable portion of the Construction Work required by the Project Management Plan and the Contract Documents, in the form and content required by the Project Management Plan or Contract Documents;

**7.4.5.9** The guarantees in favor of Owner, if any, required under Section 11.4 have been executed, obtained and delivered to, and received by, Owner and are in full force and effect; and

**7.4.5.10** All representations and warranties of Concessionaire in Section 21.1 shall be and remain true and correct in all material respects, and Concessionaire has delivered to Owner a certificate certifying to the same.

Upon satisfaction of the above conditions precedent, Concessionaire's Authorized Representative shall execute and deliver a certificate, in form acceptable to Owner certifying to the same, and Owner will provide a countersigned certificate to Concessionaire acknowledging receipt.

#### **7.4.6 Completion of D&C Work**

Concessionaire shall achieve Revenue Service Availability and Final Completion in accordance with the procedures, requirements and conditions set forth in Section 7.10.

### **7.5 Acquisition of Real Property**

#### **7.5.1 Property Acquisition Schedule**

**7.5.1.1** Owner has identified certain property to be used for the Project, the boundaries of which are depicted in the Right of Way plats in Book 4 (Contract Drawings). Owner will acquire, at its cost, the Project ROW as well as certain other property rights as specified in this Section 7.5. Owner will staff a ROW team that will be available to acquire ROW and deal with all issues that may arise relating to ROW acquisition. For purposes of this Section 7.5, dates in the Property Acquisition Schedule are as identified with respect to the properties listed in Exhibit 2, Section 7.

**7.5.1.2** The Property Acquisition Schedule in Exhibit 9 specifies dates by which Owner intends to provide Concessionaire with rights of access for properties as identified in said Exhibit 9. Concessionaire must obtain from Owner a notice of clear right of way prior to entering any property listed on Exhibit 9 or that is otherwise to be obtained by Owner.

**7.5.1.3** If Owner determines that it is necessary to acquire other real property interests for the Project as a result of a Relief Event during the Design-Build Period, then those real property interests will be added to the Property Acquisition Schedule and will not be treated as Additional Properties.

**7.5.1.4** If Concessionaire considers that other real property interests are required for the permanent System improvements or Third Party Work and were erroneously excluded from the Property Acquisition Schedule, Concessionaire may, by notice to Owner, request Owner to add such other real property interests to the acquisition schedule. Concessionaire's notice shall include an analysis identifying alternative approaches that could be adopted to avoid the need for the acquisition, including use of retaining walls and other design modifications. If Owner determines that any real property interests identified by Concessionaire are necessary for the permanent System improvements or Third Party Work and should therefore have been included in the Property Acquisition Schedule, Owner will add such real property interests to the Property Acquisition Schedule. Owner will determine acquisition dates and acquire such real property interests at its own expense and will not treat such real property interests as Additional Properties. However, Concessionaire shall remain responsible for any costs incurred with respect to such real property interests under Section 7.5.2.1.

**7.5.1.5** Real property required for Utility Easements will be considered an Additional Property for which Concessionaire is required to pay 50% of the acquisition costs, with the following exceptions:

(a) If it is impracticable to design the Project to avoid the need for the additional Utility Easement (that is, if such a design is impossible, overly costly or otherwise not in the best interest of the Project), the real property required for such Utility Easement will not be considered an Additional Property.

(b) If the Utility Easement is required as the result of an unreasonable refusal or delay by the Utility Owner to approve placement of Utility Adjustments within the boundaries of the properties identified in Exhibit 9, the real property required for such Utility Easement will not be considered an Additional Property.

Where the foregoing exceptions apply, Owner will be responsible for the costs of acquiring the real property required, excluding costs incurred by Concessionaire under Section 7.5.2.1, and delays under exception (b) above will be considered Utility Owner Delays. In all other cases, Concessionaire shall be responsible for 50% of the cost of acquisition of any such property as described in Section 7.5.2 as well as costs it incurs under Section 7.5.2.1, and shall be responsible for the risk of delays related to acquisition of such property. Such Utility Easements will be added to the Property Acquisition Schedule, subject to the cost allocations under this Section 7.5.1.5.

## **7.5.2 Documentation Relating to Additional Acquisitions**

**7.5.2.1** If Concessionaire identifies any property that it believes should be added to the Project ROW or is required for Utility Easements, Concessionaire may submit to Owner a request for acquisition of additional property interests and related documentation in accordance with Part 2A, Section 27.2 of the Technical Provisions. In such event, Concessionaire shall prepare and submit to Owner new or revised surveys, legal descriptions, draft ROW plats for review and approval by the Owner or its designee and design and other appropriate documentation of basis of acquisition and justification of acquisition of any property interests not listed in Exhibit 9 the need for additional ROW. Following delivery of a request under this Section 7.5.2.1,

(a) Owner will review the request and supporting documentation and will determine whether the proposed acquisition appears to be appropriate for the Project, whether it will be considered as an “Additional Property” acquisition or fits into another acquisition category, whether any additional information or documentation is necessary for the acquisition, and the anticipated schedule for the acquisition.

(b) Upon agreement between Owner and Concessionaire regarding the acquisition of any additional property, Concessionaire shall support the acquisition in accordance with Part 2A, Section 27.2 of the Technical Provisions.

(c) Prior to acquisition of any additional property interests under this Section 7.5, Concessionaire shall provide to Owner any additional documentation required by Owner for the acquisition.

**7.5.2.2** If Owner determines, in its sole discretion, that the requested acquisition is appropriate and in the best interest of the Project, Owner will approve Concessionaire’s request in accordance with this Section 7.5.2. Owner will then proceed with the acquisition in accordance with applicable federal and State procedures, and add such real

property interests to the Property Acquisition Schedule subject to this Section 7.5. In all other situations, Owner has no obligation to approve any request for acquisition.

**7.5.2.3** Concessionaire shall be responsible for all costs and expenses incurred by Owner in connection with acquisition of Additional Properties other than property required for Utility Easements. With respect to additional property required for Utility Easements, except as otherwise provided in Section 7.5.1.5, Concessionaire shall be responsible for its costs incurred under Section 7.5.2.1 and for 50% of the aggregate of all other costs and expenses incurred with respect to the acquisition of such properties. In paying all such costs and expenses, Concessionaire is not acquiring, and shall not be deemed to be acquiring, any interest in real property for Concessionaire. Such costs and expenses may include:

- (a) The cost of acquisition services, relocation services and associated document preparation costs;
- (b) The cost of relocation assistance in accordance with the applicable Maryland State law, the Uniform Act and FTA Circular 5010.1D;
- (c) The cost of condemnation proceedings handled by the Office of the Attorney General of the State of Maryland, including attorneys' and expert witness fees, and all fees and expenses for exhibits, transcripts, photos and other documents and materials production;
- (d) The acquisition and associated costs, settlements, offers of judgment, court awards or judgments, including pre-judgment and post-judgment interest, costs, and attorney's fees, or other consideration for interests in real property for all parcels required for the Project or the Work;
- (e) The cost of permanent or temporary acquisition of leases, easements, rights of entry, licenses and other interests in real property, including for drainage, temporary work space, Project-Specific Locations, and any other convenience of Concessionaire;
- (f) The cost of permitting; and
- (g) Closing costs in accordance with the Uniform Act and Owner policies.

**7.5.2.4** Owner will submit statements to Concessionaire regarding Recoverable Costs relating to acquisition of Additional Properties and property required for Utility Easements, not more often than monthly. Concessionaire shall reimburse Owner within 30 days of Owner's submittal to Concessionaire of each such invoice. In addition to any other remedy, Owner shall have the right to curtail or suspend acquisition activities if Concessionaire for any reason fails to pay any such invoice in full when due. Owner will resume acquisition activities promptly after delinquent amounts are paid in full with interest.

**7.5.2.5** Concessionaire shall bear all risk of delays related to acquisition of Additional Properties.

### **7.5.3 Temporary Interests in Property**

**7.5.3.1** Concessionaire shall be solely responsible for acquisition of any temporary interests in property which Concessionaire determines is necessary, desirable or advisable to obtain in connection with the Project or the Work, excluding acquisitions of temporary interests in property identified in Exhibit 9 but including any property interests that Concessionaire wishes to obtain in advance of the acquisition date identified in Exhibit 9. Temporary interests to be obtained outside of the right of way boundaries in the ROW Maps may include rights to use property for borrow pits and storage, as well as any property needed for any temporary utility facilities being constructed by Concessionaire. Concessionaire shall pay the purchase price for all such property interests directly. If the property is within the limits of any real property scheduled for acquisition by Owner or is intended to be used for permanent improvements, or if Concessionaire intends to request Owner to acquire such real property, Concessionaire shall coordinate with Owner and shall not negotiate with the owner(s) of such interests except with express permission of Owner and in compliance with applicable Maryland Law, FTA Circular 5010.1D and the Uniform Act.

**7.5.3.2** Owner shall have no obligation to acquire temporary interests in property other than any temporary property interests identified in Exhibit 9, but may agree to do so following receipt of request from Concessionaire. Concessionaire shall solely bear the risk of any delays and cost impacts related to acquisition of temporary interests not listed in Exhibit 9, regardless of whether Owner agrees to undertake any such acquisition.

**7.5.3.3** Concessionaire shall promptly notify Owner regarding all temporary interests in property that it or any of its Contractors acquires in the vicinity of the Project.

### **7.5.4 Property Acquisitions and Scheduling Work**

**7.5.4.1** Concessionaire's Baseline Schedule shall not provide for any Work to be done on any property before the availability date in Exhibit 9. In developing its schedule, Concessionaire shall reasonably minimize dependence on the property acquisition process.

**7.5.4.2** Concurrently with the initial review of the Baseline Schedule, Concessionaire and Owner shall meet to discuss:

- (a) Concessionaire's access requirements associated with planned activities and the extent to which delay in access to property listed in the Property Acquisition Schedule is likely to affect a Critical Path;
- (b) What efforts (if any) could reasonably be undertaken by the Parties to accelerate acquisition of any critical real property interests;
- (c) Whether schedule delays may be avoided by providing access to property subject to conditions or restrictions;
- (d) Whether any changes should be made to the Property Acquisition Schedule or Baseline Schedule; and
- (e) Whether anticipated covenants, conditions and restrictions affecting access will affect Concessionaire's ability to perform Work as scheduled, and how to mitigate any such problems.

**7.5.4.3** In certain cases, Owner may be able to avoid or mitigate schedule delays by providing access to property listed in the Property Acquisition Schedule subject to restrictions, in which case Owner will notify Concessionaire of the restrictions and Concessionaire shall ensure that all requirements are met. Concessionaire may be entitled to compensation under Section 15.11 for its costs of complying with said restrictions.

**7.5.4.4** If Owner agrees, based on a request from Concessionaire, to seek to accelerate acquisition of any property interests, such agreement shall have no effect on the scheduled access date listed in the Property Acquisition Schedule for the purpose of determining whether an Owner-Caused Delay has occurred.

**7.5.4.5** Concessionaire shall coordinate with Owner regarding:

(a) Completion of Project design and identification of final ROW requirements and construction impacts;

(b) Any adjustments to the Baseline Schedule necessary to reflect updates to the Property Acquisition Schedule; and

(c) Any design features that may impact properties for which no property acquisition is contemplated, with the goal of avoiding damages to properties not previously identified and addressed.

## **7.6 Utility Adjustments**

### **7.6.1 Concessionaire's Responsibility**

Concessionaire shall:

(a) Ensure completion of all Utility Adjustments necessary to accommodate the Project are completed in accordance with the Project Schedule and the requirements of the Contract Documents, including Part 2A, Section 9 of the Technical Provisions and Part 2B, Section 6 of the Technical Provisions;

(b) Conduct reasonable site investigation and exploration before commencement of Construction Work in any particular area to correctly identify all Utilities in the area;

(c) Include in the design all utilities identified in clause (b) to ensure that Utility services are not mistakenly disrupted by the Construction Work;

(d) Ensure that all Utility Work performed by Concessionaire-Related Entities complies with the Contract Documents; and

(e) Coordinate, monitor and otherwise undertake appropriate efforts to ensure timely performance of Utility Work by Utility Owners, in coordination with the D&C Work, and in compliance with the standards and other applicable requirements specified in the Contract Documents and Owner Utility Agreements. Concessionaire shall keep Owner informed of any concerns regarding work by Utility Owners, and Owner agrees to cooperate as reasonably requested by Concessionaire to ensure proper performance by the Utility Owners.

## **7.6.2 Utility Agreements**

**7.6.2.1** The Owner Utility Agreements and, in some cases, draft Owner Utility Agreements, are included as Reference Documents and portions of such agreements are incorporated into the Contract Documents by reference. The Owner Utility Agreements provide information regarding the responsibilities of Utility Owners and Concessionaire to perform the Utility Work, the basis for compensation, preliminary engineering agreements, extent of design reviews, requirements for Contractors engaged by Concessionaire to perform Utility Work, and other relevant information.

**7.6.2.2** Concessionaire is delegated, and accepts, certain responsibilities and obligations of Owner under the Owner Utility Agreements (or under the assumed terms of Owner Utility Agreements) in accordance with Part 1, Section 9, Part 2A, Section 19 and Part 2B, Section 6 of the Technical Provisions. Concessionaire shall comply with, be bound by and timely perform all such responsibilities and obligations except to the extent Concessionaire and the applicable Utility Owner expressly agree to modify such responsibilities and obligations, with prior approval from Owner. Concessionaire acknowledges and agrees that Utility or Owner may require Concessionaire to use pre-approved Contractors and/or Suppliers in performance of certain Utility Work.

**7.6.2.3** Before commencing Construction Work on a particular utility facility, Concessionaire shall obtain the relevant Utility Owner's approval regarding the work to be performed, in accordance with the requirements of the Owner Utility Agreement, Part 1, Section 9 of the Technical Provisions, and Good Industry Practice.

**7.6.2.4** If Concessionaire determines that a Utility Adjustment is required for a facility owned by a Utility Owner that has not entered into an Owner Utility Agreement, Concessionaire shall promptly notify Owner regarding the circumstances. In such event, unless Owner directs otherwise, Concessionaire shall prepare, negotiate and enter into a Concessionaire Utility Agreement with such Utility Owner, enabling Utility Work to proceed.

**7.6.2.5** Each Concessionaire Utility Agreement (if any) entered into pursuant to Section 7.6.2.4 shall:

- (a) Clearly specify and distinguish the scope of Utility Work to be performed by Concessionaire and the Utility Owner, respectively;
- (b) Contain provisions for payments, payment terms, controlling specifications, work description, compliance with applicable federal Law and any requirements with respect to use of Contractors or Suppliers pre-approved by any Utility Owner for work on its facilities;
- (c) Include specific procedures for resolving scheduling, design, construction and payment issues arising due to errors or omissions in information the Utility Owner provides to Concessionaire;
- (d) Require the Utility Owner and its contractors to comply with and abide by all applicable Buy America Requirements in connection with performance of Utility Work. The foregoing shall not be deemed to obligate Utility Owners to comply with federal Buy America Requirements if the Utility Owner is required by applicable law to perform such Utility Work at its own expense and without right to payment or reimbursement from Owner or Concessionaire, or if the Utility Owner is otherwise exempt from federal Buy America requirements; and

(e) Expressly provide that Owner shall have no liability under the Concessionaire Utility Agreement unless and until Owner is assigned Concessionaire's interests and agrees to assume Concessionaire's obligations under such agreement. Owner agrees to cooperate as reasonably requested by Concessionaire in pursuing Concessionaire Utility Agreements, including attending negotiation meetings and review of Concessionaire Utility Agreements. Concessionaire shall keep Owner informed of the status of any such negotiations. Concessionaire shall submit each such Concessionaire Utility Agreement (including supplements and amendments) to Owner for review and comment. Concessionaire shall deliver to Owner, within 10 days after execution, a true and complete copy of each such Concessionaire Utility Agreement entered into by Concessionaire. Concessionaire shall not enter into any agreement with a Utility Owner that purports to bind Owner in any way, unless Owner has also executed such agreement.

**7.6.2.6** Concessionaire is responsible for proper completion of the Utility Work required for the Project, in accordance with the Contract Documents, regardless of the nature or provisions of the Utility Agreements and regardless of whether Concessionaire or its Contractors, or the Utility Owner or its contractors, is performing the Utility Work. No extension of time will be allowed for delays associated with Utility Work, and no additional compensation will be allowed relating to Utility Work, except to the extent specifically permitted by the Contract Documents.

**7.6.2.7** In the event of any conflict, ambiguity or inconsistency within any Utility Agreement or between the provisions of any Utility Agreement and the Contract Documents, the provisions that establish the higher quality, manner or method of performing the Utility Work, establish better practice (as determined by Owner in its discretion), or use more stringent standards shall prevail, as between Concessionaire and Owner.

**7.6.2.8** If the conflict, ambiguity or inconsistency within any Utility Agreement or between the provisions of any Utility Agreement and the Contract Documents cannot be reconciled under Section 7.6.2.7, then the Contract Documents shall prevail.

**7.6.2.9** Concessionaire shall comply with and timely perform all obligations imposed on Concessionaire by any Utility Agreement.

### **7.6.3 Requirements**

Each Utility Adjustment (whether performed by Concessionaire or by the Utility Owner) shall comply with applicable Utility Standards and other requirements in the Utility Agreements, as well as requirements of the Technical Provisions, the other Contract Documents and applicable Law. Concessionaire is solely responsible for making arrangements with Utility Owners to limit applicability of changes to Utility Standards made after the Setting Date.

### **7.6.4 Costs of Utility Work**

**7.6.4.1** Concessionaire shall be responsible for:

(a) all costs of Utility Work performed by Concessionaire-Related Entities;

(b) all payments owing to Utility Owners for Utility Work under Concessionaire Utility Agreements (if any);

(c) A share of the costs of acquisition of property required for Utility Easements as provided in Section 7.5.2;

(d) all costs of Incidental Utility Work; and

(e) all costs of materials furnished by Utility Owners under Owner Utility Agreements.

**7.6.4.2** Concessionaire is responsible for making payments directly to the Utility Owner for costs that Section 7.6.4.1 or Part 1, Section 9 of the Technical Provisions requires Concessionaire to pay.

**7.6.4.3** Owner is responsible for payments owing to Utility Owners under the Owner Utility Agreements, except as otherwise provided in this Section 7.6.

### **7.6.5 FTA Reimbursement Requirements**

Unless Owner notifies Concessionaire that Owner does not intend to seek reimbursement from FTA for Utility Work:

**7.6.5.1** The Utility Work will be subject to, and Concessionaire shall comply with, 23 CFR Part 645 Subpart A (including requirements as to plans, specifications, estimates, charges, tracking of costs, credits, billings, records retention, and audit, in addition to Concessionaire's record retention obligations under Section 23.1) and FTA's associated policies and procedures.

**7.6.5.2** Each Concessionaire Utility Agreement (if any) shall incorporate by reference 23 CFR Part 645 Subparts A and B, and assign the obligations arising under 23 CFR Part 645 Subparts A and B.

**7.6.5.3** Concessionaire shall comply with 23 CFR Part 645, Subparts A and B, to ensure that costs of Utility Work are eligible for reimbursement from FTA.

### **7.6.6 Betterments**

**7.6.6.1** Utility Betterments may be added to the Work pursuant to this Section 7.6.6 and Part 2B, Section 6.1 of the Technical Provisions.

**7.6.6.2** Any Utility Owner may request Owner to permit Concessionaire to perform work relating to Betterments as a part of the Work, at the Utility Owner's expense. If Owner's Authorized Representative approves any such request, Concessionaire will have the obligation to perform such work, with the right to receive additional payment by a Change Order issued under Article 14 or by direct payment from the Utility Owner, in accordance with this Section 7.6.6. Unless specifically authorized in the approved Owner Utility Agreement, Concessionaire shall not request or accept payment directly from any Utility Owner for any Betterment added to the Work.

**7.6.6.3** Any Change Order for Betterment Work shall identify the scope of the Betterment Work and establish compensation for such work as agreed upon by Owner, Concessionaire and the Utility Owner. The amount payable by Owner under any such Change Order shall be a direct pass-through, without additional markup, of (a) the price negotiated by Contractor and the Utility Owner for such work or (b) amounts payable on a time and materials basis for such work in accordance with Exhibit 13A.

**7.6.6.4** Owner will approve the addition of a Betterment to the scope of the Work under this Section 7.6.6 only if: (a) the Utility Owner has agreed to the addition of such Betterment to the Work, (b) such Betterment is compatible with the Project and will not delay the Critical Path, (c) it is feasible to separate the cost/pricing of the Betterment work from that for any related Utility Work being furnished or performed by Concessionaire, (d) the Utility Owner has agreed to reimburse Owner or pay Concessionaire directly for all the costs of the Betterment, and (e) the Utility Owner has agreed as to the method of pricing such Work. Concessionaire shall provide Owner with such information, analyses and certificates as may be requested by Owner in connection with its review of the Betterment.

**7.6.6.5** If any Betterment added to the Work by Change Order is subsequently deleted from the Work, or if the scope of Concessionaire's Work with regard to such Betterment is materially reduced, then Owner shall be entitled to issue a Change Order reducing compensation payable to Concessionaire based on the reduction in the costs of the Work directly attributable to such deletion or reduction. If the entire Betterment is deleted from the Work, such Change Order shall be equal to the entire amount payable under the Change Order issued for the Betterment; otherwise, the amount of the deductive Change Order shall be determined in accordance with Exhibit 13A.

### **7.6.7 Assignment of Rights Against Utility Owners**

If Concessionaire establishes that it has a good faith claim based on wrongful actions or inactions of a Utility Owner pertaining to a Utility within the Project ROW or otherwise affected by the Project, upon receipt of a written request from Concessionaire, Owner may assign to Concessionaire Owner's rights of recovery, as such may exist, under any existing agreement between Owner and the Utility Owner or under any utility permit.

### **7.6.8 Applications for Utility Permits**

**7.6.8.1** For reasons unrelated to a Utility Adjustment, Utility Owners may apply to an Authority Having Jurisdiction for utility permits to install new Utilities that would conflict with the Project, or to modify, upgrade, relocate or expand existing Utilities within the Site. In such event, the Authority Having Jurisdiction would request Owner's input in connection with the permitting decision.

**7.6.8.2** Concessionaire agrees to:

- (a) Assist Owner in providing comments regarding such permit applications;
- (b) Make available upon request the most recent Project design information and/or Record Documents, as applicable, to the applicants;
- (c) Assist each applicant with information regarding the location of other proposed and existing Utilities; and
- (d) Use commercially reasonable efforts to coordinate work schedules with such applicants as appropriate to avoid interference, if possible, with the Work by applicants' activities.

## **7.6.9 Utility Owner Delays**

Subject to the requirements and limitations of Article 15 and this Section 7.6.9, (a) the risk of additional costs directly attributable to Utility Owner Delays shall be shared by the Parties in accordance with Section 15.3.2.2, (b) the RSA Deadline shall be extended by one day for every two days of Utility Owner Delay until the \$5,000,000 limit under Section 15.3.2.2(c) is reached, and (c) once the \$5,000,000 limit under Section 15.3.2.2(c) is reached, the RSA Deadline shall thereafter be extended on a day-for-day basis. Concessionaire shall give notice to Owner of any circumstances which may lead to a claim of a Utility Owner Delay within five days of Concessionaire's becoming aware that such circumstance has occurred or is likely to occur.

### **7.6.9.1 Conditions to Relief for Utility Owner Delays**

Concessionaire shall not be entitled to reimbursement of Incremental Costs or any extension of the RSA Deadline for a Utility Owner Delay unless all of the following conditions are satisfied:

(a) Concessionaire has provided evidence reasonably satisfactory to Owner that: (i) Concessionaire has fulfilled its obligation under the Contract Documents and applicable Utility Agreement(s) to coordinate with the Utility Owner to prevent or reduce such delays; and (ii) Concessionaire has otherwise made diligent efforts to obtain the timely cooperation of the Utility Owner but has been unable to obtain such timely cooperation.

(b) If Concessionaire is responsible for the Adjustment, Concessionaire has provided a reasonable plan for completion of the Adjustment to the Utility Owner and Concessionaire has obtained, or is in a position to timely obtain, all applicable Governmental Approvals required for design and construction of such Adjustments, other than the Owner-Provided Approvals.

(c) No circumstances exist which have delayed or are delaying the affected Adjustment, other than those which fit within the definition of a Utility Owner Delay.

### **7.6.9.2 Concurrent Delays**

To the extent that any Utility Owner Delay is concurrent with another delay to the Critical Path which is Concessionaire's responsibility under this Agreement, but which is not a Utility Owner Delay, then such Utility Owner Delay(s) shall not be grounds for extension of the Contract Deadlines, and Incremental Costs due to such delay shall not be considered in determining Concessionaire's entitlement to reimbursement under Section 15.3.2.2. To the extent that a Utility Owner Delay is concurrent with a delay caused by another Relief Event or Force Majeure Event, Concessionaire's entitlement to relief shall be based on the provisions concerning such other Relief Event or Force Majeure Event instead of the provisions concerning Utility Owner Delays.

## **7.6.10 Utility-Related Claims**

Concessionaire may assert that a Relief Event, Force Majeure Event or other basis for a Claim has occurred relating to Utilities only with respect to: (a) Relief Events concerning material inaccuracy of Utility Information or Utility Owner Delays (clauses (e) and (o) of the Relief Event definition); (b) Force Majeure Events under clause (l) of the Force Majeure

definition; and (c) Utility Work required solely as the result of an Owner Change or other Relief Event. In all other respects, Concessionaire assumes full responsibility for costs associated with Utility Work (including any inaccuracies in the Utility Information that do not qualify as a Relief Event and any inaccuracies in the Reference Documents) and any delays to the Project Schedule associated with Utilities and Utility Owners. In no event shall Concessionaire be entitled to make a Claim for increased costs of performing Incidental Utility Work or for any extension of time for delays associated with Incidental Utility Work, except with respect to Incidental Utility Work required as the result of an Owner Change.

## **7.7 Supply of LRVs and Fare System Equipment**

**7.7.1** Concessionaire shall:

(a) Obtain LRVs from the LRV Supplier, meeting requirements specified in the Contract Documents, including all requirements in Section 7.11.5, Part 2B, Section 12 of the Technical Provisions, this Section 7.7 and any additional commitments described in Exhibit 2;

(b) Ensure that LRVs are properly integrated with the System;

(c) Supply and install a fare collection system, including supply and installation of all Fare System Equipment;

(d) Ensure that the fare collection system meets requirements specified in the Contract Documents including any additional commitments described in Exhibit 2; and

(e) Ensure that the Fare System Equipment is integrated with the System, properly interfaces with Owner's accounting system and WMATA's New Electronic Payment Program (NEPP) and enables Concessionaire to meet the Performance Requirements relating to fare collection.

**7.7.2** The Parties acknowledge and agree that the LRV Supply Contract is a Key Contract.

**7.7.3** Concessionaire shall take appropriate measures to identify Fleet Defects and, if any Fleet Defects are identified, to (a) require LRV Supplier to correct all Fleet Defects in the LRVs, Option LRVs and all associated Equipment and (b) afford Owner right of Review and Approval of Fleet Defect corrective actions taken.

### **7.7.4 Fare System Allowance**

A Fare System Allowance in the amount of \$15,000,000 is available to reimburse Concessionaire for certain D&C Work activities related to the Fare System, performed in accordance with Part 2B, Section 19.7 of the Technical Provisions, without markup. No Change Order is required for invoicing amounts within the Fare System Allowance amount. Concessionaire acknowledges and agrees that other payments to Concessionaire provided under this Agreement provide compensation for all other costs relating to the Fare System and Fare System Equipment incurred as part of the D&C Work, including designing the Project to accommodate the Fare System Equipment, overhead expenses associated with administration of the Contract for supply of the Fare System Equipment and other work activities that Part 2B, Section 19.7 of the Technical Provisions states are not payable from the Fare System Allowance. If at any time the estimated costs of performing the D&C Work to be covered by the

Fare System Allowance exceed the Fare System Allowance amount, the Parties shall consult regarding measures to bring the cost within budget, provided that if it becomes apparent that the D&C Work to be covered by the Fare System Allowance cannot be performed within the Fare System Allowance and that the scope of D&C Work cannot be modified to reduce the cost to the Fare System Allowance, the Parties shall negotiate a Change Order for such excess costs. Concessionaire shall have no obligation to expend funds in excess of the Fare System Allowance amount for D&C Work related to the Fare System.

## **7.8 Hazardous Materials Management, Risk Allocation and Payment**

### **7.8.1 Hazardous Materials Management**

**7.8.1.1** Except as otherwise provided in this Section 7.8.1, Concessionaire shall, as part of the Work, perform, or cause to be performed, all Hazardous Materials Management required in connection with the Project in accordance with applicable Law, Governmental Approvals, the approved Comprehensive Environmental Protection Program, and all applicable provisions of the Contract Documents.

**7.8.1.2** Concessionaire shall have the following duties to identify, avoid, minimize and mitigate adverse monetary and non-monetary impacts to the Project and to Owner relating to Hazardous Materials:

(a) Concessionaire shall adopt design and construction techniques for the Project, using Good Industry Practice, that avoid, to the maximum extent practicable, the need for Hazardous Materials Management.

(b) When performing Hazardous Materials Management, Concessionaire shall use Good Industry Practice, including design modifications and construction techniques, to minimize costs (including long-term costs) of Hazardous Materials Management.

(c) Concessionaire shall use appropriately trained personnel to conduct Hazardous Materials Management activities.

**7.8.1.3** Concessionaire shall promptly provide notice to Owner of any Hazardous Materials encountered in connection with the Project, the Site or the Work that require (a) reporting or notice to any Governmental Entity and/or (b) taking any response action (e.g., evaluating and addressing the circumstances and location of the Hazardous Materials) under applicable Law, Governmental Approvals, the approved Comprehensive Environmental Protection Program and the Contract Documents, as applicable. A notice provided under this Section 7.8.1.3 shall advise Owner of any obligation to notify State or federal agencies under applicable Law. Concessionaire shall make all such reports, or deliver all such notices, to any Governmental Entity with respect to Hazardous Materials encountered in connection with the Project, the Site or the Work, providing concurrent notice and copies of such reports and notices to Owner.

**7.8.1.4** Concessionaire shall manage all Pre-Existing Hazardous Materials encountered in connection with the Project, in compliance with applicable Law, subject to the following:

(a) To the extent circumstances warrant off-site disposal of any Pre-Existing Hazardous Materials, Concessionaire shall manage and dispose of such materials in accordance with the Hazardous Materials Management Plan. The

Hazardous Materials Management Plan shall include utilization of an EPA site identification number(s) obtained for that purpose by Owner for said Pre-Existing Hazardous Materials. Owner has exclusive decision-making authority regarding selection of the destination facility to which any Hazardous Materials will be transported using an EPA site identification number provided by Owner and Concessionaire will not be designated as the generator on the transport manifest for Pre-Existing Hazardous Materials.

(b) To the extent circumstances warrant managing and/or remediating any Pre-Existing Hazardous Materials in place or otherwise on-site, Concessionaire shall take all appropriate actions in accordance with the Comprehensive Environmental Protection Plan (including specifically the Hazardous Materials Management Plan component) and applicable Law.

(c) As between Owner and Concessionaire, notwithstanding the obligations assumed by Concessionaire under Section 7.8.1.4(a) or 7.8.1.4(b), to the extent permitted by applicable Law, Owner accepts legal responsibility for any Losses incurred by either of the Parties arising out of, relating to or resulting from the proper management (including off-site disposal) of Hazardous Materials under Section 7.8.1.4(a) or 7.8.1.4(b), including Losses incurred due to any impacts to nearby property. Owner shall have no liability for third party claims under this Section 7.8.1.4(c) to the extent that such Losses were the result of any Concessionaire Release or the negligence, willful misconduct, or breach of applicable Law or contract by Concessionaire or any Concessionaire-Related Entity.

(d) As between Owner and Concessionaire, Concessionaire accepts legal responsibility for third party claims arising out of, relating to, or resulting from any Concessionaire Release and any Losses relating to Concessionaire Releases or any improper performance of off-site disposal or remediation or management in place of Pre-Existing Hazardous Materials by any Concessionaire-Related Entity.

(e) As between Concessionaire and Owner, and in addition to those obligations listed in Section 7.8.1.4(d) as Concessionaire's responsibility, without abrogating any of Concessionaire's rights under this Agreement, and to the extent permitted by and consistent with applicable Law, Concessionaire accepts legal responsibility for any Losses, including those of third parties, with respect to (i) Concessionaire Releases of Hazardous Materials and (ii) Hazardous Materials discovered or released into, onto or under Additional Properties or Project-Specific Locations. However, this shall not preclude or limit any rights or remedies that Concessionaire may have against third parties, including prior owners, lessees, licensees and occupants of the Additional Properties or Project-Specific Locations.

(f) To the maximum extent permitted by and consistent with applicable Law, Concessionaire shall indemnify and hold harmless Owner from and against any and all claims, causes of action, suits, legal or administrative proceedings or Losses arising out of, relating to or resulting from the off-site disposal of Hazardous Materials for which Concessionaire accepts or is imputed legal responsibility under Section 7.8.1.4(c) through 7.8.1.4(e).

(g) Nothing in this Section 7.8.1.4 shall preclude or limit any rights or remedies that Owner or Concessionaire may have against third parties, including (with respect to Owner) prior owners, lessees, licensees and occupants of any parcel of land that is or becomes part of the Project ROW and (with respect to

Concessionaire) prior owners, lessees, licensees and occupants of Additional Properties), or shall abrogate any of Owner's rights under this Agreement and at law.

**7.8.1.5** If Concessionaire fails to undertake the Hazardous Materials Management required under this Section 7.8.1 within a reasonable time after discovery of Hazardous Materials, taking into consideration the nature and extent of the contamination and action required and the potential impact upon Concessionaire's schedule for use of and operations on the Project ROW, Owner may notify Concessionaire that it will undertake the Hazardous Materials Management itself. Following provision of a notice under this Section 7.8.1.5:

(a) Owner may undertake Hazardous Materials Management actions itself or procure a contractor to perform such work, in which case Owner will do so in accordance with all applicable Environmental Laws;

(b) Owner may draw against the Hazardous Materials Remediation Allowance for costs that would have been payable to Concessionaire from the Allowance;

(c) For costs not eligible for payment from the Allowance, Concessionaire shall reimburse Owner on a current basis, within 10 days of request, for the reasonable costs that Owner incurs in carrying out such Hazardous Materials Management actions (including costs incurred by virtue of fines, penalties or other assessments against Owner or the Project by Governmental Entities due to Concessionaire's delay or failure to undertake the Hazardous Materials Management), so long as Owner has performed in accordance with Section 7.8.1.5(a); and

(d) Owner shall have no liability or responsibility to Concessionaire arising out of, relating to or resulting from Owner's Hazardous Materials Management actions and such actions shall not constitute a Relief Event or other basis for a Claim.

## **7.8.2 Hazardous Materials Risk Allocation**

**7.8.2.1** Concessionaire shall bear all risk associated with the discovery of Hazardous Materials within the Site, except to the extent that (a) compensation for Hazardous Materials Management is payable by Owner under Section 7.8.1.4(c) or payable from the Allowance under Section 7.8.4 or (b) relief is allowed under Section 15.3.3.

**7.8.2.2** Notwithstanding anything to the contrary in the Contract Documents, no Request for Change Order may include:

(a) Costs incurred or extensions of time for investigation and characterization of Hazardous Materials (including Phase I or Phase II ESAs), except with respect to discovery of Hazardous Materials of an unexpected and extraordinary quantity or toxicity, in which event Owner will be responsible for reasonable costs and expenses of investigation and characterization incurred by Concessionaire.

(b) Costs incurred or extensions of time with respect to any discovery of Hazardous Materials within Additional Properties or Project-Specific Locations.

(c) Costs incurred or extensions of time with respect to any discovery of Hazardous Materials if Owner is not afforded the opportunity to inspect the area before Concessionaire takes any action that would inhibit Owner's ability to ascertain, based on a site inspection, the nature and extent of the materials, except for Concessionaire's Emergency actions necessary to stabilize and contain a sudden release or otherwise required by Law to immediately address the Emergency.

(d) Costs that are covered by insurance available to Concessionaire, or are deemed to be self-insured by Concessionaire under Section 11.1.4.6.

(e) Costs incurred associated with discovery and management of Known or Suspected Hazardous Materials, except as allowed under Section 7.8.4 or 15.3.3.

(f) Extensions of time for delays associated with discovery and management of Known or Suspected Hazardous Materials.

(g) With respect to Work for which unit prices are provided in Exhibit 4B: (i) costs of performing such Work that exceed the unit prices, as such prices may be adjusted under the terms of this Agreement, and (ii) costs of performing Work that is reasonably related to the unit priced Work but is not included in the unit price scope description in Exhibit 4B.

**7.8.2.3** Notwithstanding any contrary provision of the Contract Documents, an Owner-Caused Delay does not include any reasonable delay arising out of, relating to or resulting from (a) Owner's review and approval or disapproval of aspects of remediation plans in accordance with Part 2A, Section 5.4.3 of the Technical Provisions, (b) any act or omission by Owner concerning off-site disposal of Hazardous Materials (except Owner's failure to sign undisputed manifests under Section 7.8.1.4(a)), or (c) any Dispute over Concessionaire's entitlement to any compensation or time extension relating to Hazardous Materials.

### **7.8.3 Additional Hazardous Materials Obligations of Concessionaire.**

**7.8.3.1** Concessionaire shall avoid exacerbating Hazardous Materials (including Pre-Existing Hazardous Materials as well as new Releases) in, on, under or migrating from the Site. For purposes of determining liability, as between Owner and Concessionaire, under Sections 7.8.1.4(a) and 7.8.1.4(b), Concessionaire shall only be liable for exacerbation of Hazardous Materials arising out of or relating to the negligent (including grossly negligent), reckless, willful or intentional acts or omissions by Concessionaire or any Concessionaire-Related Entity.

**7.8.3.2** Concessionaire shall take all reasonable efforts to ensure that no act or omission of any Concessionaire-Related Entity will result in an unlawful Release of Hazardous Materials to or into wastewater, storm or sanitary sewer systems, surface water, air, soils or groundwater in, on, under or migrating from the Site.

### **7.8.4 Hazardous Materials Remediation Allowance**

A Hazardous Materials Remediation Allowance is available to pay for certain Hazardous Materials Management Work concerning Pre-Existing Hazardous Materials, with payments from the Allowance to be made based on the unit prices in Exhibit 4B, as adjusted under Section 13.9, and actual quantities.

**7.8.4.1** The initial amount of the Hazardous Materials Remediation Allowance is identified in Exhibit 4A, and is based on estimated quantities and unit prices for Allowance items specified in Exhibit 4B, Table 1.

**7.8.4.2** Owner may also elect to use the Hazardous Materials Remediation Allowance as a source of payment for Hazardous Materials Management Work directly attributable to a Hazardous Materials Relief Event under Section 15.3.3.2.

**7.8.4.3** No Change Order is required for invoicing amounts within the Hazardous Materials Remediation Allowance amount. Concessionaire shall promptly notify Owner if it becomes apparent that the Hazardous Materials Remediation Allowance amount will be exceeded, in which event the Parties shall negotiate a Change Order increasing the Allowance amount and/or modifying the scope of the Work to avoid the need to increase the Allowance.

## **7.9 Public Art**

**7.9.1** Concessionaire shall select one or more artists, from a prequalified pool of artists identified by Owner before Financial Close, to develop and implement concepts for integration of artwork into the Project in accordance with Owner's art in transit program and the requirements in Part 2B, Section 8.3.2 of the Technical Provisions. Concessionaire shall pay a stipend of up to \$3,500 to each prequalified artist who submits a conforming proposal. Concessionaire or its Design-Build Contractor shall enter into Contract(s) with selected artist(s), and shall coordinate with Owner, stakeholders and neighborhood work groups in development of the concepts.

**7.9.2** An Art in Transit Allowance in the amount of \$6,070,000 is available to reimburse Concessionaire for the stipends payable to shortlisted artists and amounts paid to selected artists for their work product and costs of transportation and installation of said product, subject to the limitations on reimbursement in Part 2B, Section 8.3.2.2 of the Technical Provisions, without markup. No Change Order is required for invoicing amounts within the Art in Transit Allowance amount. Concessionaire acknowledges and agrees that other payments to Concessionaire provided under this Agreement provide compensation for all other costs relating to the artwork, including designing the Project to accommodate the artist's concepts and overhead expenses associated with administration of the artwork Contract. If at any time the estimated costs of developing and implementing the art concepts exceed the Art in Transit Allowance amount, the Parties shall consult regarding measures to bring the cost within budget. Concessionaire shall have no obligation to expend funds in excess of the Art in Transit Allowance amount.

## **7.10 Availability and Final Completion**

### **7.10.1 Revenue Service Availability Deadline; Acceleration Request**

Concessionaire shall exercise its best efforts to achieve Revenue Service Availability on or before the RSA Deadline. Failure to achieve Revenue Service Availability by the Long Stop Date is a Concessionaire Default under Section 17.1.1(d)(i). Owner approval is required for any proposed opening before the RSA Deadline. Any request for early opening must be submitted to Owner at least 12 months before the date on which Concessionaire wishes the O&M Period to commence.

## **7.10.2 Conditions to Revenue Service Availability**

The Independent Engineer's Certificate of Revenue Service Availability may be issued only after satisfaction of the following conditions to Revenue Service Availability:

**7.10.2.1** Concessionaire has completed all D&C Work required for running normal and safe passenger service on the System at Service Level 1, including (a) full access to all points of entry and exit and (b) completion of all Construction Work other than punch list items approved by Owner;

**7.10.2.2** Concessionaire has successfully completed each Test Program Plan, including providing Owner with all of the certificates and reports listed in Part 2C, Section 4.7 of the Technical Provisions (except that certificates for the Reliability Demonstration Test under Part 2C, Section 1.7 of the Technical Provisions are not prerequisites for Revenue Service Availability);

**7.10.2.3** All systems and equipment installed by or on behalf of Concessionaire comply, in all respects, with applicable Laws and are operational and functional;

**7.10.2.4** Concessionaire has substantially completed the Capital Crescent Trail enabling safe use by the public of said trail for its entire length, as determined in Owner's discretion, including completion of the following:

- (a) The paved path and unpaved shoulders;
- (b) All bridges, underpasses, connections to Stations, trail access facilities and other structures;
- (c) Lighting; and
- (d) Safety fencing;

**7.10.2.5** D&C Work remaining to be performed is limited to (a) punch list items approved by Owner under Section 7.10.2.1 and (b) any other D&C Work that the Contract Documents contemplate will be performed after the RSA Date. No D&C Work scheduled for performance after the RSA Date shall require closure of any portion of the System or traffic lanes;

**7.10.2.6** All Submittals required by the Project Management Plan or Contract Documents to be submitted and/or approved by Owner before Revenue Service Availability have been submitted to and approved by Owner (as applicable), including the final Threat and Vulnerability Assessment;

**7.10.2.7** Concessionaire has delivered to Owner:

- (a) documents and evidence that electromagnetic interference caused by System operations between stationing 598+00 and 658+00 as described in the "Spectral Analysis of Radiated Emissions – Trial Running," defined in Part 2B, Section 11.3.5.4 of the Technical Provisions, does not exceed the greater of 0.1 mG or the ambient level immediately prior to the energization of traction power as described by the "Spectral Analysis of Existing background Radiation levels – Pre-Energization," as defined in Part 2B, Section 11.3.5.4 of the Technical Provisions; or

(b) an Owner-approved Operational Phase Mitigation Plan that includes mitigation measures designed to reduce the impacts to Research Facilities below said maximum level, in accordance with Part 2B, Section 11.3.5.1 of the Technical Provisions;

**7.10.2.8** There exists no uncured Concessionaire Default that is the subject of a notice, unless (a) Revenue Service Availability will effect its full and complete cure, or (b) with respect to a non-monetary Concessionaire Default relating to an obligation that does not constitute a condition to Revenue Service Availability under other provisions of this Section 7.10.2, (i) Concessionaire has a right to cure and is diligently pursuing cure within the applicable cure period or (ii) Collateral Agent has a right to cure and is diligently pursuing cure within the applicable cure period specified in any Direct Agreement; provided, however, that the Collateral Agent's and Concessionaire's respective cure periods shall be deemed to run concurrently, and not serially, for purposes of this condition to Revenue Service Availability;

**7.10.2.9** Concessionaire has delivered to Owner (a) all manufacturer warranties required under, and in the form and content specified by the Technical Provisions and (b) all documents and other evidence of warranties under Sections 7.10 and 7.11;

**7.10.2.10** Concessionaire demonstrates to Owner's reasonable satisfaction that Concessionaire has acquired and properly stored, or arranged for immediate availability, or incorporated into its Asset Management Plan arrangements to obtain, non-revenue service vehicles, the O&M Spare LRV, a reasonable inventory of all spare parts, spare components, spare equipment, tools, materials, expendables and consumables necessary for operation and maintenance of the Project during the O&M Period as identified in the Operating Plan, Asset Management Plan, Maintenance Plan and Maintenance Manuals;

**7.10.2.11** Concessionaire has (a) completed training of operations and maintenance personnel in accordance with Part 2C, Section 3.1.3 of the Technical Provisions, (b) delivered to Owner a certificate, in form acceptable to Owner, executed by Concessionaire that it and its Contractors are fully staffed with such trained personnel and are ready, willing and able to operate and maintain the Project in accordance with the terms of the Contract Documents including the approved Staff Management Policies and Procedures Manual, (c) delivered to Owner training records evidencing compliance with training requirements including copies of course completion certificates issued to each of the subject personnel and (d) Concessionaire has completed and documented completion of all training required to allow full access to the Site to those individuals designated by Owner in accordance with Part 3, Section 1 of the Technical Provisions;

**7.10.2.12** Owner has reviewed and approved the final plans required in Part 3, Section 1 of the Technical Provisions;

**7.10.2.13** Concessionaire has received, and paid all associated fees for, all applicable Governmental Approvals (excluding Owner-Provided Approvals) and other third party approvals required for use and operation of the Purple Line System, such Governmental Approvals and other third party approvals are in full force and effect, there exists no uncured material violation of the terms of any such Governmental Approval or other third party approvals and all such Governmental Approvals are in final form and are not subject to appeal;

**7.10.2.14** Subject to Section 11.1.7, all Insurance Policies required under this Agreement to be in effect during the O&M Period (excluding insurance for capital asset replacement work) have been obtained and are in full force and effect and Concessionaire has delivered to Owner verification thereof as required under Section 11.2;

**7.10.2.15** Any Performance Security required under Section 11.2.3 for the O&M Period has been obtained, delivered to Owner and is in full force and effect;

**7.10.2.16** Concessionaire has provided evidence that (a) all deposits to the Intellectual Property Escrow(s) required to be provided at or before Revenue Service Availability under Section 23.5 have been made and (b) all Cost and Pricing Data required to be provided at or before Revenue Service Availability under Section 23.6 has been delivered to Owner;

**7.10.2.17** Concessionaire has satisfied any other requirements for commencement of O&M Work in the Technical Provisions (i.e., requirements that are expressly identified as conditions to Revenue Service or Revenue Service Availability as well as other requirements that must be completed prior to Revenue Services), including obtaining Owner's Approval of the Submittals required by Part 3, Section 1.17 of the Technical Provisions; and

**7.10.2.18** Concessionaire has provided evidence satisfactory to Owner that Concessionaire's Equity Member(s) have completed direct investment of good and immediately available funds, including the purchase of equity shares in and/or the provision of Subordinate Debt, to Concessionaire.

### **7.10.3 Process for Issuance of Revenue Service Availability Certificate**

**7.10.3.1** Promptly following award of a contract to the Independent Engineer under Section 5.10, the Independent Engineer shall meet with the Parties to review the requirements to be met as conditions to Revenue Service Availability, including Owner's final checklist for use by the Independent Engineer regarding Concessionaire's compliance with the Technical Provisions, substantially in the form of Exhibit 15B.

**7.10.3.2** Approximately six months before the date on which Concessionaire expects to achieve Revenue Service Availability, Concessionaire shall provide a schedule for the period up to and including the anticipated RSA Date for the purpose of enabling Owner and the Independent Engineer to schedule their activities relating to the System opening.

**7.10.3.3** Concessionaire shall promptly advise Owner and the Independent Engineer if at any time Concessionaire determines that Revenue Service Availability will be delayed beyond the date specified in the notice in Section 7.10.3.2. Such notice shall not excuse Concessionaire from meeting the requirements in Part 2C of the Technical Provisions.

**7.10.3.4** Concessionaire's schedule under Section 7.10.3.2 shall include, at a minimum:

(a) Dates when Concessionaire will submit all remaining documentation required by Part 2C, Section 2.7 of the Technical Provisions with respect to "Safety and Security Certification";

(b) Dates when Concessionaire will submit all remaining evidence required by Part 2C, Section 4.7 of the Technical Provisions with respect to "Readiness for Revenue Service" as such term is defined in said Section 4.7; and

(c) Dates when Concessionaire will complete all remaining Work required for "Trial Running and Revenue Service," as identified in Concessionaire's "Operational Readiness Plan/Strategy".

**7.10.3.5** Concessionaire shall provide an updated schedule to Owner and the Independent Engineer three weeks before the date of expected Revenue Service Availability. During the ensuing period, Concessionaire, Owner and the Independent Engineer shall meet, confer and exchange information on a regular cooperative basis, and Owner and the Independent Engineer will conduct, either jointly or independently, an inspection of the entire Project and its assets, a review of the Final Design Documents and such other investigation and review of reports, data and documentation as may be necessary to evaluate whether all of the conditions to Revenue Service Availability have been satisfied or will be satisfied before the RSA Date. Concessionaire shall provide daily updates to Owner and the Independent Engineer regarding any potential delay in Revenue Service Availability.

**7.10.3.6** When Concessionaire is ready to start Revenue Service, Concessionaire shall deliver to Owner and the Independent Engineer notification of readiness to commence Revenue Service, as required in Part 2C, Section 4.7 of the Technical Provisions. The notice shall be accompanied by a certification, in form reasonably acceptable to Owner, stating that Concessionaire has met all the conditions in Section 7.10.2.

**7.10.3.7** Within two business days after receipt of the notice and evidence given by Concessionaire to Owner under Section 7.10.3.6, the Independent Engineer shall deliver a report of findings and recommendations to Owner and Concessionaire stating in the Independent Engineer's opinion whether Revenue Service Availability has been achieved or provide notice to Concessionaire stating the reasons why the conditions to Revenue Service Availability have not been met. In the latter event Concessionaire shall take appropriate steps to satisfy the remaining conditions and shall provide notice under Section 7.10.3.6 once the conditions have been satisfied.

**7.10.3.8** Within two business days after Owner's receipt of a report given by the Independent Engineer under Section 7.10.3.7 stating that the conditions to Revenue Service Availability have been achieved, Owner will either (a) notify Concessionaire that it concurs with the Independent Engineer's determination that conditions to Revenue Service Availability have been met or (b) notify Concessionaire regarding the reasons why Owner believes the conditions to Revenue Service Availability have not been satisfied. If Owner provides notice under Section 7.10.3.8(b), then it will nevertheless permit the System to be opened for Revenue Service and will make the RSA Payment. Following receipt of notice from Owner under this Section 7.10.3.8, or following expiration of the two-business day period if Owner fails to provide such notice, the Independent Engineer may issue the Certificate of Revenue Service Availability or may notify Concessionaire and Owner that additional conditions must be met before the certificate will be issued. In the latter event Concessionaire shall take appropriate steps to satisfy the remaining conditions and provide notice under Section 7.10.3.6 once the conditions have been satisfied. Revenue Service may commence once the certificate has been issued.

**7.10.3.9** In accordance with the Project Management Plan, Concessionaire shall prepare a punch list of D&C Work to be completed as a condition precedent to achievement of Final Completion, obtain Owner's approval of the punch list, and maintain the list until all such Work is completed. Concessionaire shall also obtain approval from Utility Owners of any punch list items relating to Utility Work. The punch list shall not include any items that adversely affect the safety, use or operability of the Purple Line System. The schedule for preparation of the punch list shall be consistent and coordinated with the requirements for Revenue Service Availability.

**7.10.3.10** Concessionaire shall notify Owner and the Independent Engineer not less than five days before the scheduled date when Concessionaire will commence punch list field inspections and punch list preparation. The Design-Build Contractor and the

Independent Engineer shall prepare, and Owner may participate in the development of, the punch list. Each participant (including Owner) shall have the right to add items to the punch list and no participant shall remove any item added by Owner without Owner's express permission. If Concessionaire objects to the addition of an item and the Parties are unable to resolve the objection, the Dispute shall be subject to resolution under the Dispute Resolution Procedures.

**7.10.3.11** Concessionaire shall deliver to Owner and the Independent Engineer a true and complete copy of the punch list and any modifications as soon as they are prepared.

#### **7.10.4 Final Completion**

**7.10.4.1** Promptly after achieving Revenue Service Availability, Concessionaire shall perform all remaining D&C Work. If Owner disputes the Independent Engineer's determination of Revenue Service Availability under Section 7.10.3.8(b), then all such items shall be required to be completed as a condition to Final Completion.

**7.10.4.2** The following are conditions to Final Completion:

(a) Owner has determined that all conditions to Revenue Service Availability have been satisfied;

(b) All remaining D&C Work has been completed, including completion of all punch list items and landscape establishment Work in accordance with Part 2B, Section 10.7 of the Technical Provisions;

(c) The Project ROW, other areas within the Limits of Disturbance and any Project-Specific Locations in the vicinity of the Project ROW shall be cleaned of all surplus and discarded materials, spilled materials, excess materials left deposited on the permanent Work as a result of the D&C Work, falsework, and rubbish and temporary structures and buildings, placed thereon by Concessionaire-Related Entities;

(d) Project-Specific Locations shall be reshaped, seeded and mulched, or otherwise restored to the extent required by the condition on which access was provided;

(e) Concessionaire has delivered, and Owner has accepted, all Submittals required as conditions precedent to Final Completion in accordance with Part 2A, Section 10 of the Technical Provisions (including Owner approval of (i) as-built survey sheets for the Project and (ii) a complete set of the Record Documents in form and content required by Part 2A, Section 26 of the Technical Provisions);

(f) If any Authority Having Jurisdiction requires any form of certification of design, engineering or construction with respect to the Project or any portion thereof, including any certifications from the Engineer of Record and architect of record for the Project, Concessionaire has caused such certificates to be executed and delivered and has concurrently issued identical certificates to Owner;

(g) All D&C Work that Concessionaire is obligated to perform for, or on behalf of, Third Parties and Utility Owners has been accepted by Owner for, or on behalf of, such Third Parties and Utility Owners, as provided under the Contract

Documents, and Concessionaire has paid for all work performed by third parties that Concessionaire is obligated to pay for, other than disputed amounts;

(h) Concessionaire has provided evidence that (i) all deposits to the Intellectual Property Escrow(s) required at or before Final Completion under Section 23.5 have been made and (ii) all Cost and Pricing Data required to be provided at or before Final Completion under Section 23.6 has been delivered to Owner;

(i) There exist no uncured Concessionaire Defaults that are the subject of a notice, or with the giving of notice or passage of time, or both, could become a Default Termination Event under Section 19.3.1 except for (i) any Concessionaire Default for which Final Completion will effect full and complete cure or for which corrective work is proceeding under the warranty provisions of this Agreement or (ii) any Concessionaire Default relating to the O&M Work if Concessionaire has a right to cure and is diligently prosecuting such cure;

(j) Concessionaire has submitted to Owner (i) documentation of DBE utilization and (ii) if the DBE Goal is not met, documentation supporting good faith efforts (including with respect to compliance with the DBE Participation Plan), as required under Section 9.10;

(k) Concessionaire, all relevant Contractors and the O&M Contractor have delivered to Owner certified copies of Labor Peace Agreement required under Section 9.14.1; and

(l) Concessionaire has provided to Owner the certificates and reports listed in Part 2C, Section 4.7 of the Technical Provisions. If any such certificate or report was previously provided subject to restrictions, exceptions, waivers or other temporary measures as permitted by Part 2C, Section 2.7 of the Technical Provisions, all such exceptions, waivers and other temporary measures shall have been resolved in accordance with Part 2C, Section 2.7.4 of the Technical Provisions, and a final certificate or report shall be provided reflecting the resolution.

**7.10.4.3** Concessionaire shall notify Owner upon completion of all physical Work and delivery of Submittals required under Section 7.10.4.2, excluding the requirements of subsections (f) and (g). Concessionaire and Owner shall meet, confer and exchange information on a regular cooperative basis. Owner will conduct inspections and other investigations whether jointly or independently in order to evaluate whether said conditions to Final Completion are satisfied.

**7.10.4.4** When Concessionaire believes that it has satisfied all conditions to Final Completion, it shall provide notice to Owner to that effect, including certification, in form reasonably acceptable to Owner, stating that Concessionaire has satisfied all the criteria in Section 7.10.4.2. Following receipt of such notice and certification, Owner will conduct such additional inspections and investigations either jointly or independently as it deems advisable to determine whether Final Completion has been achieved.

**7.10.4.5** Within three business days after Owner's receipt of the notice from Concessionaire under Section 7.10.4.4, Owner will either (a) issue a certificate of Final Completion or (b) provide notice to Concessionaire stating the reasons why the conditions to Final Completion have not been satisfied. If Owner provides notice under Section 7.10.4.5(b), then the notifications and processes in Section 7.10.4.3 to 7.10.4.4 shall be repeated until (i) Owner issues a certificate of Final Completion or (ii) either Party initiates the Dispute

Resolution Procedures. The certificate of Final Completion will indicate the actual date on which Concessionaire achieved Final Completion.

## **7.11 Warranties**

**7.11.1** Concessionaire shall obtain from all Prime Contractors, and shall ensure that all other Contractors and Suppliers provide, representations, warranties, guarantees and obligations in accordance with Good Industry Practice for work of similar scope and scale, with respect to design, materials, workmanship, equipment, tools and supplies furnished by all such Contractors and Suppliers, which shall extend not only to Concessionaire but also to Owner and relevant Third Parties.

**7.11.2** To the extent that any Contractor warranty or guaranty is voided after termination of this Agreement by reason of Concessionaire's negligence or failure to comply with the requirements of the Contract Documents in incorporating material or equipment into the Project, Concessionaire shall correct any defects which would otherwise have been covered by such warranty.

**7.11.3** Contractor warranties are in addition to all rights and remedies available under the Contract Documents or applicable Law, and shall not limit Concessionaire's liability or responsibility imposed by the Contract Documents or applicable Law with respect to the Work, including liability for design defects, construction defects, strict liability, breach, negligence, willful misconduct or fraud.

**7.11.4** Notwithstanding the foregoing, Concessionaire shall cause all Contractors performing Renewal Work during the last two years of the Term, and all Contractors, Suppliers and manufacturers providing warranties or guaranties that extend beyond the scheduled end of the Term, to provide such warranties and guaranties for the joint benefit of Owner and Concessionaire. Concessionaire hereby assigns to Owner all such warranties and guaranties, as well as Concessionaire's rights under the relevant Contracts, effective as of the end of the Term.

**7.11.5** If any LRV or associated equipment, part, system or component is replaced due to an identified Fleet Defect, the period of the LRV Supplier's warranty under the LRV Supply Contract as to that LRV, equipment, part, system or component shall commence again from the date of completion of the replacement and continue for the duration of the original, unextended warranty.

## **7.12 Warranties for Third Party Improvements**

Concessionaire shall provide, or obtain and ensure performance under as if Concessionaire provided, warranties and guaranties for all Work performed for Third Parties for a minimum of one year after the date of acceptance of such Work by the Third Party or such longer term as may be required in Part 1, Section 8 of the Technical Provisions, for such Third Party's benefit (with rights of enforcement). Owner shall have, and shall be identified as a third party beneficiary of the right to enforce, all such warranties and guaranties of such Work. Upon acceptance of such Work by the Third Party and delivery of an assignment of the relevant warranty and guaranty rights to the Third Party, Concessionaire shall be relieved of responsibility for maintenance of such Work. Concessionaire shall also provide any warranties or guaranties required under the Utility Agreements with respect to Utility Work performed by Concessionaire-Related Entities for the benefit of the Utility Owners, with Owner identified as a third party beneficiary of the right to enforce all such warranties and guaranties of such Work.

## **7.13 Responsibility for Loss or Damage**

**7.13.1** The D&C Work includes having full charge and care of the Site and the D&C Work (including bearing risk of loss and damage to the D&C Work and Site) through the RSA Date, except to the extent that third parties have accepted elements of the D&C Work and assumed responsibility for maintenance of such elements before the RSA Date. Following the RSA Date, the D&C Work shall include continued responsibility for all improvements not yet completed as of such date, until Final Completion is achieved or maintenance responsibility is assumed by third parties.

**7.13.2** Concessionaire shall take every reasonable precaution against loss or damage to any part of the Project by the action of the elements (e.g., rain, snow, wind, etc.), or from any other cause, whether arising from the performance or nonperformance of the D&C Work.

**7.13.3** For so long as Concessionaire bears the risk of loss and damage to D&C Work under Section 7.13.1, Concessionaire shall repair, restore and replace losses or damages to such D&C Work occasioned by any of the causes identified in Section 7.13.2, and shall bear the expense thereof except to the extent that compensation is allowed under Article 15.

**7.13.4** Concessionaire shall repair, restore or replace materials lost or structures damaged as a result of faulty temporary drainage during construction or the action of the elements.

## **7.14 Nonconforming Work**

### **7.14.1 Obligation to Replace Nonconforming Work**

Concessionaire shall perform all Work in conformity with the Contract Documents. If Concessionaire has not performed the Work in conformity with the Contract Documents, then, in addition to any other remedies available to Owner, Owner may direct Concessionaire to, and Concessionaire shall, remove and replace or otherwise remedy the Nonconforming Work, without entitlement to make a Claim in connection with such Work.

### **7.14.2 Concessionaire's Plan of Correction**

**7.14.2.1** Promptly after Nonconforming Work is identified and no later than 10 business days after Concessionaire first obtains knowledge of such Nonconforming Work, Concessionaire shall submit a proposed plan of correction to Owner, for review and approval, describing the error or defect giving rise to the Nonconforming Work and describing Concessionaire's planned remedial action. Such proposal shall address System integrity, aesthetics, operational impact, maintainability, the effect on the Project Schedule and other relevant issues.

**7.14.2.2** If Owner determines that a proposed plan of correction may infringe upon System integrity, operations or maintainability, then Owner may elect to perform a technical assessment of Concessionaire's proposal. Owner shall notify Concessionaire promptly upon determining that an assessment is required, and shall take reasonable efforts to expedite the assessment. Should Owner elect to perform any such technical assessment, (a) if so requested by Owner, Concessionaire shall not proceed with the plan of correction until Owner has conducted its technical assessment and provided prior approval of the plan of correction and (b) Concessionaire shall not be entitled to make any Claim in connection with the technical assessment or reasonable delay in the plan of correction pending Owner's approval.

### **7.14.3 Owner's Remedies**

Owner shall have the right and authority to cause Nonconforming Work to be removed, replaced or otherwise remedied and to withhold or deduct the costs from any monies due or that become due to Concessionaire under the Contract Documents upon (a) any failure of Concessionaire to provide a proposed remedial plan as described in Section 7.14.2.1 and obtain Owner's approval thereof, promptly following discovery of the Nonconforming Work, or (b) any failure of Concessionaire to comply with Owner's direction under this Agreement relating to any safety issue, including Safety Compliance Orders under Section 10.4.

### **7.15 System Integration**

Concessionaire shall perform, or cause to be performed, the successful commissioning, testing and acceptance of all components of the System, including operational readiness of the LRVs, subsystems and Fare System Equipment, in accordance with Part 2C of the Technical Provisions, so that the System may be opened for Revenue Service by the RSA Deadline. Concessionaire shall manage, administer, control, coordinate and integrate the work of all of the Contractors in execution of the D&C Work as detailed in Part 2 of the Technical Provisions.

## ARTICLE 8. O&M WORK

### 8.1 General

#### 8.1.1 General Obligations

**8.1.1.1** Concessionaire is responsible for performance of O&M Work in accordance with requirements specified in the Contract Documents, including Part 3 of the Technical Provisions.

**8.1.1.2** Concessionaire shall ensure that (a) all O&M Work, is performed in accordance with all applicable Laws, Governmental Approvals and Good Industry Practice, as it may evolve over time, (b) the System shall remain fit for use for the intended functions of meeting the Performance Requirements, and shall remain free of defects and shall meet the minimum performance standards for operations as specified in the Technical Provisions throughout the O&M Period, (c) all (i) materials and equipment furnished during the O&M Period shall be of good quality and new and (ii) all LRV(s), LRV components and related consumables obtained as part of the O&M Work and supplied during the O&M Period shall be of good quality and new and fit for its intended purpose, (d) all O&M Work is performed in accordance with the Owner-approved plans required in Part 3, Section 1 of the Technical Provisions and (e) the O&M Work shall meet all other requirements of the Contract Documents. Concessionaire shall be responsible for self-monitoring compliance of the O&M Work with the Contract Documents and notifying Owner if any noncompliance occurs.

**8.1.1.3** Unless expressly provided otherwise in this Agreement, Concessionaire shall comply with all Technical Provisions in performing the O&M Work, including Safety Standards throughout the O&M Period. The Activity Noncompliance Occurrence Table sets forth minimum performance requirements related to O&M Work and Part 3, Section 3 of the Technical Provisions sets forth additional requirements and the required availability of the Purple Line System. Concessionaire's failure to comply with such requirements shall entitle Owner to the rights and remedies under the Contract Documents, including the assessment of Noncompliance Points, deductions from payments otherwise owed to Concessionaire, and termination for uncured Concessionaire Default.

**8.1.1.4** In addition to performing all other requirements of the Contract Documents, Concessionaire shall cooperate with Owner (and Authorities Having Jurisdiction as applicable) in all matters relating to the O&M Work and required availability of the Purple Line System, including any Oversight with respect to operation and maintenance of the Project.

**8.1.1.5** Concessionaire shall obtain (as applicable), maintain, repair and replace elements of the System as appropriate throughout the duration of the O&M Period, including maintenance, repair and replacement of consumable and life-expired items and rehabilitation or overhaul of the LRVs.

**8.1.1.6** Concessionaire shall comply with, and require that all Contractors comply with, all requirements of Laws applicable to the O&M Work, and otherwise for the Term.

**8.1.1.7** Concessionaire shall develop the Project to accommodate future anticipated Technology Enhancements in keeping with Good Industry Practice. Concessionaire shall implement or incorporate Technology Enhancements for the System, at no cost to Owner, to the extent such enhancements are (a) scheduled in the Asset Management Plan, (b) needed to correct Defects in the Work, and (c) required to comply with Good Industry Practice.

## **8.1.2 Changes in O&M Standards and Technology Enhancements**

**8.1.2.1** Owner shall have the right to modify the O&M Standards applicable to the Project at any time, and it is also possible that standards applicable to the Project by reference will be updated during the Term. Owner will provide Concessionaire with prompt notice of changes in O&M Standards adopted by Owner that Concessionaire is obligated to implement.

**8.1.2.2** Upon Concessionaire's becoming aware of a change in O&M Standards, Concessionaire shall determine whether it believes the change is a Discriminatory Change in O&M Standards or a Non-Discriminatory Change in O&M Standards, shall review the Contract Documents to determine which provisions are affected by the change, and shall ascertain the estimated cost impact on performance of the O&M Work and whether the change will require capital improvements as described in Section 8.1.2.3 or 8.1.2.4. Concessionaire shall promptly notify Owner of its belief regarding the characterization of the changes and provide information to Owner regarding the impacts of the change, including information regarding how the change affects specific provisions of the Contract Documents. Subject to Section 8.1.2.3, Concessionaire shall promptly comply with all Non-Discriminatory Changes in O&M Standards unless Owner provides direction to the contrary. Implementation of any Discriminatory Change in O&M Standards shall proceed only after Concessionaire's receipt of a Change Order or Directive Letter issued under Article 14. Concessionaire may submit a request in writing to Owner to consider whether a change is discriminatory or non-discriminatory and to clarify when the change becomes effective, and shall include information with the request regarding Concessionaire's interpretation with the request. Within 10 business days after receipt of such a request, or such other time period as Owner and Concessionaire may agree to at the time of such request, Owner shall provide its determination regarding categorization of the change and the effective date.

**8.1.2.3** If a Non-Discriminatory Change in O&M Standards requires new improvements or any major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any element of the System (including any Technology Enhancement) that is not contemplated by one of the plans required in Part 3, Section 1 of the Technical Provisions, Concessionaire shall perform such Work by the first to occur of (a) any deadline specified by Owner in its notification (if any) regarding the Non-Discriminatory Change in O&M Standards, (b) the date when Concessionaire next performs Renewal Work on such element or (c) the date when Concessionaire is first obligated to perform Renewal Work on such element. Concessionaire will be compensated for its Incremental Costs of performing such Work under Section 15.3.4. No compensation will be allowed for costs of Work contemplated by the Operating Plan, Maintenance Plan or Asset Management Plan or for any costs incurred as a result of the Non-Discriminatory Change in O&M Standards except as allowed under Section 15.3.4.

**8.1.2.4** Concessionaire will be compensated through the Relief Event provisions of this Agreement for its Incremental Costs of performing Work directly attributable to the Discriminatory Change in O&M Standards. If a Discriminatory Change in O&M Standards requires new improvements or any major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any element of the System that is not contemplated by one of the plans required in Part 3, Section 1 of the Technical Provisions (including Technology Enhancements), Concessionaire shall perform such Work in accordance with the direction provided in the Change Order or Directive Letter.

**8.1.2.5** Owner shall have the right to modify the Operating Plan, including the Service Plan, for the Project at any time. In accordance with Part 3, Section 1.1.3 of the

Technical Provisions, if Owner requires a change in the Service Plan (and therefore the Operating Plan), Owner will provide Concessionaire with prompt notice of such change and if appropriate will issue a Change Order under Article 14. Concessionaire will be obligated to implement such change.

### **8.1.3 Deviations**

Concessionaire may provide notice to Owner seeking approval of Deviations from Technical Provisions or Technical Documents applicable to O&M Work. Owner may approve, any such application, and Concessionaire shall bear the burden of persuading Owner that the Deviation sought constitutes sound and safe practices consistent with Good Industry Practice and achieves Owner's applicable Safety Standards and criteria. No Deviation shall be deemed approved or be effective unless and until notice is provided to Concessionaire in writing signed by Owner's Authorized Representative. If Owner fails to issue approval of a Deviation within 10 business days after Concessionaire applies, Owner shall be deemed to have disapproved it. Except with respect to Deviation requests under Section 7.2.4, Owner's denial or disapproval of a requested Deviation shall be final and not subject to appeal under the Dispute Resolution Procedures. Owner may elect to process the application as a Modification Request under Section 14.2 rather than as an application for a Deviation.

### **8.1.4 Hazardous Materials Management**

The provisions of Section 7.8.1 concerning Hazardous Materials Management shall apply throughout the O&M Period except to the extent that such provisions are specific to the original construction of the Project.

### **8.1.5 Utility Accommodation**

**8.1.5.1** It is anticipated that from time to time during the course of the O&M Period, Utility Owners will apply for additional utility permits to install new Utilities that would cross or longitudinally occupy the Project ROW, or to modify, repair, upgrade, relocate or expand existing Utilities within the Project ROW. In such circumstances, the provisions of Section 7.6.8 shall apply.

**8.1.5.2** Throughout the O&M Period, Concessionaire shall monitor Utilities and Utility Owners within the Project ROW for compliance with applicable utility permits, Utility Agreements, easements, and applicable Law, and shall use diligent efforts to obtain the cooperation of each Utility Owner having Utilities within the Project ROW. Concessionaire shall promptly notify Owner if (a) Concessionaire believes that any Utility Owner is not complying with the terms of a utility permit, Utility Agreement, easement, or applicable Law affecting a Utility within the Project ROW, or (b) any other dispute arises between Concessionaire and a Utility Owner with respect to a Utility within the Project ROW, despite Concessionaire having exercised its diligent efforts to obtain the Utility Owner's cooperation. If Concessionaire, despite diligent efforts, is unable to resolve any dispute with a Utility Owner, Concessionaire may request Owner to provide reasonable assistance. Following delivery of such a request the Parties shall consult regarding measures to be undertaken.

## **8.2 Service Changes**

**8.2.1** Owner shall provide at least six months advance written notice of a Major Service Change contemplated by Part 3, Section 3.6 of the Technical Provisions or Exhibit 4D. No Change Order is required for any Major Service Change. Refer to Part 3, Section 3.6 of the Technical Provisions for requirements relating to commissioning and de-commissioning of LRVs

in connection with a Major Service Change. If Owner directs Concessionaire to decommission LRVs, re-commission LRVs that Owner previously directed Concessionaire to decommission, or store decommissioned LRVs off-site, Owner will pay reasonable costs associated with such decommissioning, re-commissioning, or off-site storage.

**8.2.2** Subject to the limitations in Part 3, Section 3.6 of the Technical Provisions, Owner may direct a Minor Service Change contemplated by said Section 3.6 by providing written notice of such change. Minor Service Changes may be implemented to address Tsc changes identified as described in Section 8.3, in which case (a) a change under Section 8.3.1 shall be effective at the start of Revenue Service Demonstration and (b) a change relating to Section 8.3.2 shall be effective as specified by Owner but no earlier than 30 days after issuance. Owner shall provide at least three months' advance written notice of any other Minor Service Change contemplated by Part 3, Section 3.6 of the Technical Provisions.

**8.2.3** Special Events, Special Event Service, and Special Event Service Support Staff are also contemplated in Part 3, Section 1.1.3 and Section 3.14 of the Technical Provisions. Payment for Special Event Support Staff will be made on a per hour basis in accordance with Exhibit 4D.

**8.2.4** No Change Order is required for Minor Service Changes or Special Events Services within the limits of the volume adjustment in Exhibit 4D, Part B, Section 2. However, any service adjustments that are outside of the volume adjustment parameters in said Section 2 will require a Change Order.

**8.2.5** Concessionaire shall notify Owner when sustained passenger loading on the Purple Line System has reached the Peak Passenger Loads condition described in Part 3, Section 3.3.2 of the Technical Provisions. Such notice shall include an analysis of the impact of the Peak Passenger Loads condition on Concessionaire's ability to meet the Performance Requirements. When the Purple Line System has sustained the Peak Passenger Loads condition described in Part 3, Section 3.3.2 of the Technical Provisions for at least three consecutive months, Concessionaire shall be entitled to a Modification for prospective relief from Operations Availability Noncompliance Deductions, provided the analysis of the Peak Passenger Loads condition demonstrates that (a) the impact of the sustained Peak Passenger Loads condition on the Total Trip Run Time results in unavoidable Operations Availability Noncompliance Deductions and (b) such passenger loading on the Purple Line System has reached or exceeded, and is reasonably expected to continue to exist at or exceed, the Peak Passenger Loads. Following delivery of such Modification Request, notwithstanding anything to the contrary in Section 14.2, the Parties shall negotiate in good faith to determine the remaining terms and conditions of a Modification. Any executed Modification giving relief from the Operations Availability Noncompliance Deductions under this Section 8.2.5 shall provide that such relief will expire when the Peak Passenger Loads no longer meet the conditions described in Part 3, Section 3.3.2 of the Technical Provisions.

### **8.3 Calculation of Total Trip Run Time and Tsc**

**8.3.1** Owner and Concessionaire shall conduct the activities specified in Part 2C, Section 4.9 of the Technical Provisions so as to enable Actual Combined Tsc and Total Trip Run Time to be determined before the start of Revenue Service Demonstration. During the five business day period after completion of the activities specified in said Section 4.9 in connection with the Revenue Service Demonstration, the Parties will consult regarding:

(a) the differences between (i) the commitments regarding Total Trip Run Time in Tables AA-1 through AA-4 of Section 3 of Exhibit 2 and (ii) actual Total Trip Run Time;

(b) the extent to which the differences in Total Trip Run Time are attributable to changes between the Bid Combined Tsc values in Table AA-5 of Section 3 of Exhibit 2 and the Actual Combined Tsc values;

(c) the effect of changes between the Bid Combined Tsc and the Actual Combined Tsc values on (i) Concessionaire's ability to meet the Performance Requirements and (ii) its costs of performance; and

(d) the extent to which it would be appropriate to exercise an LRV Option and/or implement Minor Service Changes to address the changes between the Bid Combined Tsc and the Actual Combined Tsc values.

Following such consultation, if and to the extent appropriate to address the impacts of changes between Bid Combined Tsc and Actual Combined Tsc, Owner will direct a Minor Service Change in accordance with Section 8.2.2 and revise the Total Scheduled Operating Hours and Total Scheduled LRV Miles to reflect the impacts of changes between Bid Combined Tsc and Actual Combined Tsc. Owner may also exercise an LRV Option in accordance with Article 12.

**8.3.2** Concessionaire and Owner shall repeat the activities specified in Part 3, Section 3.15 of the Technical Provisions to obtain a new determination upon request by either Party, subject to the constraints in this Section 8.3.2. The Parties anticipate that a re-determination will be made following a Service Change, but otherwise a re-determination will not be made more often than once during each five-year period, starting from the date of the most recent determination of Actual Combined Tsc values. Each Party shall notify the other in writing, before the end of each five-year period, whether or not it wishes to conduct such activities. The purpose of such activities is to recalculate the Actual Combined Tsc values and ascertain any changes to the other Total Trip Run Time elements, with the goal of producing a final report regarding current Actual Combined Tsc values and Total Trip Run Time at least 90 days prior the end of each five-year period. During the 30-day period after completion of the activities specified in said Section 3.15, the Parties will consult regarding:

(a) the differences between the actual Total Trip Run Time and the commitments in Tables AA-1 through AA-4 of Section 3 to Exhibit 2;

(b) the extent to which the differences in Total Trip Run Time are attributable to changes in between Bid Combined Tsc and Actual Combined Tsc;

(c) the effect of changes in between Bid Combined Tsc and Actual Combined Tsc on Concessionaire's ability to meet the Performance Requirements and its costs of performance; and

(d) the extent to which it would be appropriate to modify requirements of the Contract Documents or implement Minor Service Changes to address the changes between Bid Combined Tsc and Actual Combined Tsc.

Following such consultation, if appropriate, Owner may, in its discretion, direct a Minor Service Change in accordance with Section 8.2.2 or the Parties may negotiate a Change Order that includes equitable adjustments to Section 3 of Exhibit 2 and/or other requirements of the

Contract Documents as necessary to account for the changes between Bid Combined Tsc and Actual Combined Tsc. Owner may also exercise an LRV Option or otherwise provide additional LRVs in accordance with Article 12. If the Owner directs a Minor Service Change to account for such Bid Combined Tsc and Actual Combined Tsc changes, the Total Scheduled Operating Hours and Total Scheduled LRV Miles will be revised to account for the impacts of changes in Bid Combined Tsc and Actual Combined Tsc, taking into consideration any LRV Option previously exercised and other relevant prior actions by Owner. Any Change Orders previously issued with respect to items (i)(4) or (i)(5) of the definition of Relief Event during prior periods will be superseded by the Minor Service Change or Change Order issued under this Section 8.3.2.

**8.3.3** If the Parties fail to reach agreement regarding the need for a Change Order or on the terms of a Change Order as described above, Owner may issue a unilateral Change Order or direction to proceed.

**8.3.4** The Operations Availability Deduction Factor (OADFn) calculated in Section 1.1 of Appendix B to Exhibit 4D shall not be revised through any Change Order issued under this Section 8.3.

**8.3.5** If Owner exercises an LRV Option to address the impacts of changes between Bid Combined Tsc and Actual Combined Tsc (or between the previously determined Actual Combined Tsc and the newly determined Actual Combined Tsc), then, unless the Owner directs otherwise, the Concessionaire will automatically be required to provide the prior Peak Period headways as of the date established for completion of the delivery and commissioning of the Option LRVs consistent with Section 12.2.

#### **8.4 Supply of the O&M Spare LRV**

**8.4.1** Concessionaire shall deliver the O&M Spare LRV to Owner no earlier than the RSA Date and no later than 390 days after the RSA Date. Delivery may not occur until after satisfactory completion of acceptance testing for the O&M Spare LRV.

**8.4.2** The O&M Spare LRV shall be properly integrated with the System and shall meet all of the requirements specified in the Contract Documents, including all requirements in Section 7.11.5, Part 2B, Section 12 of the Technical Provisions, Section 7.7 and any additional commitments described in Exhibit 2.

**8.4.3** Payment for the O&M Spare LRVs shall be made, pending delivery and completed commissioning, as part of the Special Lifecycle Payment.

#### **8.5 Concessionaire Inspection, Testing and Reporting**

**8.5.1** Concessionaire shall carry out Inspections and tests in accordance with the Technical Provisions, Project Management Plan and O&M Management Plan and Section 5.7. Concessionaire shall use the results of such inspections and tests to develop and update the Asset Management Plan, to maintain asset condition and service levels, and to develop programs of maintenance and Renewal Work to minimize the effect of O&M Work on Users and other members of the public.

**8.5.2** Concessionaire shall submit all reports relating to the O&M Work, including the O&M annual reports, in the form, with the content and within the time required under the Contract Documents.

**8.5.3** The inspections and reports described above are in addition to maintenance of the Activity Noncompliance Occurrence, Activity Noncompliance Event and Operations Availability Noncompliance Event database and related reports under Section 16.2.

## **8.6 Fare Collection and Fare System**

**8.6.1** Concessionaire shall be responsible for:

(a) Operations, maintenance and renewal of the Fare System Equipment (including making all equipment repairs and component replacements necessary to enable Concessionaire to meet performance requirements or remediate defects);

(b) Stocking ticket vending machines, collecting cash from such machines, depositing cash receipts and arranging for proceeds of credit and other electronic transactions to be deposited into a designated Owner account;

(c) Maintaining generally accepted fiscal controls and procedures in accordance with Owner and State of Maryland requirements;

(d) Providing accounting reports regarding all transactions and deposits;  
and

(e) Monitoring the Fare System Equipment, and providing reports regarding, any intrusion or tampering with said equipment;

all as more specifically provided in Part 3 of the Technical Provisions.

**8.6.2** The O&M Work does not include the obligation to pay credit card transaction costs associated with fares purchased from the Fare System Equipment, or to pay WMATA fees for the New Electronic Payment Program (NEPP) server maintenance. Owner will directly pay WMATA and/or credit card companies for these costs.

**8.6.3** The Availability Payment formula is not dependent on the value of revenues collected. However, Noncompliance Points may be assessed for any Noncompliance Event, and failure to collect properly, deposit and account for fare revenues deposits constitutes a Concessionaire Default.

**8.6.4** The Lifecycle Payments do not include replacement of the entire Fare System during the Term or any replacement of Fare System Equipment components after Contract Year 15. Before Contract Year 15 (or before the end of the expected useful life of the initial Fare System, if earlier than Contract Year 15) the Parties shall consult regarding the scope of such replacements and associated changes to the O&M Work and shall proceed to negotiate a Change Order in accordance with Article 14. For the avoidance of doubt, MAPO and MAPM include all Fare System operating and maintenance costs during the entire Term. This Change Order will only address changes in such costs to the extent that the new Fare System Equipment results in changes in the Fare System requirements from those identified in the Technical Provisions.

## **8.7 Inventory**

Concessionaire shall comply with all requirements established in the Maryland Department of General Services Inventory Control Manual (dated July 1, 2012, as it may be updated from time to time) applicable to the "Custodial Agency" under said manual, except that Concessionaire

shall coordinate with Owner with regard to any contacts with the Department of General Services and any reports to said department required under said manual.

## **8.8 Renewal Work; Asset Management Plan; Renewal Work Budget**

### **8.8.1 Performance of Renewal Work**

**8.8.1.1** The State of Good Repair requirements in Part 3, Section 6 of the Technical Provisions and related provisions of the Technical Provisions include Performance Requirements for the O&M Work. Concessionaire shall diligently perform Renewal Work as and when necessary to comply with the Performance Requirements, and Contract Documents; to achieve full design life for each asset, supporting reliable and quality service operations and availability; and to restore the Useful Life of each element at the end of its Residual Life. Concessionaire shall use the Asset Management Plan, as updated from time to time, as the principal guide for scheduling and performing Renewal Work; but complying with the Asset Management Plan shall not excuse or be a defense to any failure to comply with the Performance Requirements.

**8.8.1.2** The O&M Work includes having full charge and care of those portions of the Project within the O&M Limits from the RSA Date through the end of the Term, except to the extent that charge and care of certain Work is Concessionaire's responsibility as part of the D&C Work in accordance with Section 7.13.

**8.8.1.3** Concessionaire shall take reasonable precautions against loss or damage to the System and other improvements and assets within the O&M Limits caused by (a) the action of the elements (e.g., rain, snow, wind, etc.), (b) Users or (c) any other cause, whether arising from the performance or nonperformance of the O&M Work.

### **8.8.2 Asset Management Plan**

**8.8.2.1** Within 90 days before the beginning of the first full calendar year of the O&M Period, Concessionaire shall prepare and submit to Owner for review and approval an Asset Management Plan under Part 3, Section 6.1 of the Technical Provisions. As part of the Asset Management Plan, Concessionaire shall state, by element, (a) the estimated Useful Life, (b) the estimated Residual Life, (c) a brief description of the type of Renewal Work anticipated to be performed at the end of the element's Residual Life, (d) a brief description of any Renewal Work anticipated to be performed before the end of the element's Residual Life, including reasons why this work should be performed at the proposed time, (e) the estimated cost in current dollars of such Renewal Work, (f) the total estimated cost in current dollars of Renewal Work in each of the years Renewal Work is anticipated to be performed under the Asset Management Plan, (g) a description of any Renewal Work performed in the prior 12 months including the cost of such Renewal Work and (h) a schedule for Renewal Work to be performed during the coming year. As part of the Asset Management Plan, Concessionaire shall also provide a listing and schedule for delivery of the O&M Spare LRV, those non-revenue service vehicles, spare parts, spare components, spare equipment, tools, materials, expendables and consumables necessary for operation and maintenance of the Project during the O&M Period that were not obtained at or prior to Revenue Service Availability.

**8.8.2.2** Concessionaire shall estimate the Useful Life of each element within the Asset Management Plan based on (a) Concessionaire's reasonable expectations respecting the manner of use, levels and mix of traffic, environmental conditions, and wear and tear and (b) the assumption that, when subject to Routine Maintenance, the element will comply throughout its Useful Life with each applicable Performance Requirement. Concessionaire shall

estimate the Residual Life of each element within the Asset Management Plan based on its age and whether (i) the element has performed in service in the manner and with the levels and mix of traffic and wear and tear originally expected by Concessionaire (ii) Concessionaire has performed Routine Maintenance of the element, and (iii) the element has complied throughout its life with each applicable Performance Requirement.

**8.8.2.3** Within 90 days before the beginning of the second full calendar year of the O&M Period and each subsequent calendar year, Concessionaire shall prepare and submit to Owner for review and approval either (a) a revised Asset Management Plan or (b) the then-existing Asset Management Plan accompanied by a statement that Concessionaire intends to continue its existing plan for Renewal Work in effect without revision (in either case, referred to as the “updated Renewal Work”). Revisions may reflect past experience, then-existing conditions, the factors described in Section 8.8.2.2, changes in estimated costs of Renewal Work, changes in technology, changes in Concessionaire’s planned means and methods of performing Renewal Work, and other relevant factors. The updated Asset Management Plan shall show the revisions, if any, to the prior Asset Management Plan and include an explanation of reasons for revisions. If no revisions are proposed, Concessionaire shall include an explanation of the reasons no revisions are necessary.

**8.8.2.4** At Owner’s request, Concessionaire and its O&M Contractor(s) shall promptly meet and confer with Owner to review and discuss the original or updated Asset Management Plan.

**8.8.2.5** Within 30 days after receiving the original or any updated Asset Management Plan, Owner shall have the right to comment on, object to, make recommendations on or disapprove the original or updated Asset Management Plan or any of its elements and disapprove such Plan. Owner may base its comments, objections, recommendations or disapproval on whether the original or updated Asset Management Plan and underlying assumptions are reasonable, realistic and consistent with Good Industry Practice, Project experience and condition, applicable portions of the Contract Documents, Governmental Approvals and Laws.

**8.8.2.6** Within 30 days after receiving timely notice of comments, objections, recommendations or disapprovals from Owner, Concessionaire shall submit to Owner a revised original or updated Asset Management Plan rectifying such matters or, if it disagrees with Owner, Concessionaire shall submit a notice identifying each comment, objection, recommendation and disapproval that Concessionaire disputes and the grounds for dispute.

**8.8.2.7** If Concessionaire fails to provide notice within the time period specified in Section 8.8.2.6, it shall be deemed to have accepted the comments, objections, recommendations or disapproval and the original or updated Asset Management Plan, as applicable, shall thereupon be deemed revised to incorporate the comments and recommendations and to rectify the objections or disapproval. After timely delivery of any such notice, Concessionaire and Owner shall endeavor in good faith to reach agreement as to the matters listed in the notice. If no agreement is reached as to any such matter within 30 days after Concessionaire delivers its notice, the Dispute may be subject to resolution under the Dispute Resolution Procedures.

**8.8.2.8** No later than five calendar years before the end of the Term or within a reasonable period before any Early Termination Date, Concessionaire and Owner shall identify and determine the Handback Renewal Work Plan, as set forth in Section 8.13.1.

### **8.8.3 Renewal Work Budget and Responsibility for Injury or Damage to the Project**

**8.8.3.1** As described in Exhibit 4D, Availability Payments include a budgeted amount for Renewal Work based on an assumed schedule for performance of Renewal Work. The portion of the Availability Payment allocable to Renewal Work performed during each Payment Period will be subject to escalation based on the index identified in Exhibit 4D.

**8.8.3.2** The schedule for performance of Renewal Work may be affected if any assets are repaired or replaced due to damage that is covered by insurance or paid for by Owner or another Governmental Entity. If during any Contract Year the cost of such repairs and replacements exceeds \$100,000 (excluding costs which are funded by Concessionaire as a deductible under any Insurance Policy), the Parties will document the Work done and cost of such Work, and will determine when the assets would have been repaired or replaced absent the Relief Event. If any such repairs or replacements would otherwise have been performed during the last 10 years of the Term, at the beginning of the Contract Year in which Concessionaire would otherwise have performed the repair or replacement, the Parties will determine the costs that Concessionaire would have incurred for a current repair or replacement and shall negotiate a Change Order allowing Owner a credit for the avoided costs of a current repair or replacement, not to exceed the value of the insurance proceeds used for the accelerated repair or replacement.

**8.8.3.3** Concessionaire shall repair, restore and replace all losses or damages to the System or such other improvements and assets during the O&M Period due to (a) the action of the elements (e.g., rain, snow, wind, etc.), (b) Users or (c) any other cause. Such repair, restoration and replacement shall be at Concessionaire's cost and expense, except to the extent that compensation is allowed under this Agreement.

**8.8.3.4** Owner will pay for Incremental Costs incurred by Concessionaire in performance of Work under Section 8.8.3.3 only to the extent that (a) any of the reasonable costs of repair, restoring or replacing are Owner's responsibility because it has agreed to act as a self-insurer for the relevant coverage (or has agreed to pay the difference between an adjusted and unadjustable deductible in connection with any claim made under an Insurance Policy arising out of a covered Loss) under Section 11.1.2.12(g), 11.1.7.2 or 11.1.8.10 or (b) the damage is covered by federal grant funds provided to Owner to compensate it for the costs of such Work.

**8.8.3.5** Owner will also pay for eligible Incremental Costs incurred by Concessionaire in performance of Work under Section 8.8.3.3 that are not covered by insurance or payable by Owner under Section 8.8.3.4, as follows:

(a) If, with respect to individual acts of Vandalism (other than acts of Vandalism occurring within areas for which Concessionaire is responsible for providing security) resulting in losses or damages exceeding \$1,000 (in Base Date dollars) in a 24-hour period, the total of such Incremental Costs during the Contract Year exceed \$100,000 (in Base Date dollars), Owner will reimburse Concessionaire for the excess amount. At the beginning of each Contract Year, the Parties shall escalate and document the revised limits under this Section 8.8.3.5(a) based on the General Escalation Factor (ESCGn) for that year.

(b) If, with respect to losses or damages not caused by Vandalism, the total of such Incremental Costs during the O&M Period exceeds, in the

aggregate, \$10,000,000 (the “O&M Damage Deductible”), Owner will reimburse Concessionaire for the excess amount. Concessionaire shall maintain records regarding the reasonable costs of repairing, restoring or replacing losses or damages in excess of costs, identifying the source of funding for such costs (including insurance proceeds, grant funds, and payments from Owner under Section 8.8.3.4(a)), and shall provide reports regarding Work performed and costs incurred in a format similar to the requirements applicable to records of force account work under Exhibit 13A.

**8.8.3.6** Incremental Costs eligible for reimbursement under Section 8.8.3.4 or 8.8.3.5 and to be considered in determining whether total costs incurred exceed the Vandalism thresholds or the O&M Damage Deductible under Section 8.8.3.5 shall exclude costs of repairing, restoring or replacing that (a) constitute payment of deductible amounts, SIRs and/or co-insurance requirements with respect to loss or damage required to be covered by insurance, (b) are due to normal wear and tear or obsolescence, (c) are attributable to breach of contract, negligence or other wrongful act or omission by any Concessionaire-Related Entity, or (d) could reasonably have been avoided or prevented.

## **8.9 Power Supply**

**8.9.1** Owner is responsible for directly paying for electrical power required for Purple Line System operations, including electrical power required for Purple Line System facilities and platforms as well as traction power. Concessionaire shall ensure the Project is connected to the power grid in accordance with Part 2B, Sections 6.5.2 and 9.4.1 of the Technical Provisions and shall take appropriate action to facilitate start-up of permanent power service to the Project before commencement of trial running. Owner is responsible for working with the electric power provider to establish electrical power rates and fees prior to the start of Trial Running.

**8.9.2** From and after start-up of permanent power service, Concessionaire shall take appropriate steps to ensure efficient energy usage and shall otherwise conform to the approved Energy Management Plan. Concessionaire shall provide monthly Electrical Power Usage Reports to Owner regarding electricity usage during the prior month and year to date, using the form described in Appendix E to Exhibit 4D, together with such other related information as Owner may reasonably request, within five business days after delivery of the monthly invoice to Concessionaire from the supplier of permanent electrical power. Such reports shall form the basis for adjustments to Monthly Availability Payments in accordance with Appendix E to Exhibit 4D.

## **8.10 Law Enforcement, Security and Incident Response**

### **8.10.1 Law Enforcement Services**

**8.10.1.1** The Maryland State Police or other State law enforcement services will provide law enforcement services, including enforcement of applicable laws and the Project fare policy and establishment of concurrent jurisdiction with other law enforcement agencies of the State and any political subdivision of the State.

**8.10.1.2** Concessionaire acknowledges and agrees that:

(a) The MTA Police Force is empowered to enforce all applicable Laws and to enter the Project, and that any person engaged by Owner to provide law enforcement services has the authority to enter the Project (including trains

in revenue and non-revenue service, Stations and Project facilities), at any and all times to carry out their duties;

(b) All law enforcement officers of the State and any political subdivision, as applicable, have the same powers and jurisdiction within the limits of the Project ROW (and otherwise with respect to the Project) as such law enforcement officers have in their respective areas of jurisdiction, including the roads and highways of the State, as applicable; and

(c) No provision of this Agreement is intended to surrender, waive or limit any police powers of the MTA Police Force or any other Governmental Entity, and all such police powers are expressly reserved.

**8.10.1.3** Concessionaire shall ensure that any person engaged by Owner to provide services under Sections 8.10.1.2(a) and 8.10.1.2(b) has necessary access to the Project to carry out their duties, power and jurisdiction (as applicable).

**8.10.1.4** Owner shall not have any liability or obligation to Concessionaire arising out of, relating to or resulting from the failure of the Maryland State Police or any other law enforcement agency to provide services, or any of their, or their respective agents' or employees', acts, omissions, negligence or misconduct in providing services. The general indemnity in Section 11.5.1 shall not apply to the extent that a claim, cause of action, suit, legal or administrative proceeding or any other occurrence, loss or damage of the type listed in Section 11.5.1 is directly attributable to actions of a law enforcement agency designated by Owner to provide services for the Project, and is not due to any fault of any Concessionaire-Related Entity.

**8.10.1.5** As reasonably requested by Concessionaire from time to time, Owner will set up meetings with Concessionaire and representatives of relevant law enforcement agencies to discuss issues affecting operation of the System.

## **8.10.2 Security and Incident Response**

**8.10.2.1** Concessionaire is responsible for the security of the Project and safety and security of the workers and public throughout the Term. Concessionaire shall perform or otherwise take all measures identified in the Safety and Security Plan required by Part 3, Section 1.9 of the Technical Provisions, as approved by Owner.

**8.10.2.2** Without limiting Section 8.10.2.1, as between Owner and Concessionaire, Concessionaire shall be responsible for site security and shall take measures, consistent with Good Industry Practice, to prevent damage to or destruction of Project improvements by any third party or by any Force Majeure Event.

**8.10.2.3** Concessionaire shall comply with all rules, directives and guidance of the U.S. Department of Homeland Security and comparable State agency, and shall coordinate and cooperate with all Governmental Entities providing security, first responder and other public emergency response services.

**8.10.2.4** Without limiting Section 8.10.2.3, whenever the National Terrorism Advisory System (NTAS) or successor system has issued an "elevated" or "imminent" alert or comparable level of threat or alert for any region in which the Project is located or which the Project serves, Concessionaire, at its expense, shall assign management personnel with decision-making authority to be personally present at the relevant emergency operations center

serving the region. Concessionaire shall provide such service 24 hours a day, seven days a week, until such level or threat or alert expires based on a “sunset period” or is cancelled, or until the lead agency at the operations center determines such staffing level is no longer necessary.

**8.10.2.5** Concessionaire shall perform and comply with the provisions of Part 2A, Section 15.4 of the Technical Provisions concerning Incident response, safety and security.

**8.10.2.6** Concessionaire shall implement all Incident response, safety and security procedures, protocols and requirements in the Incident Management Plan and Emergency Plan included in the O&M Management Plan.

### **8.10.3 Additional Services**

**8.10.3.1** Concessionaire may engage one or more security firms, at Concessionaire’s own expense, to provide services for the Project following receipt of written approval from Owner.

**8.10.3.2** Concessionaire may at any time request the Maryland State Police and/or MTA Transit Police to provide additional services required for operation of the System. Concessionaire acknowledges that Owner has no obligation to require performance of any such services.

## **8.11 Coordination of Operations and Maintenance Responsibilities**

**8.11.1** At Concessionaire’s request from time to time, Owner will assist Concessionaire in seeking the cooperation and coordination of any Authority Having Jurisdiction with respect to Concessionaire’s operation and maintenance activities. The objectives of such assistance will be to minimize disruptions to Revenue Service and traffic and ensure that all operation and maintenance activities are carried out in accordance with then-current maintenance standards and then-current traffic management standards, practices and procedures of such Authorities Having Jurisdiction.

**8.11.2** Except where expressly identified in this Agreement as a Non-Concessionaire Caused Disruption or Force Majeure Event, no interference with or disruption of traffic due to activities on the O&M Limits, and no failure to meet such standards, practices and procedures, by any such other Authorities Having Jurisdiction, shall entitle Concessionaire to any Claim.

## **8.12 Annual Budget; Support for Annual Reporting by Owner**

**8.12.1** Concessionaire shall, concurrently with delivery to any Lender, deliver to Owner any budget for O&M Work, and any updates to such budget, required by or delivered to any Lender.

**8.12.2** Concessionaire acknowledges and agrees that Owner may be required to provide such budget and other documents pertaining to the Availability Payment as part of its annual reporting obligations. Concessionaire shall provide such assistance as Owner may reasonably request in connection with preparing and delivering all such documentation, provided that Owner has identified the requirements to be met by Concessionaire at least 60 days before the due date of the report.

**8.12.3** Concessionaire shall make available to Owner information relating to the status of the Work, including non-proprietary information relating to the design, engineering and construction, estoppel certificates, and such other matters as Owner may reasonably request in accordance with the Technical Provisions.

**8.12.4** Concessionaire shall furnish such further certifications, and opinions of counsel addressed to Owner and the State and other documents, as may be reasonably requested by Owner.

## **8.13 Handback Requirements**

### **8.13.1 Handback Condition**

**8.13.1.1** No later than five calendar years before the end of the Term or within a reasonable period before any Early Termination Date, Concessionaire and Owner shall jointly (a) identify the Renewal Work required for the Project to be in the condition and meet all of the requirements for Residual Life at the conclusion of the Term specified in the Handback Requirements and (b) determine the schedule (and Concessionaire's estimated budget) for the performance, Owner inspection and Concessionaire completion of all such Renewal Work. Such information and schedule for Renewal Work during the five calendar years before the end of the Term or the remaining period before any Early Termination Date shall become the Handback Renewal Work Plan and be a separate document from, but complementary to, the Asset Management Plan. No later than 90 days before the beginning of each subsequent calendar year, Concessionaire shall update the Handback Renewal Work Plan and provide the update to Owner. Following delivery of the update the Parties shall meet to discuss whether any changes should be made to the scope or schedule for performance of the Renewal Work.

**8.13.1.2** Subject to Section 8.13.3.2, all Handback Renewal Work shall be completed no later than the earlier of (a) three months before the Termination Date (under clause (a) of the definition thereof) and (b) the Early Termination Date.

**8.13.1.3** The Handback Requirements and the Handback Renewal Work Plan shall incorporate the following criteria:

(a) The main civil and structural works and other System elements shall not exhibit any undue signs of damage, wear, stress, cracking, settlement, corrosion, or weather erosion, such that they cannot reasonably be expected to satisfy their full design life specification and to support reliable service operations for a period of three years beyond the end of the Term;

(b) Limited life and "wear and tear" components of the System elements have been replaced by Concessionaire during the O&M Period in accordance with Good Industry Practice as and when they failed, wore out, or reached their design life or customary replacement frequency, as part of ongoing maintenance activities;

(c) Major electrical and mechanical components or other System elements (excluding the LRVs) have been repaired, refurbished, or replaced by Concessionaire as appropriate if their then condition indicates that they are unlikely to support reliable service operations (without recourse to major repair) for a period of three years beyond the end of the Term; and

(d) Each LRV and its components, whether original or replacement equipment, have been, and continues to be, maintained in accordance with

the original equipment manufacturers' recommendations, subject to reasonable modification of maintenance practices, up until the end of the Term.

### **8.13.2 Handback Inspections**

The Parties shall conduct inspections of the Project at the times and according to the terms and procedures specified in the Handback Requirements, for the purposes of:

- (a) Determining and verifying the condition of all elements and their Residual Lives;
- (b) Adjusting, to the extent necessary based on inspection and analysis, element Useful Lives, Ages, Residual Lives, estimated costs of Renewal Work and timing of Renewal Work;
- (c) Revising and updating the Asset Management Plan to incorporate such adjustments;
- (d) Determining the Renewal Work required to be performed and completed before the Termination Date, based on the Handback Requirements for Residual Life at the conclusion of the Term, the foregoing adjustments and the foregoing changes to the Asset Management Plan; and
- (e) Verifying that such Renewal Work has been properly performed and completed in accordance with the Handback Requirements.

### **8.13.3 Renewal Work under Handback Requirements**

**8.13.3.1** Concessionaire shall diligently perform and complete all Renewal Work required to be performed and completed before the Termination Date, based on the required adjustments and changes to the Asset Management Plan resulting from the inspections and analysis under the Handback Requirements.

**8.13.3.2** In the event of an early termination of this Agreement, this Section 8.13 shall apply to the extent of any Renewal Work required to be performed and completed before the Early Termination Date, based on the required adjustments and changes to the Asset Management Plan resulting from the inspections and analysis under the Handback Requirements.

### **8.13.4 Additional Handback Requirements; Owner Right to Self-Perform and Recover Costs**

**8.13.4.1** On or before the date of Handback, and as a condition to acceptance of Handback by Owner, Concessionaire shall, and shall cause its Contractors to, deliver all specialized equipment used in operations and maintenance of the System, which, in each case, shall be mechanically, electrically and structurally sound, as applicable, and ready for and capable of being operated, and otherwise used safely, in the normal course of business by Owner after Handback.

**8.13.4.2** If, before or at the end of the Term, Owner determines that the Project does not comply with any Handback Requirement, or Renewal Work is not timely or properly performed, then, in addition to Owner's rights under the Contract Documents, Concessionaire shall be liable for Owner's Recoverable Costs incurred in bringing the Project

into compliance with such Handback Requirement(s). In recovering such amounts, Owner may (a) reduce any Availability Payment then due and owing from Owner to Concessionaire, (b) invoice Concessionaire for such amount, as a lump sum payment, (c) set off such amount against any other amount then due and owing from Owner to Concessionaire, (d) draw against funds withheld under Section 8.14 or against the letter of credit described in Section 8.14.5, (e) require funds in the reserve account described in Section 8.14 to be used to pay for required Renewal Work, or (f) any combination of (a) through (e).

## **8.14 Handback Requirements Holdback**

**8.14.1** When the schedule for Renewal Work to meet Handback Requirements is set, the Parties shall determine whether the remaining budget for Renewal Work included in the Availability Payments is sufficient to cover the cost of such Renewal Work. If a shortfall exists, the Parties shall then determine whether the shortfall is covered by amounts held in a Project handback reserve account that is subject to restrictions satisfactory to Owner ensuring that funds from said account will be used only to pay for reasonable costs of performance of Renewal Work and any other uses that have previously been approved by Owner.

**8.14.2** If the shortfall is not covered by amounts held in the handback reserve account, Owner may withhold sufficient funds from future Availability Payments to cover any remaining deficit after accounting for funds in the handback reserve account. The amount to be withheld from each Monthly Availability Payment shall not exceed the greater of (a) the portion of the payment that would otherwise be available for Distributions to Equity Members or (b) the deficit amount divided by 60.

**8.14.3** Each month following finalization of the schedule for Renewal Work, Owner will assess whether to pay out amounts withheld from Availability Payments based on (a) a review of progress of the Renewal Work, (b) updated estimates regarding the cost of Renewal Work remaining to be performed, and (c) a determination as to whether the sum of the remaining budget for Renewal Work included in the Availability Payments and amounts in the handback reserve account is sufficient to cover the cost of such Renewal Work.

**8.14.4** If Owner is withholding excess funds, it shall promptly pay the excess amount to Concessionaire. If Owner is not holding sufficient funds to cover the revised deficit amount, Owner shall continue to have the right to withhold additional funds from Availability Payments until it has withheld an amount sufficient to cover the entire deficit, provided that the monthly amount withheld may not exceed the greatest of (a) the portion of the payment that would otherwise be available for Distributions to Equity Members, (b) the amount determined under Section 8.14.2(b), or (c) the updated deficit amount divided by the number of months remaining to the end of the Term.

**8.14.5** Concessionaire shall have the right to provide a letter of credit as described in this Section 8.14.5 to secure its obligation to perform Renewal Work, and thereby have the right to receive Monthly Availability Payments without any withholding based on the deficit. Any such letter of credit shall be in form reasonably acceptable to Owner and in an amount equal to 100% of the deficit. If the letter of credit is not renewed at least 30 days before expiration, Owner shall have the right to withhold payments as described in Sections 8.14.1, 8.14.2, and 8.14.3, including the right to withhold "catch-up" payments without regard to the limitations described in Section 8.14.1, until the total amount withheld by Owner is at the same level that Owner would otherwise have held as of such date, as though Concessionaire had not elected to provide security for its obligations to perform Renewal Work.

## ARTICLE 9. CONTRACTING AND LABOR PRACTICES

### 9.1 Disclosure of Contracts and Contractors

**9.1.1** The provisions of this Section 9.1 apply with respect to (a) Prime Contracts and lower tier Contracts entered into by Prime Contractors, excluding personal services contracts and contracts with Suppliers other than Key Contractors, and (b) Contracts with Affiliates, regardless of the nature or tier of the Contract. With respect to each such Contract, Concessionaire shall notify Owner's Authorized Representative of the proposed Contractor and proposed scope of work to be performed by the Contractor, at least 10 days in advance of execution and delivery of the Contract.

**9.1.2** Each notice under Section 9.1.1 shall identify the Work to be performed under the Contract and the proposed dollar value of the Contract. If the Contract includes Construction Work, the notice shall include assurance that the minimum wage for labor, as specified in the Contract Documents, shall apply to labor performed on all work sublet, assigned, or otherwise disposed of in any way.

**9.1.3** Each of the Contracts listed in the notice under Section 9.1.1 may be executed and delivered 10 days after the notice provided to Owner unless Owner's Authorized Representative objected to Concessionaire regarding that Contract during the prevailing 10 day period or Section 9.3 or 9.6 applies. The failure of Owner's Authorized Representative to object to a Contract shall not be construed to relieve Concessionaire or any Contractor of responsibility for the fulfilling of all the requirements of the Contract Documents.

**9.1.4** Concessionaire shall provide Owner a monthly report separately listing (a) all Key Contracts in effect, (b) all Contracts in effect to which Concessionaire is a party, (c) all Subcontracts in effect to which an Affiliate is a party and under which all or a substantial portion of the Affiliate's responsibilities or obligations under its Contract with Concessionaire are delegated to the Subcontractor and (d) all other Subcontracts. Concessionaire also shall list in the monthly report the Contractors under such Contracts, guarantees of Key Contracts in effect and the relevant Guarantors. Concessionaire shall allow Owner ready access to all Contracts and records regarding Contracts and shall deliver to Owner, (i) within 10 days after execution, copies of all Key Contracts, guarantees thereof and amendments and supplements to Key Contracts and guarantees thereof, and (ii) within 10 days after receipt of a request from Owner, copies of all other Contracts (including amendments and supplements) as may be requested.

### 9.2 Responsibility for Work, Contractors and Employees

**9.2.1** Concessionaire shall be entitled to enter into one or more Contracts with Contractors to perform portions of the Work. Concessionaire shall retain or cause to be retained only Contractors that are qualified, experienced and capable in the performance of the portion of the Work assigned. Concessionaire shall ensure that each Contractor has at the time of execution of the Contract, and maintains at all times during performance of the assigned Work, all licenses, certifications, registrations, permits, approvals bonds and insurance required by applicable Laws.

**9.2.2** The retention of Contractors by Concessionaire does not relieve Concessionaire of its responsibilities under this Agreement or for the quality of the Work or materials or services provided by it.

**9.2.3** Each Contract shall include (a) terms sufficient to ensure both the acknowledgement of and compliance by the Contractor with the applicable requirements of the Contract Documents and to ensure that Owner has the ability to exercise its rights specified in the Contract Documents, (b) those terms that are specifically required by the Contract Documents to be included in such Contract, and (c) all applicable federal requirements, including those in Exhibit 16.

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

**9.2.5** Nothing in this Agreement will create any contractual relationship between Owner and any Contractor. No Contract entered into by or under Concessionaire shall impose any obligation or liability upon any Indemnified Party to any Contractor or any of its employees. Concessionaire shall include, or cause to be included, a provision in all Contracts acknowledging the same.

**9.2.6** Concessionaire shall supervise and be fully responsible for the actions, omissions, negligence, willful misconduct, fraud, bad faith or breach of applicable Law or contract by any Concessionaire-Related Entity or by any member or employee of Concessionaire or any Concessionaire-Related Entity while performing Work under this Agreement or while on the Site, as though Concessionaire directly employed all such individuals.

### **9.3 Key Contracts; Contractor Qualifications**

#### **9.3.1 Key Contract Approvals, Amendments and Termination; Use of and Change in Key Contractors**

**9.3.1.1** Concessionaire shall provide Owner, for Owner's review and comment, draft copies of (a) any Key Contracts not executed prior to the Agreement Date and (b) proposed material amendments to Key Contracts (regardless of whether the Key Contract to be amended was executed before the Agreement Date). Such drafts shall be provided at least 30 days prior to execution. Any proposed amendment to required terms described in Section 9.3.2 shall be considered a material amendment.

**9.3.1.2** Except as otherwise approved by Owner, Concessionaire shall retain, employ and utilize the firms and organizations specifically identified in the document entitled "Information About Major Participants and Other Identified Contractors" in the Technical Proposal to fill the applicable Key Contractor roles.

**9.3.1.3** Concessionaire shall not terminate or permit termination of any Key Contract or permit any substitution, replacement or assignment of any Key Contractor, except with Owner's prior approval; provided, however, that Owner's prior approval is not required in the event of (a) any termination of this Agreement where Owner elects not to assume Concessionaire's future obligations under such Key Contract, (b) any suspension, debarment, disqualification or removal (distinguished from ineligibility due to lack of financial qualifications) of the Key Contractor, or (c) any agreement for voluntary exclusion of the Contractor, from bidding, proposing or contracting with any federal, State or local department or agency; and provided, further, that Owner will act reasonably with respect to approval of a replacement in the case of material uncured default by the Key Contractor under the Key Contract.

### **9.3.2 Key Contract Provisions**

Each Key Contract shall expressly:

**9.3.2.1** Require the Key Contractor to carry out its scope of work in accordance with applicable requirements of the Contract Documents, the Governmental Approvals, applicable Law, and plans, systems and manuals developed and used by Concessionaire under the Contract Documents;

**9.3.2.2** Set forth a standard of professional responsibility or a standard for commercial practice equal to the requirements of the Contract Documents and in accordance with Good Industry Practice for work of similar scope and scale;

**9.3.2.3** To the extent applicable, if not obtained by Concessionaire, require the Key Contractor to provide a Payment Bond and Performance Security as required under Section 11.2 before commencement of any work by or on behalf of the Key Contractor;

**9.3.2.4** Preclude suspension of performance or demobilization by the Key Contractor unless and until it delivers to Owner notice of the other contracting party's breach or default under such Key Contract and allows Owner the reasonable opportunity to cure such breach or default;

**9.3.2.5** Not be assignable by the Key Contractor without Concessionaire's and Owner's prior consent, provided that this provision shall not prohibit subcontracting of portions of the Work;

**9.3.2.6** Include the requirements and provisions in this Agreement applicable to Contractors regarding title to and other Intellectual Property rights and licenses;

**9.3.2.7** Require the Key Contractor to participate in meetings between Concessionaire and Owner concerning matters pertaining to such Key Contractor, its work or the coordination of its work with other Contractors in accordance with direction to such Key Contractor provided by Concessionaire or other party to the Key Contract, provided that Owner retains authority to give such direction or take such action as in its opinion is necessary to remove an immediate and present threat to the safety of life or property;

**9.3.2.8** Require the Key Contractor to participate in, be subject to and give evidence in any dispute resolution proceeding under Article 20, if such participation is requested by either Owner or Concessionaire;

**9.3.2.9** Without cost to Concessionaire or Owner, and subject to the rights of the Collateral Agent under any Direct Agreement, permit assignment to Owner, the Collateral Agent or either of their respective successors, assignees or designees of all Concessionaire's or other contracting party's rights under the Key Contract, contingent only upon delivery of notice from Owner following the Termination Date, allowing Owner or its successor, assign or designee to obtain the benefit of Concessionaire's or other contracting party's rights with liability only for those remaining obligations of Concessionaire or the other contracting party accruing after the date of delivery of said notice from Owner, without extinguishing existing claims of the Key Contractor against Concessionaire or the corresponding Claims of Concessionaire against Owner;

**9.3.2.10** Include (a) a covenant acknowledging that, subject to the rights of the Collateral Agent under any Direct Agreement, upon receipt of written notice from Owner,

Owner is entitled to exercise step-in rights with respect to the Key Contract (where Owner is also exercising its step-in rights under Section 17.2.4), without any necessity for a consent or approval from Concessionaire or the making of a determination whether Owner validly exercised its step-in rights, and (b) a waiver and release by Concessionaire of any claim or cause of action against the Key Contractor arising out of, relating to or resulting from its recognition of Owner's step-in rights in reliance on any such written notice from Owner;

**9.3.2.11** Include a covenant that will survive termination of the Key Contract obligating the Key Contractor to promptly execute and deliver to Owner or its successor, assign or designee a new contract between the Key Contractor and Owner or its successor, assign or designee on the same terms as the Key Contract, if (a) the Key Contract is rejected by Concessionaire in bankruptcy or is wrongfully terminated by Concessionaire and (b) Owner delivers a request for such new contract within 60 days following termination or expiration of this Agreement;

**9.3.2.12** Include a covenant that will survive termination of the Key Contract to the effect that if the Key Contractor was a party to an escrow agreement for an Intellectual Property Escrow and Concessionaire terminates it, then the Key Contractor also shall execute and deliver to Owner, concurrently with such new contract, a new escrow agreement on the same terms as the terminated escrow agreement, and shall concurrently make the same deposits to the new Intellectual Property Escrow as made or provided under the terminated escrow agreement. The obligation to include the same terms in each such new contract (including new Intellectual Property Escrows) is subject to the following exceptions: (i) terms of a Key Contract or Intellectual Property Escrow agreement rendered moot or inapplicable solely due to change in the identity of the contracting party to Owner or its successor, assign or designee; and (ii) terms of a Key Contract that must be adjusted due to schedule delay caused solely by Concessionaire's rejection in bankruptcy or wrongful termination;

**9.3.2.13** Require the Key Contractor to (a) maintain usual and customary Books and Records for the type and scope of operations of business in which it is engaged and retain such Books and Records for the period stated in Section 23.1.1 or other applicable period specified in the Contract Documents, (b) permit audit of Books and Records by Owner and (c) provide progress reports to Concessionaire appropriate for the type of work it is performing sufficient to enable Concessionaire to provide the reports it is required to furnish Owner under this Agreement;

**9.3.2.14** Include a right of inspection for Owner, or Owner's designee(s), consistent with Owner's inspection rights under the Contract Documents.

Each Key Contract shall provide that any purported amendment contrary to the requirements of this Section 9.3, without the prior written consent of Owner, shall be null and void.

## **9.4 Prompt Payment to Contractors**

Concessionaire shall make prompt payment to its Prime Contractors, and shall require all Contractors to make prompt payment to lower tier Contractors with whom they have privity of contract, as follows:

**9.4.1** Within seven days after Concessionaire's receipt of payment allocable to Work performed by a Prime Contractor, Concessionaire shall make the corresponding payment to such Prime Contractor. Concessionaire shall insert in all Prime Contracts a requirement for the Prime Contractor to (a) make all payments owing to Subcontractors within seven days after

receiving payment for Work satisfactorily performed by such Subcontractors and (b) require Subcontractors to insert the same provision in each Subcontract at all tiers. Any Subcontractor that does not receive prompt payment shall have the right to request a remedy in accordance with COMAR 21.10.08, incorporated in this Agreement by reference.

**9.4.2** The Parties agree that, for purposes of Section 17-110(c) of the State Finance and Procurement Code of the Annotated Code of Maryland, the fact that the Owner will pay for a portion of the D&C Work through the RSA Payment, the Final Completion Payment and Availability Payments allows Concessionaire to withhold retainage from payments owing to the Design-Build Contractor as provided in this Section 9.4.2. The retainage to be withheld from the Design-Build Contractor shall not exceed 5% of the amount otherwise owing. If Concessionaire elects to withhold such retainage from the Design-Build Contractor, the Design-Build Contractor shall have the further right to withhold retainage from its Subcontractors, not to exceed the amount withheld by Concessionaire, and each Subcontractor from whom retainage is withheld shall have the right to withhold retainage from its lower tier Subcontractors, not to exceed the amount withheld from the upper tier Subcontract. If retainage is withheld, Concessionaire shall be obligated to provide evidence to Owner, as a condition to Revenue Service Availability, that all retainage for Construction Work completed as of the RSA Date has been paid in full, or will be paid in full from the proceeds of the RSA Payment, within the relevant time period specified in Section 9.4.1. Furthermore, Concessionaire and the Contractors shall comply with requirements to release retainage under 49 CFR 26.29 upon satisfactory completion of Work by Subcontractors. Accordingly, as the D&C Work proceeds, Concessionaire shall release retainage to the Design-Build Contractor, and shall require Contractors at each successive tier to release retainage, so as to enable release of retainage to each individual Subcontractor upon satisfactory completion of all Work by such Subcontractor in accordance with applicable Law including 49 CFR 26.29.

**9.4.3** The duties and obligations under the foregoing payment requirements, Section 15-226 of the State Finance and Procurement Article of the Annotated Code of Maryland, and COMAR 21.10.08 (incorporated in this Agreement by reference) shall apply to all tiers of Contractors performing Construction Work under this Agreement.

## **9.5 Key Personnel**

Concessionaire shall:

- (a) Retain, employ and utilize the individuals specifically listed in the Technical Proposal, the Project Management Plan or O&M Management Plan to fill Key Personnel positions for the relevant period;
- (b) Not change or substitute any such individuals except due to retirement, death, disability, incapacity, or voluntary or involuntary termination of employment, or as otherwise approved by Owner under Section 9.5(c);
- (c) Provide notice to Owner of any proposed replacement for any Key Personnel position. Owner shall have the right to review the qualifications and character of each individual to be appointed to a Key Personnel position and act reasonably in approving or disapproving use of such individual in such position before the commencement of any Work by such individual;
- (d) Cause each Key Person to dedicate the full amount of time necessary for the proper prosecution and performance of the Work, as more specifically described in Part 2A, Section 2.3 of the Technical Provisions;

(e) Commit each Key Person exclusively to the Project with no other conflicting assignments during the periods indicated in Part 2A, Section 2.3 of the Technical Provisions;

(f) Provide Owner with office and cell phone numbers and email addresses for each Key Person. Owner may contact any Key Personnel 24 hours per day, seven days per week;

(g) Ensure that the Project Manager identified in the Technical Proposal or otherwise approved by Owner (a) will have full responsibility for the prosecution of the D&C Work, (b) will act as agent and be a single point of contact in all matters relating to the D&C Work on behalf of Concessionaire at least until Final Completion, (c) is present (or his or her approved designee is present) at the construction site at all times that Construction Work is performed, and (d) will be available to respond promptly to Owner or its Authorized Representative; and

(h) Ensure that the Quality Program Manager identified in the Technical Proposal or otherwise approved by Owner (a) will have full responsibility for quality assurance and quality control with respect to D&C Work until Final Completion, (b) is present (or his or her approved designee is present) at the construction site at all times that Construction Work is performed, and (c) will be available to respond promptly to Owner or its Authorized Representative.

## **9.6 Contracts with Affiliates**

**9.6.1** Affiliates may perform Work only if:

**9.6.1.1** Concessionaire executes a written Contract with the Affiliate which:

(a) Complies with all applicable provisions of the Contract Documents, including this Article 9, is consistent with Good Industry Practice, and is in form and substance substantially similar to Contracts then being used by Concessionaire or Affiliates for similar Work or services with unaffiliated contractors;

(b) Sets forth the scope of Work and all the pricing, terms respecting the scope of Work; and

(c) Contains pricing, scheduling and other terms no less favorable to Concessionaire than those that Concessionaire could reasonably obtain in an arms' length, competitive transaction with an unaffiliated Contractor. Concessionaire shall bear the burden of proving that the same are no less favorable to Concessionaire; and

**9.6.1.2** The Work to be performed by the Affiliate is not Work that any Contract Document, the Project Management Plan or O&M Management Plan indicates is to be performed by an independent or unaffiliated party.

**9.6.2** Before entering into a written Contract (including supplements and amendments) with an Affiliate, Concessionaire shall submit a true and complete copy of the proposed Contract to Owner for review and comment. Owner shall have 20 days after receipt to deliver its comments to Concessionaire. If the Contract with the Affiliate is a Key Contract, it shall be subject to Owner's approval as provided in Section 9.3.1.

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

## **9.7 Labor Standards**

**9.7.1** In performing the Work, Concessionaire shall comply, and require all Contractors to comply, with all applicable federal and State labor, occupational safety and health Laws and orders, including payment of prevailing wages.

**9.7.2** All individuals performing the Work shall be qualified, experienced, competent and skilled in the performance of the portion of the Work assigned and related obligations of Concessionaire in accordance with the Contract Documents and any applicable minimum levels in the Technical Provisions.

**9.7.3** If any individual employed by Concessionaire or any Contractor lacks such qualifications, skill, competence, experience, licensing, certification, registration, permit, approval, bond or insurance or is not performing the Work in a proper, safe and skillful manner, then Concessionaire shall, or shall cause such Contractor to, remove such individual and such individual shall not be re-employed on the Work. Concessionaire shall not be entitled to make any Claim as a result of such removal.

**9.7.4** If, after notice and reasonable opportunity to cure, Concessionaire fails to take action as required by Section 9.7.3, or if Concessionaire fails to ensure that qualified, skilled, experienced, competent, licensed, certified, registered, permitted and approved personnel are furnished for the proper performance of the Work, then Owner may suspend the affected portion of the Work by delivering to Concessionaire notice of such suspension. Such suspension shall in no way relieve Concessionaire of any obligation contained in the Contract Documents or entitle Concessionaire to make any Claim.

## **9.8 Ethical Standards**

**9.8.1** Within 90 days after the Effective Date, Concessionaire shall adopt written policies establishing ethical standards of conduct for all Concessionaire-Related Entities, including Concessionaire's supervisory and management personnel, in dealing with (a) Owner and (b) employment relations. Such policy shall be delivered to Owner upon request. Such policy shall include standards of ethical conduct concerning:

**9.8.1.1** Compliance with restrictions applicable to federal grantees, Maryland state agencies, public contracts, public officials and employees, and former public officials and employees, in accordance with the Maryland Public Ethics Law, Title 15 of the State Government Article of the Annotated Code of Maryland and Title 14 of the Election Law Article of the Annotated Code of Maryland with respect to prohibitions on political contributions by Concessionaire, and other requirements specified in Attachment 1 to Exhibit 16, Part A, Section 1.2;

**9.8.1.2** Protection of employees of Concessionaire-Related Entities from unethical practices in selection, use, hiring, compensation or other terms of employment, or in firing, promotion and termination of employees;

**9.8.1.3** Protection of employees of Concessionaire-Related Entities from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms of employment) in response to reporting of illegal (including the making of a false claim), unethical or unsafe actions or failures to act by any Concessionaire-Related Entity;

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

**9.8.1.5** Restrictions on use of office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer or supervisory or management person, rather than primarily for the benefit of 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

**9.8.1.6** Restrictions on directors, members, officers or employees of any Concessionaire-Related Entity performing any of the Work if the performance of such Work would be prohibited under Owner's conflict of interest rules and policies.

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

**9.8.3** No employee of the State of Maryland or any unit thereof, whose duties as such employee include matters relating to or affecting the subject matter of this Agreement, shall, while so employed, become or be an employee of any Concessionaire-Related Entity.

## **9.9 Non-Discrimination; Equal Employment Opportunity**

### **9.9.1 Compliance with State Non-Discrimination Law and Regulations**

During the performance of this Agreement, Concessionaire, for itself, its assignees and its successors in interest, agrees as follows:

- (a) Not to discriminate in any manner against any employee or applicant for employment because of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity or disability unrelated in nature and extent so as reasonably to preclude the performance of such employment;
- (b) To include a provision similar to that contained in Section 9.9.1(a) in each Contract, and to require such a provision to be included in all lower tier Contracts, other than Contracts for standard commercial supplies or raw materials; and
- (c) To post and to cause Contractors to post in conspicuous places available to employees and applicants for employment, notices setting forth the substance of Section 9.9.1(a).

## 9.9.2 Sanctions

In the event of noncompliance with the nondiscrimination provisions of this Agreement, Owner will impose such sanctions as it may determine to be appropriate, including:

- (a) Withholding of payment to Concessionaire under this Agreement until the Concessionaire-Related Entity complies; and/or
- (b) Cancellation, termination or suspension of this Agreement in whole or in part.

Owner will provide notice regarding any breach of Section 9.9.1(c) and allow Concessionaire five business days to cure the breach before taking any action under this Section 9.9.2. If Owner elects to terminate this Agreement pursuant to this Section 9.9.2, Concessionaire shall be entitled to compensation in accordance with Section 4.5 of Exhibit 13B.

## 9.9.3 Compliance with Federal Law

- (a) Concessionaire assures Owner that it is conforming to the provisions of the Civil Rights Act of 1964 and Section 202 of Executive Order 11246 of the President of the United States of America as amended by Executive Order 11375, as applicable.
- (b) Concessionaire shall comply with all applicable federal laws pertaining to nondiscrimination in employment, including the requirements specified in Exhibit 16.

## 9.9.4 Affirmative Action and EEO Requirements

Concessionaire shall comply with Owner's affirmative action requirements and all applicable Equal Employment Opportunity requirements and shall require its Contractors to comply with such requirements. Such requirements shall apply to the entire Project and all the Work.

## 9.10 Disadvantaged Business Enterprise (DBE)/Minority Business Enterprise (MBE)

### 9.10.1 General Requirements

**9.10.1.1** The spirit and intent of the State of Maryland is to afford small, disadvantaged, minority and women-owned businesses the opportunity to perform viable and meaningful services in a teaming effort. It is the desire of the State to maximize notice, and the opportunity to participate in the solicitation process, to a diverse and broad range of small, disadvantaged, minority and women-owned businesses.

**9.10.1.2** The governing statutes, regulations and program requirements are: 49 CFR Part 26; the Maryland Annotated Code, State Finance and Procurement Article Sections 14-301 through 14-309; COMAR 21.11.03, COMAR 11.01.10.01; and the State of Maryland Minority Business and Federal Disadvantaged Business Enterprise Program Manuals. These manuals can be found at the Maryland Department of Transportation website: <http://www.mdot.maryland.gov/Office%20of%20Minority%20Business%20Enterprise/Resources%20Information/Resources%20Information>, or successor site.

**9.10.1.3** Concessionaire shall support and actively participate in various meetings, as directed by Owner, including executive steering committees, workgroups, advisory groups, USDOT OSDBU “Bonding Education Program” and local business leadership councils.

**9.10.1.4** Owner expects continuing good faith efforts on the part of Concessionaire over the course of the Project to achieve the DBE or MBE participation goal(s).

**9.10.1.5** This Section 9.10.1.5 sets out requirements and procedures consistent with Laws or policies applicable to the unique aspects of this Agreement:

(a) The DBE participation goal(s) for the Design-Build Period of the Project (excluding supply of LRVs) are 26% for D&C Design Services and 22% for D&C Construction Services;

(b) The LRV Supplier shall not discriminate on the basis of race, color, national origin or sex in the performance of this Agreement. The requirements of 49 CFR Part 26.49, “Transit Vehicle Manufacturer’s Certification of Compliance with DBE Regulations,” are incorporated into this Agreement by reference. Failure by the LRV Supplier 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 Owner deems appropriate. Each Contract the LRV Supplier signs with a Contractor at any tier must include the assurance in this paragraph (see 49 CFR 26.13(b));

(c) Only MDOT-certified DBEs can be utilized to achieve the Project’s DBE participation goal(s) and only MDOT-certified MBEs can be utilized to achieve the Project’s MBE participation goals/subgoals;

(d) At Financial Close, Concessionaire shall provide to Owner the following information: (i) a list of D&C Construction Services contracts, including the dollar value, for which Construction Work is anticipated to begin within the first 180 days after Financial Close; and (ii) the DBE Participation Forms (as directed by Owner) for each D&C Construction Services contract awarded as of Financial Close;

(e) Beginning 90 days after Financial Close and on a quarterly basis thereafter, Concessionaire shall submit: (i) an updated list of Construction Work contracts, including the dollar value, for which Construction Work is anticipated to begin within the next 180-day period; (ii) DBE Participation Forms, as directed by Owner, for the Construction Work contracts awarded since the last submission of DBE Participation Forms; and (iii) any other forms or information the Owner requests related to the total dollar value of the awarded Construction Work contracts and total commitments to DBE firms;

(f) On a quarterly basis after Financial Close, Concessionaire shall also provide a brief description of the scope of work for each Construction Work contract to be issued for bid by the Design-Build Contractor in the upcoming 90-day period;

(g) Where Concessionaire is unable to meet a specific DBE or MBE goal established by Owner, Concessionaire shall submit to Owner a waiver request, with documentation of Concessionaire’s good faith efforts, and Owner will work with Concessionaire to establish an improvement plan as part of the DBE Participation Plan, or determine whether to seek other appropriate remedies herein;

(h) In accordance with the “DBE/MBE Participation Plan” portion of the “Project Management Technical Solutions” in the Proposal, Concessionaire shall, promptly following Commercial Close, submit an updated DBE/MBE Participation Plan, detailing Concessionaire’s continuing responsibility to meet its DBE commitments, including its obligation to use good faith efforts to achieve the Project’s DBE participation goal(s), including how final design will lead to maintaining the goal(s) or achieving additional participation (the “DBE Participation Plan”). The DBE Participation Plan shall also include a system of reports and procedures that will document adjustments and maintenance of the DBE participation schedule, achievement of the Project’s DBE goal(s) and compliance with the requirements of COMAR 21.11.03.13.

## **9.10.2 Waivers**

**9.10.2.1** If Concessionaire is unable to meet a DBE goal or MBE goal/subgoal (or a portion thereof), then Concessionaire must request a waiver and submit all required documentation as directed by Owner, including Form H-6 (MDOT MBE/DBE Form E – Good Faith Efforts Guidance and Documentation attached as Exhibit 15C). Documentation supporting a waiver request includes:

(a) A detailed statement of the efforts made to select portions of the Work proposed to be performed by certified firms in order to increase the likelihood of achieving the stated goal;

(b) A detailed statement of the efforts made to contact and negotiate with certified firms including the names, addresses, dates, and telephone numbers of the certified firms contacted and a description of the information provided to the certified firms regarding plans, specifications, and anticipated time schedule for portions of the work to be performed;

(c) As to each certified firm that placed a quotation or offer that Concessionaire considered not to be acceptable, a detailed statement of the reasons for this conclusion; and

(d) In the event certified minority Subcontractors are found to be unavailable, a signed and notarized Statement of Unavailability, on the form provided by Owner, must be prepared by Concessionaire to include the names, addresses, dates, times, and telephone numbers of the certified firms contacted and the reason each certified firm is unavailable.

**9.10.2.2** In order to be granted a waiver, Concessionaire must demonstrate good faith efforts to meet the goal, which includes a reasonable demonstration by Concessionaire that it was unable to obtain certified DBE or MBE participation or was unable to obtain such participation at a reasonable price.

**9.10.2.3** The documentation required under Section 9.10.1 shall be provided by Concessionaire within the time specified by Owner. If Owner determines that Concessionaire:

(a) Has not complied with the participation contract goal;

(b) Has not obtained a waiver as required;

- Documents;
- (c) Failed to submit the documentation required by the Contract
  - (d) Failed to comply in good faith with outreach efforts, or
  - (e) Failed to adhere to the improvement plan established under Section 9.10.1.5(g),

then Owner, in consultation with MTA's Office of Fair Practices, and upon review by the Office of the Attorney General, may make a determination that Concessionaire is non-compliant, and take appropriate action against Concessionaire in accordance with provisions of this Agreement.

### **9.10.3 Amendment for Unforeseen Circumstances**

**9.10.3.1** If at any time after submission of a proposal but before the award of this Agreement, Concessionaire determines that a certified firm listed on the Participation Schedule has become or will become unavailable or is ineligible to perform the work, Concessionaire shall promptly provide notice to Owner. The notification shall indicate Concessionaire's efforts to substitute another certified firm to perform the work.

**9.10.3.2** Within 10 business days after delivery of notification under Section 9.10.3.1, Concessionaire may request and submit an amendment to the Participation Schedule, signed by both Concessionaire and the newly proposed certified firm(s), which certified firms must be approved by Owner.

**9.10.3.3** If Concessionaire cannot find one or more replacements, Concessionaire shall document and submit in writing all good faith efforts to substitute another certified firm to perform the work that the unavailable or ineligible firm would have performed, including seeking assistance from Owner.

**9.10.3.4** Any change to the Participation Schedule shall be approved in advance by Owner and shall indicate Concessionaire's efforts to substitute another certified firm to perform the work as set forth in Section 9.10.3.1. Changes to the Participation Schedule occurring after the Effective Date may occur only upon written approval by Owner and evidenced by a Modification to this Agreement.

### **9.10.4 Third-Tier and Lower-Tier Contracting**

**9.10.4.1** Owner must approve all third-tier and lower-tier contracting intended to be used to achieve DBE goals. Two conditions must be met before Owner may approve any such third-tier and lower-tier contracting arrangement:

(a) Before awarding the Contract, Owner must be satisfied, through the DBE participation schedule and the preliminary DBE Participation Plan, that the third-tier or lower-tier contract is a necessary component of the Project's DBE goal(s); and

(b) The DBE participation schedule submitted with the Proposal (i.e., Proposal Form H-3) must have attached approval requests for each third-tier and lower-tier Contract arrangement that contain specifics as to why a third-tier or lower-tier contracting arrangement should be approved with respect to DBE firms identified in said schedule. During the course of the Project, approval requests must be submitted to

Owner whenever the use of third-tier or lower-tier contracting arrangements is contemplated.

**9.10.4.2** No third-tier or lower-tier contracting arrangement intended to be counted toward meeting the Project's DBE goals may be used to perform the Work until approved by Owner. Owner will require submission of all records of any approved third-tier or lower-tier Subcontract and Concessionaire shall make the records available to Owner upon request. Third-tier or lower-tier contracting to meet the Project's DBE goal(s) is to be considered the exception and not the rule.

### **9.10.5 Subcontract Report**

**9.10.5.1** As part of the monthly progress report, Concessionaire shall submit a subcontract report which shall:

- (a) Include an updated list of Subcontractors (design and construction, at all tiers; and to the extent when applicable, operations and maintenance, at all tiers);
- (b) Identify DBE firms and to the extent applicable, MBE firms, and the location where the Subcontractors worked;
- (c) Include results of all procurements consummated in the previous month, including those procured competitively and by other means;
- (d) Indicate the type of work or product procured and size of the procurement (in dollars), the names of firms competing for the Subcontract, and the name of the selected Subcontractor;
- (e) Indicate the total number of Subcontractors and the total dollar value of all Subcontracts awarded to date;
- (f) Show the total number of Subcontracts and the total value of Subcontracts awarded to DBE firms to date; and
- (g) Indicate, for each Subcontract, the following:
  - (i) The original Subcontract amount;
  - (ii) The value of any modifications to date; and
  - (iii) Payments made to date.

Suppliers are not required to be included in the report unless they are DBEs; however, Concessionaire must retain records of non-DBE supplier contracts and subcontracts.

### **9.10.6 Compliance**

**9.10.6.1** As requested by Owner, Concessionaire shall report to Owner regarding compliance with the DBE and MBE requirements for purposes of Owner's monitoring.

**9.10.6.2** If Owner finds that Concessionaire is not in compliance, Owner may take immediate action to ensure compliance. The compliance process includes monitoring payments and performing onsite reviews to verify that the certified firms listed in applicable DBE

Participation Forms and other relevant submissions are actually performing work and receiving compensation in accordance with that schedule.

**9.10.6.3** Owner shall monitor compliance, and in accordance with this Section 9.10, Concessionaire shall:

(a) By the 15th of each month, beginning the first month after the date of Financial Close, submit to Owner a Monthly Prime Disadvantaged Business Enterprise Payment Report in the form provided by Owner, for each certified DBE or MBE firm. The report shall include: (i) a listing of all invoices submitted by each certified firm during the reporting period; (ii) all invoices paid by Concessionaire to the certified firms during the reporting period, and (iii) a listing of unpaid invoices over 30 days old received from a certified firm, and the reason payment has not been made;

(b) Include in its agreements with its certified DBE or MBE firms a requirement that the certified firms submit by the 15th of each month to the MTA Office of Fair Practices (or its designee) the Monthly Subcontractor Disadvantaged Business Enterprise Payment Report (MDOT Attachment F), and listing:

(i) All invoices submitted to Concessionaire during the reporting period;

(ii) All payments received from Concessionaire in the preceding 30 days; and

(iii) A listing of unpaid Subcontractor invoices over 30 days old, and the reason payment has not been made;

(c) Provide right-of-entry at reasonable times to enable Owner's representatives to verify compliance with DBE or MBE participation requirements, including inspecting any relevant matter, conducting periodic reviews, reviewing records, visiting jobsites and interviewing Subcontractors and workers; and

(d) Maintain and retain all records concerning participation and make them available for Owner's inspection for a period of three years from the date of final payment under the Award. Subcontract agreements documenting the work performed by all certified firms shall be retained by Concessionaire and furnished to Owner upon request.

**9.10.6.4** Upon notification by MTA Office of Fair Practices of Concessionaire's noncompliance, including failure to meet reporting deadlines, Owner shall notify Concessionaire of its findings and shall specify what corrective actions are required. Concessionaire shall be required to initiate the corrective actions within 10 business days of Concessionaire's notice and complete them within the time specified by Owner.

**9.10.6.5** If Owner determines that noncompliance with DBE or MBE program requirements exists and that Concessionaire refuses or fails to take the corrective action required by Owner, then Owner, in its capacity as a governmental body charged with enforcing the DBE and MBE programs, may impose sanctions on Concessionaire, including:

(a) Withholding payment;

- Default;
- (b) Suspending the Work and declaring a Concessionaire
  - (c) Terminating this Agreement for Concessionaire Default;
  - (d) Referring the matter to the Office of the Attorney General for appropriate action; and
  - (e) Using any other compliance mechanism available at law, including the Prompt Payment Policy Directive issued by the Governor's Office of Minority Affairs (dated August 1, 2008), and promulgated under Code of Maryland Regulations at 21.11.03.01, *et seq.*; and, should Owner issue MBE goals, appropriate liquidated damages provisions shall apply in accordance with COMAR 21.11.03.10(E), to be evidenced by a Modification to this Agreement.

### **9.10.7 Prohibited Acts; Fines**

Under Section 14-308 of the State Finance and Procurement Article (the "SFP") of the Annotated Code of Maryland, any person who commits any of the following acts is guilty of a felony, and on conviction is subject to a fine not exceeding \$20,000 or imprisonment not exceeding five years or both:

- (a) Fraudulently obtains, holds, or attempts to obtain or hold certification;
- (b) Aids another person in performing an act prohibited under item (a) of this Section;
- (c) Willfully obstructs, impedes, or attempts to obstruct or impede a State official or employee investigating the qualifications of a business entity that has requested certification;
- (d) Fraudulently obtains, attempts to obtain, or aids another person in fraudulently obtaining or attempting to obtain, public monies to which the person is not otherwise entitled under SFP Title 14, Subtitle 3; or
- (e) In any minority business enterprise matter administered under SFP Title 14, Subtitle 3:
  - (i) Willfully falsifies, conceals, or covers up a material fact by any scheme or device;
  - (ii) Makes a false or fraudulent statement or representation; or
  - (iii) Uses a false writing or document that the person knows to contain a false or fraudulent statement or entry.

### **9.10.8 Cancellation of DBE or MBE Contracts**

Concessionaire shall not cancel or terminate any contract with a DBE or MBE firm except with Owner's prior, written consent. Concessionaire must provide written notice of its request to cancel or terminate the DBE or MBE Contract and comply with the applicable requirements and provisions of 49 CFR 26.53, the DBE Program Manual for DBE firms, SFP § 14-302, and the MBE Program Manual for MBE firms.

### **9.10.9 Contract Provisions**

Concessionaire shall include provisions to implement the requirements of this Section 9.10 in every applicable Contract to which it is a party (including purchase orders and task orders for Work), and shall require that they be included in all applicable Subcontracts at lower tiers (including purchase orders and task orders for Work), so that such provisions will be binding upon each applicable Prime Contractor and Subcontractor.

### **9.11 Workforce Provisions**

**9.11.1** Concessionaire shall make good faith efforts to assure that:

(a) not less than 33% of all Construction Work Hours are performed by Nationally Targeted Workers;

(b) not less than 10% of the Construction Work Hours under Section 9.11(a) are performed by Nationally Targeted Workers of Social Disadvantage; and

(c) not more than 50% of the aggregate Construction Work Hours performed pursuant to Sections 9.11(a) and (b) may be worked by Helpers or other Unskilled Laborer position as defined in the Davis-Bacon Act.

**9.11.2** If Concessionaire and/or the Design-Build Contractor relies in whole or in part upon a Labor Organization as a source of employees, Concessionaire and/or the Design-Build Contractor will use good faith efforts to obtain the cooperation of such Labor Organizations to increase opportunities for Nationally Targeted Workers with the Labor Organizations and to effect referrals by such Labor Organizations of Nationally Targeted Workers.

**9.11.3** Construction Work Hours performed by a Nationally Targeted Worker of either category may not also be used to satisfy the requirement of the other category.

**9.11.4** Recognizing that Nationally Targeted Workers of Social Disadvantage face a transition to stable employment and economic self-sufficiency, a two-year "look-back" at a person's eligibility rather than their eligibility on the date of employment on the Project shall be acceptable for counting Construction Work Hours towards the requirement set forth in Section 9.11.1. This provision shall not apply to Former Foster Care Youth or Early-Stage Registered Apprentices.

**9.11.5** Examples of good faith efforts include:

(a) systematic and documented recruitment efforts likely to yield qualified Nationally Targeted Worker applicants;

(b) entering into and performing in accordance with an agreement with a Preferred Training Partner or other government recognized workforce training agency or organization that offers an apprenticeship program recognized by the U.S. Department of Labor or Maryland Apprenticeship Training Council.

**9.11.6** Nothing in this Section 9.11 shall obligate Concessionaire to provide or pay for any job counseling, workforce training or action necessary for the Nationally Targeted Worker to successfully perform the work he or she is hired to perform.

**9.11.7** Nothing in this Section 9.11 shall be construed to interfere with or contravene Concessionaire's lawful employment practices.

**9.11.8** Prior to the start of Construction Work, Concessionaire shall propose to Owner the form of reporting on the Concessionaire's progress towards achieving the Nationally Targeted Workers requirements in this Section 9.11. Reporting shall occur on a monthly basis and shall include:

- (a) The number of Construction Work Hours performed by position or trade;
- (b) The number of Nationally Targeted Workers hired specifically to work on the Project, including their designation as a Nationally Targeted Worker of Economic Disadvantage or Nationally Targeted Worker of Social Disadvantage;
- (c) The number of Nationally Targeted Workers subject to layoff or termination from the Project and the cause for such layoff or termination;
- (d) Total wages paid to Nationally Targeted Workers; and
- (e) Any other information which the Concessionaire may deem useful to report to the Owner regarding successes or challenges in implementing this Section 9.11.

**9.11.9** Concessionaire shall maintain and retain all records concerning the Construction Labor & Workforce Development Plan, including Nationally Targeted Workers. Such records shall be made available for Owner's inspection for a period of three years from the RSA Date.

## **9.12 Prevailing Wages for Construction**

**9.12.1** The minimum wage rates and benefits paid to workmen under this Agreement and Contracts for Construction Work shall be those prevailing in the locality as predetermined by the Secretary of Labor under the Davis-Bacon Act (40 U.S.C. §§ 276a through a-7) and regulations (29 CFR Part 5) promulgated thereunder. Davis-Bacon rates applicable to the D&C Work are stated in Exhibit 16, Attachments 2A through 2D.

**9.12.2** To the extent Construction Work performed during O&M Period is not otherwise governed by the Davis-Bacon Act, then provisions of Section 17-201 et seq. of the State Finance and Procurement Article of the Annotated Code of Maryland and COMAR 21.11.11 pertaining to Prevailing Wage for Public Works shall be appropriately incorporated into any Contracts for said Construction Work.

**9.12.3** It is Concessionaire's sole responsibility to determine the wage rates required to be paid. If rates of wages and benefits change while this Agreement is in effect, then Concessionaire shall bear the cost of such changes and shall have no right to a Claim against Owner on account of such changes. Without limiting the foregoing, no Claim will be allowed which is based upon Concessionaire's lack of knowledge or a misunderstanding of any such requirements or Concessionaire's failure to include in the Financial Model or Financial Model Updates adequate increases in such wages over the duration of this Agreement.

**9.12.4** If it is found that any individual employed by Concessionaire or a Contractor has been or is being paid a rate of wages less than the rate of wages required by this

Agreement to be paid, Owner may declare a Concessionaire Default under Section 17.1.1(i), and such a Concessionaire Default may lead to termination of this Agreement under Section 19.3.

### **9.13 Not Used**

### **9.14 Additional Requirements for O&M Work**

**9.14.1** Concessionaire shall, and shall cause the O&M Contractor and all Contractors that will perform Operations Work or Maintenance Work, to execute and deliver to Owner by Final Completion a Labor Peace Agreement with a labor organization that (a) contacted Concessionaire and the O&M Contractor, in writing, before Financial Close and (b) is actively engaged in representing or attempting to represent individuals that are to perform the Operations Work and Maintenance Work for the Project. Concessionaire and each such Contractor shall be bound by the terms of such Labor Peace Agreement, which agreement shall be valid and enforceable under 29 U.S.C. § 158 and shall, at a minimum, prohibit any and all such labor organization(s) and its members from engaging in any picketing, work stoppages, boycotts or other interference, economic or otherwise, affecting the O&M Work or the System.

**9.14.2** Concessionaire shall, and shall cause its O&M Contractor to, assume all obligations under applicable Section 13(c) agreements (if any), as required under 49 U.S.C. § 5333(b).

**9.14.3** Any uniforms, badges, logos and other identification worn by personnel of Concessionaire-Related Entities shall bear colors, lettering, design or other features to ensure clear differentiation from those of Owner and its employees.

### **9.15 Sanctions Upon Improper Acts**

**9.15.1** In the event Concessionaire, or any of its officers, partners, principals or employees, is convicted of a crime arising out of, relating to or resulting from the procurement of work to be done or payment to be made under this Agreement, Owner may terminate this Agreement. Section 16-203 of the State Finance and Procurement Article of the Annotated Code of Maryland, and COMAR 21.08.01, which relate to contracts with persons convicted of bribery, attempted bribery or conspiracy to bribe are incorporated in this Agreement by reference. If Owner elects to terminate this Agreement pursuant to this Section 9.15.1, Concessionaire shall be entitled to compensation in accordance with Section 4.5 of Exhibit 13B.

**9.15.2** Section 11-205 of the State Finance and Procurement Article and COMAR 21.08.03 relating to collusion for purposes of defrauding the State are incorporated into this Agreement by reference.

**9.15.3** Section 16-101 of the State Finance and Procurement Article and COMAR 21.08.04 relating to debarment for offenses other than bribery are incorporated into this Agreement by reference.

**9.15.4** Concessionaire shall deliver to Owner, by January 31 of each year during the Term, updated affidavits in the forms included in Exhibit 14, signed by Concessionaire and each Equity Member.

## **ARTICLE 10. INTEGRATION AND INTERFACE RESPONSIBILITIES; THIRD PARTIES; SAFETY COMPLIANCE; EMERGENCY REPAIR WORK**

### **10.1 Interfaces with Related Transportation Facilities**

**10.1.1** Concessionaire shall be responsible for interfaces and integration of the Project with Related Transportation Facilities, including integration with roadway networks, operational connections to the MARC commuter rail system, intermodal connections and interfaces with facilities owned by WMATA and other transit service providers, in accordance with requirements specified in the Technical Provisions and other Contract Documents.

**10.1.2** Without limiting the obligations in Sections 5.6, 8.3 and 10.1.1, Concessionaire shall cooperate and coordinate with Owner and any third party that owns, manages, operates or maintains a Related Transportation Facility with regard to the construction, maintenance and repair programs and schedules for the Work and the Related Transportation Facility, in order to minimize disruption to the operation of the Project and the Related Transportation Facility.

**10.1.3** To assist Concessionaire, Owner will provide to Concessionaire during normal working hours, and upon reasonable prior notice, reasonable access to plans, surveys, drawings, as-built drawings, specifications, reports and other documents and information in the possession of Owner or its contractors and consultants pertaining to Related Transportation Facilities. Concessionaire, at its expense, shall have the right to make copies of the same to the extent of Owner's rights with respect to such plans, surveys, drawings, etc. Concessionaire, at its expense, shall conduct such other inspections, investigations, document searches, surveys and other work as may be necessary to identify the Related Transportation Facilities and comply with this Section 10.1.

**10.1.4** At Concessionaire's request from time to time, Owner will provide reasonable assistance to Concessionaire in obtaining cooperation and coordination from third parties that own, manage, operate or maintain Related Transportation Facilities and in enforcing rights, remedies and warranties that Concessionaire may have against any such third parties. Such assistance may include Owner's participation in meetings and discussions. In no event shall Owner be required to bring any legal action or proceeding against any such third party. At Concessionaire's request, Owner and Concessionaire shall work jointly to establish a scope of work and budget for Owner's Recoverable Costs in connection with providing such cooperation to Concessionaire. Subject to any agreed scope of work and budget, Concessionaire shall reimburse Owner for all reasonable costs, including Owner's Recoverable Costs, it incurs in connection with rendering such assistance within 10 days after receipt of Owner's request.

### **10.2 Work for and Coordination with Third Parties**

**10.2.1** Concessionaire shall implement the Third Party Agreement Requirements, including (a) performing certain obligations associated with the Third Party Agreements as described in Part 1 of the Technical Provisions and in Section 11.5.5.5, and (b) designing and constructing certain improvements that will be owned by Third Parties.

**10.2.2** Work performed that will be owned by Third Parties will be subject to acceptance by the Third Parties, and Concessionaire shall meet all requirements stated in the Contract Documents for acceptance by the Third Party. Refer to Section 7.12 for warranty requirements applicable to such Work.

**10.2.3** At Concessionaire's request from time to time, Owner will provide reasonable assistance to Concessionaire in obtaining cooperation and coordination from Third Parties and in enforcing rights, remedies and warranties that Concessionaire may have against any such third parties. Such assistance may include Owner's participation in meetings and discussions. In no event shall Owner be required to bring any legal action or proceeding against any such third party.

**10.2.4** Concessionaire shall provide Owner at least two business days' notice in writing regarding meetings with Third Parties, including information regarding topics to be discussed. If Owner does not provide a representative to participate in meetings with Third Parties, Concessionaire shall act in Owner's best interest in such dealings and to provide Owner with all information of interest to Owner regarding matters discussed in the meetings.

### **10.3 Coordination with Property Owners and Other Third Parties**

**10.3.1** Concessionaire shall schedule and perform all Work on property owned by third parties or otherwise affecting third parties in accordance with requirements reasonably imposed by such third parties and without unreasonably impairing, disrupting, interfering with, or otherwise having an adverse impact on the third party's activities or operations; provided that Concessionaire shall not be in breach of this Section 10.3.1 with respect to any such interruption that has been agreed to by the third party.

**10.3.2** To the extent that Concessionaire causes any impairment or disruption to, or interference with or impact on a third party's activities or operations not authorized under Section 10.3.1, Concessionaire shall, to the fullest extent permitted by Law, fully and effectively indemnify and hold harmless Owner from and against all claims, causes of action and Losses arising out of, relating to or resulting from such impairment, disruption, interference or impact, but only to the extent that such Losses and/or claims do not arise as a result of the negligent acts, omissions or willful misconduct of Owner or any Owner agent, servant, consultant or employee.

**10.3.3** Unless Owner agrees to an alternative schedule for payment of Losses, Concessionaire shall pay to Owner on demand all Losses under Section 10.3.2 or, at Owner's sole election, Owner may deduct the amount owing from amounts otherwise payable by Owner to Concessionaire under the Contract Documents.

### **10.4 Safety Compliance**

**10.4.1** Owner is entitled from time to time to issue Safety Compliance Orders to Concessionaire with respect to the Project to implement Safety Compliance.

**10.4.2** Promptly upon Owner becoming aware of any circumstance or information relating to the Project which in Owner's reasonable judgment is likely to result in a Safety Compliance Order, Owner will notify Concessionaire regarding the issue. Except in the case of Emergency, Owner will consult with Concessionaire before 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.

**10.4.3** Subject to conducting such prior consultation (unless excused in the case of Emergency), Owner may issue Safety Compliance Orders to Concessionaire at any time from and after the Effective Date.

**10.4.4** Concessionaire shall implement each Safety Compliance Order as expeditiously as reasonably possible following its issuance. Concessionaire shall diligently prosecute the work necessary to achieve such Safety Compliance until completion. Concessionaire shall not be entitled to claim that any Force Majeure Event, Non-Concessionaire Caused Disruption or Relief Event relieves Concessionaire from compliance with any Safety Compliance Order.

## **10.5 Emergency Repair Work**

**10.5.1** Starting on the date Construction Work is allowed to commence under this Agreement, Concessionaire shall procure and oversee temporary and/or permanent repair work required due to any Emergency affecting the Project (during the Design-Build Period) or affecting improvements within the O&M Limits (during the O&M Period). Concessionaire shall solicit competitive bids for such work if regulations, policies or procedures applicable to work to be funded by federal agencies (e.g. FTA or FEMA) require competitive bidding in order to obtain reimbursement for eligible costs. Refer to Sections 8.8.3 and 15.3.5.3 for provisions regarding payments to be made to Concessionaire if federal funding is obtained.

**10.5.2** Concessionaire shall ensure that such repair work is performed in accordance with the Contract Documents and State and federal Law applicable to such Emergency-related repair work. Further, Concessionaire shall maintain estimates, cost records and supporting documentation in accordance with such Laws, and in a form and content to enable Owner to seek reimbursement for eligible costs from federal agencies, if applicable.

## **ARTICLE 11. INSURANCE; PAYMENT AND PERFORMANCE SECURITY; INDEMNITY**

### **11.1 Insurance**

#### **11.1.1 Insurance Policies and Coverage**

At a minimum, Concessionaire shall procure or cause to be procured and keep in effect (a) the Insurance Policies in accordance with the requirements of this Section 11.1 and Exhibit 7A, and (b) the Contractors' insurance coverages as required in Section 11.1.2.5 and Exhibit 7A.

#### **11.1.2 General Insurance Requirements**

##### **11.1.2.1 Qualified Insurers**

Each Insurance Policy shall be procured from an insurer that qualifies as an Eligible Insurer or as a Surplus Lines Insurer at the time of policy placement and throughout the coverage term, unless Owner approves otherwise in writing.

##### **11.1.2.2 Deductibles and Self-Insured Retentions**

(a) Owner's liability for deductibles is limited to the amounts, if any, included as part of a Compensation Amount or Termination Compensation and deductibles paid with respect to claims under the Additional Excess Liability Insurance Policy or Policies in accordance with Section 11.1.9. Owner shall have no liability for amounts in excess of the coverage required or provided, except to the extent expressly permitted under Sections 8.8.3.4, 11.1.2.12(g), 11.1.7, 11.1.8 and 15.3.5. For purposes of this Section 11.1.2.2(a), "deductible" includes a self-insured retention and/or any co-insurance.

(b) If an Insurance Policy provides coverage with respect to an occurrence or event other than a Relief Event, then Concessionaire shall pay all insurance deductibles, and Owner shall have no liability for deductibles or claim amounts in excess of the required coverage.

(c) If no Insurance Policy provides coverage with respect to an occurrence or event other than a Relief Event, then (a) during the Design-Build Period, the provisions of Section 7.13 apply and (b) during the O&M Period, the provisions of Sections 8.8.3.3 through 8.8.3.6 apply.

(d) With respect to an occurrence or event other than a Relief Event, Owner may elect to advance or pay a deductible or any claim amount in excess of the required or provided coverage, in which case Owner shall have the right to recover such payment, in full, through deductions from the Availability Payments, direct billing, or any other method deemed appropriate by Owner.

##### **11.1.2.3 Primary Coverage**

(a) Each Insurance Policy shall provide expressly that its coverage is primary and noncontributory with respect to all insureds, except for coverage that is specifically denominated as excess coverage to a specified Insurance Policy

required under the Contract Documents. Any excess coverage shall provide expressly that it will become primary and noncontributory once the policy limits of the specified Insurance Policy are eroded.

(b) If, in connection with the Project, Concessionaire procures any additional or other insurance or expressly self-insures beyond the specifications in the Contract Documents (excluding excess cover contemplated by Section 11.1.2.3(a)), then the Insured Parties shall be named as an additional insured. Notwithstanding the foregoing, the Insured Parties are not required to be named as additional insureds on any directors and officers, crime, fiduciary, employment or additional professional errors and omissions coverage procured by Concessionaire.

#### **11.1.2.4 Verification of Coverage**

(a) Concessionaire shall deliver to Owner a written and signed binder of insurance, together with pro forma or exemplar "specimen" copies of Insurance Policies and all endorsements (including for existing corporate insurance programs, if allowed under Exhibit 7):

(i) Fifteen business days before Concessionaire is required to procure or cause to be procured any Insurance Policy, including insurance coverage required of Contractors; and

(ii) Fifteen business days before the expiration or termination date of each Insurance Policy, or at such later date as Concessionaire may request for Owner's approval (but in no event later than five business days before the expiration or termination date of such Insurance Policy).

(b) The evidence/binder of insurance shall be in a form reasonably acceptable to Owner and be personally and manually signed by a representative or agent of the insurer. Upon binding of insurance, evidence of payment of deposit insurance premiums shall also be provided to Owner.

(c) Each binder of insurance must be accompanied by a signed broker letter of undertaking stating that the insurance complies with all of the requirements of this Agreement.

(d) The evidence of insurance must be original documents, state the signer's company affiliation, title and phone number, state the identity of all insurers, named insureds and additional insureds, state the type and limits of coverage, deductibles, subrogation waiver, termination provisions of the policy and other essential policy terms, attach all policy forms and endorsements, in full, and include a statement of non-cancellation consistent with Section 11.1.2.8(a).

(e) Concessionaire may provide electronic copies of the written and signed binder of insurance, pro forma or exemplar "specimen", copies of Insurance Policies and all endorsements, provided written copies of such documents are delivered, to Owner within 10 business days after delivery of the electronic copies (five business days before the expiration or termination date of such Insurance Policy).

(f) As soon as they become available, but in no event later than 60 days after binding of coverage or renewal, as applicable, Concessionaire shall deliver

to Owner (i) a complete certified and signed copy of each such Insurance Policy or modification, or renewal or replacement Insurance Policy and all related endorsements and (ii) satisfactory evidence of payment in full of the applicable premiums that are due.

(g) If Concessionaire has not provided Owner with proof of coverage within five days after Owner delivers to Concessionaire request for such proof or Notice of a Concessionaire Default for such failure, Owner may, in addition to any other available remedy, without obligation or liability and without further inquiry as to whether such insurance is actually in force, (i) obtain such an Insurance Policy; and Concessionaire shall reimburse Owner for the cost thereof (including premiums, commissions, taxes and any and all other costs and expenses incurred in connection with obtaining any such insurance) upon demand, and (ii) suspend all or any portion of Work and shut down System operations until Owner receives from Concessionaire proof of coverage in accordance with this Section 11.1 (or until Owner obtains an Insurance Policy, if it elects to do so).

#### **11.1.2.5 Contractor Insurance Requirements**

(a) Concessionaire's obligations regarding Contractors' insurance are contained in Exhibit 7A.

(b) If Concessionaire and/or any Contractor fails to procure and keep in effect the insurance required of it under Exhibit 7A and Owner provides Notice of a Concessionaire Default for such failure, Concessionaire may, within the applicable cure period, cure such Concessionaire Default by (i) procuring or causing such Contractor to obtain the requisite insurance and providing Owner proof of insurance, or (ii) terminating the Contractor and removing its personnel from the worksite. In connection with any such cure, Concessionaire shall be responsible for ensuring there is no gap or interruption in coverage.

(c) A consolidated insurance program, with Owner's prior approval, is acceptable to satisfy all insurance requirements, provided that it otherwise meets all requirements described in this Section 11.1 and Exhibit 7A.

#### **11.1.2.6 Project-Specific Insurance**

Except as otherwise provided in Exhibit 7A, all Insurance Policies shall be purchased specifically and exclusively for the Project and extend to all aspects of the Work, with coverage limits devoted solely to the Project.

#### **11.1.2.7 Policies with Insureds in Addition to Concessionaire**

Except with respect to professional errors and omissions Insurance Policies, all Insurance Policies that are required to insure named insureds in addition to Concessionaire shall comply with the following provisions:

(a) Each Insurance Policy shall contain a separation of insureds provisions such that the Insurance Policy shall be written or endorsed so that (i) no acts or omissions of an insured shall cancel or diminish coverage of any other insureds and (ii) insurance shall apply separately to each named insured, except with respect to the erosion of the specified limits of the insurer's liability.

(b) Without limiting Section 11.1.2.7(a), the Insurance Policy shall be written so that any failure on the part of a named insured to comply with reporting or notice provisions or other conditions of the Insurance Policies, any breach of a warranty included in such Insurance Policy, any action or inaction of a named insured or others, or any change in the ownership or control of Concessionaire or the Concessionaire's Interest shall not affect coverage provided to the other named insureds (and their respective members, directors, officers, employees, agents and Project consultants). Furthermore, if commercially available, no Insurance Policy shall have an exclusion for change in control with respect to Concessionaire or the Concessionaire's Interest.

(c) Without limiting Section 11.1.2.7(a), all endorsements adding additional named insureds to required Insurance Policies shall: (i) contain no limitations, conditions, restrictions or exceptions to coverage other than those that apply to all other named insureds, including the first named insured, under the Insurance Policy; and (ii) state that the interests and protections of each such named insured shall not be affected by any misrepresentation, act or omission of another named insured or any breach by another named insured of any provision in the policy which would otherwise result in forfeiture or reduction or limitation of coverage.

#### **11.1.2.8 Additional Terms**

(a) Each Insurance Policy shall be endorsed to state that coverage or limits of coverage cannot be canceled, voided, suspended or changed by endorsement or other change in policy language (including for non-payment of premium) except after 45 days' prior written notice (or 10 days in the case of cancellation for nonpayment of deposit premium at the inception of the policy) has been given to Owner and during which time no cure has been effected by any insured. Payment of claims under an Insurance Policy is not considered an adverse modification to coverage or to coverage limits for purposes of this Section 11.1.2.8(a).

(b) No Insurance Policy shall provide coverage on a "claims made" basis (with the exceptions of any professional liability, contractor's pollution liability and operator's pollution liability Insurance Policies) unless otherwise expressly stated in Exhibit 7A. If the policy is permitted to be written on a "claims made" basis, coverage must be continued without interruption throughout the O&M Period and for a period of 10 years after termination or expiration of this Agreement (except as otherwise provided in Exhibit 7A with respect to professional liability Insurance Policy or Policies). If "claims made" coverage is terminated at any time, then an extended automatic and pre-paid reporting period of not less than 10 years after termination or expiration must be included.

(c) No self-insurance is permitted with respect to any risk or occurrence required to be insured by this Agreement without the prior consent of Owner.

(d) Each Insurance Policy, and any other liability policy of insurance placed by or on behalf of Concessionaire relating to the Work or the Project, shall contain a provision acknowledging or be endorsed to acknowledge the rights of Owner and certain other Persons to select and approve its own defense counsel as required by applicable Law as described in Section 11.8.1, and/or counsel approved by the Governmental Entity and reasonably acceptable to the insurance carrier, with respect to matters covered by the policy.

(e) Each Insurance Policy shall provide that Owner and any other Governmental Entity that is an insured has the right to settle or compromise the claim with such insurer(s) prior consent, which shall not be unreasonably withheld, delayed, conditioned or denied.

#### **11.1.2.9 Waivers of Subrogation**

Concessionaire and all of the insurance carriers providing Insurance Policies shall each waive all subrogation rights against all other Insured Parties for any claims to the extent covered and paid by insurance obtained under this Section 11.1. If Concessionaire is deemed to self-insure a claim or loss under Section 11.1.4.6, then Concessionaire's waiver shall apply as if it carried the required insurance. Concessionaire shall require all Contractors and their respective insurance carriers to provide similar waivers in writing each in favor of all other Concessionaire-Related Entities and Insured Parties. Each Insurance Policy, including workers' compensation if permitted under the applicable worker's compensation insurance Laws, shall be endorsed to include a waiver of any right of subrogation by Concessionaire and each insurance carrier against the Insured Parties or a consent to the insured's waiver of recovery in advance of loss.

#### **11.1.2.10 No Recourse**

Except as otherwise provided in this Section 11.1, there shall be no recourse against Owner or any of the other Insured Parties (other than Concessionaire) for payment of premiums or other amounts with respect to the Insurance Policies.

#### **11.1.2.11 Support of Indemnifications**

(a) The commercial general liability Insurance Policy and any other liability Insurance Policy shall provide coverage of Concessionaire's indemnity liabilities under the Principal Project Documents, to the maximum extent commercially available, either specifically as a grant of coverage or as insured contracts under an exception to any contractual liability exclusion in such Insurance Policies.

(b) No Insurance Policy shall preclude coverage of Concessionaire's indemnity obligations, including specifically indemnification obligations to the Indemnified Parties, under the Principal Project Documents arising out of, relating to or resulting from the Project or the Work. For purposes of this paragraph, normal and customary exclusions may be included in such Insurance Policies to the extent (i) not prohibited by this Agreement and (ii) unrelated to agreements, obligations, or indemnity obligations with respect to the Project or the Work.

(c) Concessionaire's indemnification obligations under the Contract Documents are not limited to the type or amount of insurance coverage that Concessionaire is required to provide under this Agreement.

#### **11.1.2.12 Adjustments in Coverage Amounts**

(a) At least once every five years during the O&M Period, Concessionaire shall retain an independent, unaffiliated, qualified and reputable insurance broker or advisor not involved in the Project and experienced in insurance brokerage and underwriting practices for major transportation facility projects, to prepare a report analyzing the policy limits and deductibles currently in place and recommending any adjustments to such limits and deductibles having regard to (i) the nature of the

Project and the Work, (ii) the Insurance Policies which Concessionaire has placed, or caused to be placed, at that time and the risks insured under those Insurance Policies; (iii) the risks sought to be insured, (iv) the terms on which insurance is available, (v) the commercial reasonableness of those terms, (vi) the insurances and risk management practices generally applying in industry with respect to the required Insurance Policies and other insurance coverages, (vii) any events that have an impact on the cost of procuring insurance in the global insurance market generally, and (viii) other factors which Owner and Concessionaire may agree to be appropriate. In accordance with Section 26.14.12, Concessionaire must provide such report at its own cost.

(b) Concessionaire shall deliver the report prepared under Section 11.1.2.12(a) to Owner, within 90 days before each adjustment date calculated under Section 11.1.2.12(a). Owner shall have 45 days after receiving such report to approve or disapprove the proposed adjustments to the limits and deductibles described in Section 11.1.2.12(a).

(c) If the report prepared under Section 11.1.2.12(a) shows an increase or decrease in premiums by more than 30% from the premiums charged for the corresponding Insurance Policy during the preceding period, the Parties will consider changes in the policy limits or deductibles to reduce the premiums. If the Parties fail to agree upon any adjustment, Owner will determine the adjustment, subject to the Dispute Resolution Procedures. The Parties acknowledge that any such adjustment is intended to result in a permanent adjustment to the insurance requirements under Exhibit 7A, and that this process will not be used to address temporary fluctuations in insurance premiums, which are to be addressed through the benchmarking provisions under Section 11.1.8.10.

(d) In determining adjustments to limits and deductibles described in Section 11.1.2.12(c), Concessionaire and Owner shall take into account (i) claims and loss experience for the Project, provided that premium increases due to adverse claims experience shall not be a basis for justifying increased deductibles, (ii) the condition of the Project, (iii) the Renewal Work record for the Project, (iv) the Safety Compliance and Noncompliance Points record for the Project and (v) then-prevailing Good Industry Practice for insuring comparable transportation projects.

(e) Concessionaire is solely responsible for any premium amounts arising from increased limits and/or increased deductible payments under this Section 11.1.2.12 that are made as a result of the loss experience of Concessionaire, any Concessionaire-Related Entity or any Affiliate. Owner agrees, however, that such adjustments under this Section 11.1.2.12 will not increase the aggregate limits required by more than 100% from the requirements specified in Exhibit 7A (for example, a limit of \$10,000,000 will not be increased to more than \$20,000,000).

(f) If, on a policy-by-policy basis, the insurance premiums for the Insurance Policies adjusted under this Section 11.1.2.12 exceed the premiums under the preceding policy, Owner will increase the Availability Payment by an amount equal to 100% of the increase in such premiums until the next adjustment date, under Section 11.1.2.12(a). If, on a policy-by-policy basis, the insurance premiums for the Insurance Policies adjusted under this Section 11.1.2.12, are less than the preceding policy's premiums, Owner will decrease the Availability Payment in an amount equal to 100% of the decrease in such premiums until the next such adjustment date under Section 11.1.2.12(a).

(g) If, under Section 11.1.2.12(c), Owner directs a decrease of aggregate limits for an Insurance Policy below the policy limits identified in Exhibit 7A, and a Loss arises during the same insurance period that is not insured to the unadjusted Insurance Policy limit, then Owner shall be responsible for any amount not fully insured solely as a result of such adjustment up to the unadjusted Insurance Policy limit. If, under Section 11.1.2.12(c), Owner directs an increase in the deductible for an Insurance Policy, and a Loss arises during the same insurance period that is covered by such Insurance Policy, then Owner shall be responsible for the difference between the adjusted and unadjusted deductible amount. Except as otherwise expressly provided in the Contract Documents, nothing in this Section 11.1.2.12 shall be deemed to relieve Concessionaire of its responsibility for Losses exceeding the unadjusted Insurance Policy limit and for payment of the amount of unadjusted deductibles in connection with any claim on an Insurance Policy.

#### **11.1.2.13 Defense Costs**

No defense costs shall be included within or erode the limits of coverage of any of the Insurance Policies, except that defense costs may be included within the limits of coverage of any pollution liability and professional liability policies.

#### **11.1.2.14 Contesting Denial of Coverage**

If any insurance carrier under an Insurance Policy denies coverage with respect to any claims reported to such carrier, upon Concessionaire's request, Owner and, to the extent necessary, the other Insured Parties shall cooperate in good faith to establish whether and to what extent to contest, and how to fund the cost of contesting, the denial of coverage. If the reported claim is a matter covered by an indemnity in favor of an Indemnified Party, then Concessionaire shall bear all costs of contesting the denial of coverage.

#### **11.1.2.15 Insolvent Insurer**

If an insurer providing any of the Insurance Policies (a) becomes the subject of any order of liquidation, (b) becomes insolvent, (c) is the subject of an order or directive limiting its business activities given by any Governmental Entity, including the Maryland Insurance Administration or the insurance regulators of any other state or jurisdiction, (d) becomes the subject of any proceeding in any state or jurisdiction for the liquidation or winding up of its affairs or in which a liquidator, conservator or custodian is appointed at the request of any Governmental Entity, or (e) if its rating is lowered below that specified in the definition of "Eligible Insurer", then Concessionaire shall exercise best efforts to promptly secure alternative coverage in compliance with the insurance requirements contained in this Section 11.1 so as to avoid any lapse in insurance coverage.

#### **11.1.2.16 Requirements Not Limiting**

The Parties acknowledge and agree that requirements of specific coverage features or limits contained in this Article 11 and in Exhibit 7A are not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by any Insurance Policy, and specific reference to a given coverage feature is not intended to be all inclusive, or to the exclusion of other coverage, or a waiver of any type.

All insurance coverage and limits provided by Concessionaire, or by third parties on behalf of Concessionaire, and, in either case, available to settle claims shall be exhausted to the full extent of the policy and other limits of the insurance coverage before other

relief, if any, is afforded under the terms of this Agreement; nothing contained in this Agreement limits, or shall be deemed to limit, the application of such insurance coverage against any eligible claim before application of other relief under this Agreement.

Except as otherwise provided in the Contract Documents, Concessionaire may meet its Insurance Policy and related obligations with any reasonable combination of underlying, primary, umbrella and excess insurance policies, so long as, in each case, Concessionaire meets all the coverage, limits and all other requirements contained in this Article 11 and in Exhibit 7A.

### **11.1.3 Lender Insurance Requirements; Additional Insurance Policies**

**11.1.3.1** If under the terms of any Funding Agreement or Security Document, Concessionaire is obligated to, and does, carry insurance coverage with higher limits, lower deductibles, or broader coverage than required under this Agreement, Concessionaire's provision of such insurance shall satisfy the applicable requirements of this Agreement provided such Insurance Policy meets all the requirements of this Section 11.1 and in Exhibit 7A.

**11.1.3.2** If Concessionaire carries property or casualty insurance coverage insuring risks to any Concessionaire-Related Entity arising out of, relating to or resulting from the Work or the Project in addition to that required under this Agreement (excluding, except as prescribed in Exhibit 7A for pre-Financial Close Work, if any, insurance that is part of Concessionaire's corporate insurance program), then Concessionaire shall include the Insured Parties as named insureds. The additional named insured endorsements shall be as described in Section 11.1.2.7(c); and Concessionaire shall provide to Owner and, upon Owner's request, the other Insured Parties, the proofs of coverage and copy of the policy described in Section 11.1.2.4. The provisions of Sections 11.1.2.4, 11.1.2.7, 11.1.2.9, 11.1.2.10 and 11.1.3 shall apply to all such policies of insurance coverage, as if they were within the definition of Insurance Policies. For purposes of clarity, insurance policies carried in addition to the project-specific insurance specified under this Agreement do not include pre-existing corporate insurance programs not insuring risks under the Project.

### **11.1.4 Notice and Prosecution of Claims**

**11.1.4.1** Owner shall have the right, but not the obligation, to report directly to insurers and may process and pursue directly claims against applicable Insurance Policies.

**11.1.4.2** Concessionaire shall report timely to the insurer(s) under each Insurance Policies any and all claims, facts, incidents or matters which give rise to or may give rise to an insurance claim and unless otherwise directed by Owner, promptly and diligently pursue such insurance claims in accordance with the claims procedures specified in such Insurance Policies, for defense and indemnity.

**11.1.4.3** Concessionaire shall diligently enforce all legal rights against the insurer under the applicable Insurance Policies and applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments, provided that Concessionaire shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means. Concessionaire shall cooperate with Owner concerning the foregoing and shall keep Owner fully informed.

**11.1.4.4** Concessionaire shall immediately notify Owner, and continue to keep Owner fully informed, of any incident, potential claim, claim or other matter of which

Concessionaire becomes aware that involves or could conceivably involve a claim against or loss suffered by any Insured Party.

**11.1.4.5** If Concessionaire is not otherwise aware of such matters, Owner agrees to promptly notify Concessionaire of matters that may reasonably be expected by Owner to give rise to a claim against Owner which would be covered under the Insurance Policies. Owner shall reasonably cooperate with Concessionaire as necessary for Concessionaire to fulfill its duties under the Contract Documents, including providing Concessionaire copies of any written materials Owner receives asserting a claim against Owner that is subject to defense by an insurer under an Insurance Policy.

**11.1.4.6** If Concessionaire has not complied with its insurance obligations under the Contract Documents or cannot enforce and collect any such insurance for failure to comply with the terms of the Insurance Policies or to prosecute claims diligently, then, for purposes of determining Concessionaire's liability and the limits on its liability or determining reductions in compensation due from Owner to Concessionaire on account of available insurance, Concessionaire shall be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had Concessionaire complied with its obligations under the Contract Documents.

**11.1.4.7** If Concessionaire elects under Section 19.2.3 to keep this Agreement in effect despite existence or occurrence of Insurance Unavailability, then, notwithstanding Section 11.1.7, for purposes of determining Concessionaire's liability and the limits on its liability, or determining reductions in compensation due from Owner to Concessionaire on account of available insurance, Concessionaire may request that Owner reimburse up to the full amount of insurance coverage which Concessionaire would have been obligated to carry had such coverage been commercially available, on the terms, and subject to the conditions, of such insurance coverage (as set out in the applicable sections of Exhibit 7A) except to the extent caused by the fraud, criminal conduct, intentional misconduct, recklessness, bad faith or breach of the Contract Documents of or by any Concessionaire-Related Entity, Collateral Agent or Lender.

### **11.1.5 Application of Insurance Proceeds**

All insurance proceeds received for physical property damage to the Project under any Insurance Policies, other than any business interruption or delay in start-up insurance maintained as part of such Insurance Policies, shall be first applied to repair, restore or replace each part or parts of the Project or the Work with respect to which such proceeds were received.

### **11.1.6 Inadequacy of Required Coverages**

Owner makes no representation that the scope or limits of insurance coverage specified for any Insurance Policy to be carried under this Agreement or approved variances therefrom are adequate to protect Concessionaire against its undertakings under this Agreement to Owner, or its liabilities to any third party. It is the responsibility of Concessionaire and each Contractor to determine if any additional coverages or limits are required to adequately protect their interests. No such limits of liability or approved variances shall preclude Owner from taking any actions as are available to it under the Contract Documents or otherwise at law.

## 11.1.7 Unavailability of Required Coverages

**11.1.7.1** If Concessionaire demonstrates to Owner's reasonable satisfaction that it has used diligent efforts in the global insurance and reinsurance markets (including those efforts described in Section 11.1.7.6) to procure the required Insurance Policy coverages, and if despite such diligent efforts and through no fault of Concessionaire any Insurance Unavailability exists or occurs, Owner may seek out, through review the global insurance and reinsurance markets, coverage at Commercially Reasonable Insurance Rates. If coverage is found, Concessionaire shall place such insurance at the premium negotiated by Owner, not to exceed Commercially Reasonable Insurance Rates, so long as such coverage complies with the applicable prescriptions under this Section 11.1 and Exhibit 7, following which the relevant Insurance Unavailability will no longer exist. If Owner is unsuccessful in identifying coverage under Section 11.1.7.1, Owner will consider in good faith approving alternative insurance packages and programs presented by or through Concessionaire that provide coverage as comparable to that contemplated in this Section 11.1 and in Exhibit 7A as is possible under then-existing insurance market conditions. Subject to other provisions in this Section 11.1.7, Owner shall thereafter act under Sections 11.1.7.2, 11.1.7.3, 11.1.7.4, or otherwise as may be agreed by the parties.

**11.1.7.2** If Owner approves alternative insurance requirements because of Insurance Unavailability, then (a) subject to Section 11.1.7.6, Owner will be responsible for any loss to the extent that the unavailable Insurance Policy or portion thereof would have covered the loss, for the duration of the Insurance Unavailability and (b) Owner will be entitled to a reduction in the Monthly Availability Payments totaling 100% of the insurance premiums that Concessionaire avoids as a result of the modification of the insurance requirements. In determining Concessionaire's avoided insurance premiums, the Parties shall calculate the amount of insurance premiums Concessionaire would have been obligated to pay under this Section 11.1 and Exhibit 7A (up to the Commercially Reasonable Insurance Rates) had there been no modification of insurance requirements; provided that if relevant comparison data is not then available, it shall be assumed that Concessionaire would have been obligated to pay 100% of the total avoided insurance premiums up to the greater of (A) the Commercially Reasonable Insurance Rates or (B) the premiums assumed in the Financial Model.

**11.1.7.3** If the required Insurance Policies are available from insurers meeting the financial requirements in Section 11.1.2.2 but not at Commercially Reasonable Insurance Rates, then Owner may by notice to Concessionaire elect not to approve modification of insurance requirements and to pay 100% of the premiums that exceed the Commercially Reasonable Insurance Rates.

**11.1.7.4** In the event of Insurance Unavailability, Owner may elect not to proceed under either Section 11.1.7.2 or 11.1.7.3 and instead terminate this Agreement under Section 19.2.2 and, if applicable, Section 19.2.9, by notice to Concessionaire.

**11.1.7.5** If the required insurance coverage is not subject to an Insurance Unavailability, Owner's decision to approve or disapprove a variance from the requirements of this Section 11.1, and the terms of any such approval or disapproval, shall be final and binding on Concessionaire and not subject to appeal under the Dispute Resolution Procedures.

**11.1.7.6** If Insurance Unavailability exists or occurs, Concessionaire shall review the global insurance and reinsurance markets at least quarterly (before the O&M Period) and at least annually no later than 120 days before insurance program renewal, to track changes in market conditions and adjust insurance coverages as soon as the coverages become available at Commercially Reasonable Insurance Rates. Concessionaire shall keep

Owner currently informed of insurance market conditions and deliver to Owner the information obtained from such quarterly (or annual, after commencement of the O&M Period) reviews.

**11.1.7.7** The provisions of this Section 11.1.7 apply to the Excess Liability Insurance Policy/(ies) in addition to all other Insurance Policies required under the Contract Documents.

### **11.1.8 Insurance Premium Benchmarking**

This Section 11.1.8 allocates the risk between Owner and Concessionaire of certain significant increases in insurance premiums for Insurance Policies (excluding “stand-alone” Terrorism Insurance Policy/ies) specified during the O&M Period for the period starting on the first anniversary of the O&M Commencement Date and ending at the end of the Term (“Benchmarking Term”), on a Line-by-Line basis, through an insurance benchmarking process. The Parties acknowledge that certain Insurance Policies may be placed for multi-year terms. At least once every three years during the Benchmarking Term, the Parties shall complete the benchmarking process as to each O&M Period Insurance Policy (excluding “stand-alone” Terrorism Insurance Policy/ies). Each Party has the right to require benchmarking to be undertaken more than once every three years during the Benchmarking Term, but no more frequently than annually. Owner will pay the insurance premium-related portion of the Availability Payment as outlined in Exhibit 4D, Section 1.5 (as such premium-related portion may be adjusted under this Section 11.1.8 or Section 11.1.2.12).

**11.1.8.1** Increases in insurance premiums attributable to any of the following factors shall be excluded from the value of the premium for an Insurance Policy (including “stand-alone” Terrorism Insurance Policy/ies) subject to the benchmarking process described in this Section 11.1.8:

- (a) Additional or extended coverages or limits beyond those required under this Article 11 and Exhibit 7A, unless requested by Owner in advance;
  - (b) Deductibles less than the maximum deductibles in this Article 11 and Exhibit 7A, unless requested by Owner in advance;
  - (c) Premium increases due to poor operations, claims, losses or other experience of Concessionaire or any Concessionaire Related Entity;
  - (d) Any fees paid or to be paid to any broker or agent of Concessionaire or any Concessionaire Related Entity by or on behalf of Concessionaire or any Concessionaire Related Entity or any other insured or agent thereof, any commissions and any indirect, incentive, or contingent commissions or other amounts in relation to policies placed or services provided by such broker or agent; and
  - (e) Other variations from the requirements for Insurance Policies under this Article 11 and Exhibit 7A, unless requested by Owner in advance
- (together, the “Excluded Premium Increases”).

**11.1.8.2** Not later than 60 days after the commencement of the Benchmarking Term and annually thereafter with respect to each Benchmarking Reference Period, Concessionaire shall submit a report (“Insurance Review Report”) to Owner that includes at least the following:

(a) Unless previously submitted to Owner (including submission with preceding annual Insurance Review Reports with respect to multi-year Insurance Policies), the written binders of insurance in the form and with all of the content required under this Article 11 and Exhibit 7A, or complete, certified and signed copies of each such Insurance Policy (including all endorsements), in each case for the subject annual insurance period (“Actual Benchmark Insurance Policies”);

(b) The premium invoices for each of the Actual Benchmark Insurance Policies (or annual pro rata allocation for Actual Benchmark Insurance Policies with terms greater than one year);

(c) If any of the Actual Benchmark Insurance Policies (or such pro rata allocation) varies from the requirements under this Article 11 or Exhibit 7A, then a comprehensive written analysis and explanation by Concessionaire’s licensed insurance broker setting forth (i) the effect (if any) that factors described in Sections 11.1.8.1(a) through (e) have had on the premiums, (ii) the Excluded Premium Increases, if any, and an explanation of the manner in which the Excluded Premium Increases were computed and (iii) the increase, if any, in the insurance premiums that would have occurred absent the factors described in Sections 11.1.8.1(a) through (e); and an explanation of the manner in which the foregoing was computed; and

(d) Detailed calculations of the final amount of the insurance premiums for the Actual Benchmark Insurance Policies, adjusted for surcharges, refunds, Excluded Premium Increases, and other increases due to the factors described in Sections 11.1.8.1(a) through (e), as well as all related backup documentation sufficient to describe how these amounts were computed.

**11.1.8.3** On an annual basis (unless multi-year policies remain in place from prior years and do not require renewal or replacement at that time), Concessionaire shall place actual Insurance Policies required under Article 11 and Exhibit 7A for the subject insurance period (the “Actual Insurance Policies”). Concessionaire shall maintain copies of all of the Actual Insurance Policies (including all endorsements) and all of the Insurance Review Reports and make these documents available following each renewal period to Owner or its designee for the entire Term plus 10 years.

#### **11.1.8.4 Owner’s Review**

(a) Each year during the Benchmarking Term, Owner will review Concessionaire’s Insurance Review Reports, with accompanying data required under Section 11.1.8.11, as applicable, promptly following receipt.

(b) Owner may, at its sole expense, independently assess the accuracy of the information in any Insurance Review Report or update including retaining actuaries or other advisors, obtaining independent quotes for the Required Minimum Insurance Policies or performing its own assessment as to the impact of factors described in Sections 11.1.8.1(a) through (e), the amount of Excluded Premium Increases, and the amount of increases in the insurance premiums for the Actual Benchmark Insurance Policies or Actual Insurance Policies that would have occurred absent the factors described in Sections 11.1.8.1(a) through (e).

(c) If Owner elects to independently assess, then Concessionaire shall cooperate in good faith with any reasonable requests for additional

information from Owner or its insurance and/or actuarial advisor(s) and shall promptly provide all such information to Owner or its insurance and/or actuarial advisor(s).

**11.1.8.5** The Starting Insurance Benchmarking Premiums for the Actual Benchmark Insurance Policies shall be calculated and established promptly after receipt of the first Insurance Review Report during the Benchmarking Term (including the annualized pro rata allocation of premium for multi-year Insurance Policies). The “Starting Insurance Benchmarking Premiums” (excluding “stand-alone” Terrorism Insurance Policy/ies) means the higher of (a) premiums actually charged or incurred for Actual Insurance Policies in place as of the O&M Commencement Date (or the annualized pro rata allocation of premiums for multi-year Insurance Policies) and (b) premiums for the Actual Insurance Policies identified in such first Insurance Review Report (or annualized, pro-rata equivalent of the premiums). The “Starting Insurance Benchmarking Premiums” for “stand-alone” Terrorism Insurance Policy/ies means the Base Relevant Insurance Cost for Terrorism Insurance Policy/ies.

**11.1.8.6** The Starting Insurance Benchmarking Premiums for all Insurance Policies shall be escalated annually for each 12-month period during the Benchmarking Term (each such period, a “Benchmarking Reference Period”). The Starting Insurance Benchmarking Premiums shall be escalated based on the percentage change between (a) the average of the previous 12 monthly index values to be determined by reference to the most recently published Escalation Index 1 monthly index value, as of the Proposal Date and (b) the average of the previous 12 months of index values to be determined by reference the most recently published Escalation Index 1 monthly index value as of the first day of the relevant annual insurance period. The benchmark premium amount for each Benchmarking Reference Period, as adjusted under Section 11.1.8.2(d), is referred to as the “Escalated Benchmark Insurance Premiums”.

**11.1.8.7** No Insurance Policy benchmarking adjustment of the Availability Payment shall occur before the second anniversary of the O&M Commencement Date. At that time, notwithstanding the first paragraph of Section 11.1.8, the Escalated Benchmark Insurance Premiums for each Benchmarking Reference Period commencing with the second year after the O&M Commencement Date shall be compared with the Base Relevant Insurance Cost. Following each such comparison, with respect to all Insurance Policies excluding “stand-alone” Terrorism Insurance Policy/ies, the higher of the two figures shall be the “Insurance Premium Benchmark Amount” for the relevant period. With respect to “stand-alone” Terrorism Insurance Policy/ies, the “Insurance Premium Benchmark Amount” for the relevant period is the Base Relevant Insurance Cost for Terrorism Insurance Policy/ies, as escalated under Section 11.1.8.6.

**11.1.8.8** The Insurance Premium Benchmark Amount shall be used in the benchmarking process for each relevant period for performing the benchmarking assessment (i.e., at least once every three years during the Benchmarking Term (but no more frequently than annually, at either Party’s initiation) during the remainder of the Benchmarking Term in accordance with the procedures in this Section 11.1.8.8. The relevant Insurance Premium Benchmark Amount is the amount, determined as provided above, on an annual basis (hereafter, the “relevant period”). For example, if Concessionaire initiates benchmarking assessment in the second year of the Benchmarking Term, then, with respect to Insurance Policies other than the “stand-alone” Terrorism Insurance Policy/ies, the Insurance Premium Benchmark Amount shall be for the higher of the Escalated Benchmark Insurance Premium, on a Line-by-Line basis, and the Base Relevant Insurance Cost, on a Line-by-Line basis, for the preceding policy year (distinguished from the average of the prior two years’ Escalated Benchmark Insurance Premiums compared to the average of the prior two years’ Base Relevant Insurance Cost). The benchmarking assessment procedures are as follows:

(a) Owner will use the applicable Insurance Premium Benchmark Amount to measure the difference in premium costs on a Line-by-Line basis for the relevant period. In accordance with Section 11.1.8.7, Concessionaire and Owner will determine the difference between the Insurance Premium Benchmark Amount and the insurance premiums for the Actual Insurance Policies for the Benchmarking Reference Period as such premiums may be adjusted for Excluded Premium Increase.

(b) Both Parties acknowledge that the actual insurance premiums are to be reduced by the Excluded Premium Increases for the purpose of the insurance benchmarking process and the Availability Payment adjustment described in Section 11.1.8.8(d).

(c) No later than 30 days after Concessionaire's submission of each updated Insurance Review Report under Section 11.1.8.3, Owner will make its determination of the eligible premium increases subject to the Availability Payment adjustment described in Section 11.1.8.8(d). In the event of a dispute, Owner's determination shall be subject to appeal under the Dispute Resolution Procedures.

(d) If, on a Line-by-Line basis, the insurance premiums for the Actual Insurance Policies for the Benchmarking Reference Period (as adjusted for Excluded Premium Increases under Section 11.1.8.8(b)) exceed 120% of the applicable Insurance Premium Benchmark Amount, Owner will increase the Availability Payment for that benchmarking period in an amount equal to 80% of the excess amount (subject to Section 11.1.8.9) until the next benchmarking period. If, on a Line-by-Line basis, the insurance premiums for the Actual Insurance Policies for the Benchmarking Reference Period (as adjusted for Excluded Premium Increases under Section 11.1.8.8(b)) is less than 80% of the applicable Insurance Premium Benchmark Amount, Owner will reduce the Availability Payment for that benchmarking period in an amount equal to 80% of the difference.

**11.1.8.9** Whenever completion of the benchmarking process is required under this Agreement, Concessionaire shall obtain firm quotes from three or more established and recognized insurance providers for the Insurance Policies required under this Article 11 and Exhibit 7A during each benchmarking cycle. No increase shall be made to the Availability Payment unless Concessionaire has demonstrated that as a result of such firm quotes, all premium quotes are above or below the 120% threshold after adjustments for Excluded Premium Increases.

#### **11.1.8.10 Adjustments Instead of or in Addition to Benchmarking.**

(a) Notwithstanding Section 11.1.8.9, within a reasonable time following receipt of any Insurance Review Report, Owner may direct Concessionaire to modify any Insurance Policies, for the Benchmarking Reference Period or, if a multi-year insurance Policy, for the entire policy term, either in combination with or instead of making benchmarking adjustments. (As an example, Owner may, instead of applying the foregoing benchmarking regime, direct Concessionaire to increase the deductible and/or decrease the policy limit for a specified Insurance Policy so as to reduce premiums.) The Parties acknowledge that the intent of this Section 11.1.8.10 is to effect a temporary response to premium fluctuations (with the intent of retaining the unadjusted insurance prescriptions under Exhibit 7A) and not to adjust the insurance prescriptions under Exhibit 7A permanently, on a going-forward basis, such adjustments to be made under Section 11.1.2.12. The minimum insurance policies do not prohibit any cost associated with insurance that exceed the insurance limits under Section 11.1.8.1(a).

(b) If Owner directs such a modification, a claim arises during the same insurance period that is not fully insured solely as a result of such modification, and either a final judgment on the claim is issued that Concessionaire is legally required to pay after exhausting all appeals or the claim is settled on terms approved by Owner in advance, then Owner will pay to Concessionaire, in connection with such judgment or settlement, 100% of the amount of the Loss not covered by insurance that would have been covered but for Owner's directed modification. If Owner has directed modification of the deductible amount for an Insurance Policy, and if a claim arises during the same annual insurance period that is not fully insured solely as a result of such modification, and either a final judgment on the claim is issued that Concessionaire is legally required to pay after exhausting all appeals or the claim is settled on terms approved by Owner in advance, and if the amount of the claim exceeds the original deductible amount, then Owner will pay to Concessionaire, in connection with such judgment or settlement, 100% of the excess deductible amount attributable to Owner's directed modification of the deductible. For purposes of this calculation, the "original" deductible amount shall be the amount specified in Exhibit 7A, provided that if Exhibit 7A does not specify a deductible, the "original" deductible shall be the actual deductible for the same policy during the immediately preceding insurance period.

(c) Owner's obligation under Section 11.1.8.10(b) shall exist from the date of Owner's direction to Concessionaire to modify any Insurance Policy until the earlier of (a) the end of the insurance period during which the modification is made and (b) the date on which it becomes possible to restore the policy limits and deductibles through payment of premiums that do not exceed the amount originally budgeted for the ensuing period's Availability Payment. If after Owner directs any such modification, Concessionaire is able to restore the policy limits and/or deductibles through payment of budgeted premium amounts, Concessionaire shall make such payments and such other arrangements with applicable insurance companies to restore such policy limits and/or deductibles. For purposes of clarity, if at the end of the annual insurance period during which the modification is made with respect to an Insurance Policy and, at such date, the Insurance Policy is subject to Insurance Unavailability, then the Parties shall proceed under Section 11.1.7.

(d) Nothing in this Section 11.1.8.10 limits Concessionaire's obligation for losses for which Concessionaire is responsible under this Agreement above the policy limits prescribed in Exhibit 7A, including in such circumstances where Owner directs adjustments in lieu of benchmarking.

The following example illustrates how this process might be implemented, based on an original Insurance Policy with a deductible of \$250,000, Owner's election to direct Concessionaire to procure a succeeding Insurance Policy with a deductible of \$500,000 instead of implementing a benchmarking adjustment under this Section 11.1.8. In such event, should Concessionaire experience a Loss covered by such Insurance Policy that exceeds the \$250,000 deductible, then Concessionaire would pay the first \$250,000 of the \$500,000 deductible, Owner would pay the remaining \$250,000.

#### **11.1.8.11 Anticipated Material Change in Insurance Costs or Availability**

(a) Notwithstanding anything to the contrary in this Section 11.1.8, if Concessionaire has reason to believe, or has knowledge, that there will be (i) a material change in insurance availability, (ii) a material increase in premium for any Insurance Policy or (iii) Insurance Unavailability will exist for the succeeding full annual insurance period, then Concessionaire shall provide Notice to Owner 150 days

before expiration of the subject Insurance Policy/(ies), or promptly following Concessionaire's knowledge of any of the foregoing. In such case, Concessionaire shall allow, and shall cause its insurers to allow, Owner to participate in negotiations of such Insurance Policy/(ies) to be placed in the succeeding full annual insurance period. Concessionaire shall cause such negotiations to commence promptly following the date of Concessionaire's earlier Notice delivered under this Section 11.1.8.11.

(b) Concessionaire shall use commercially reasonable efforts to ensure such negotiations conclude sufficiently in advance of expiration of such Insurance Policy/(ies) to ensure continuation, without gap, of insurance coverage under (the) renewed or replacement Insurance Policy/(ies). Owner will cooperate with Concessionaire in its discharge of this obligation.

(c) If Concessionaire delivers Notice to Owner under this Section 11.1.8.11, then a reasonable time before commencement of negotiations with Concessionaire's insurers, Concessionaire shall submit to Owner:

(i) Firm quotes from three or more Eligible Insurers for the Insurance Policies required under this Article 11 and Exhibit 7A for the upcoming annual insurance period, without any variation from such requirements ("Required Minimum Insurance Policies"). If Concessionaire is unable to obtain at least three firm quotes, then Concessionaire shall provide documentation to Owner of Concessionaire's good faith efforts to obtain at least three firm quotes from all relevant domestic and foreign markets, including a detailed declination report signed by the broker providing details of all markets approached. The quotes shall represent the current and fair market cost of providing the Required Minimum Insurance Policies; if there are less than three firm quotes, Owner may elect to consider two or one quotes as sufficient to establish the current and fair market cost of providing such Required Minimum Insurance Policies; and

(ii) A comprehensive written analysis and explanation by Concessionaire's independent insurance broker or consultant setting forth (i) industry trends in premiums for the Required Minimum Insurance Policies, (ii) any claims (paid or reserved) since the last review period, with claim date(s), description of incident(s), claims amount(s), and the level of deductibles provided, (iii) the effect (if any) that factors described in Section 11.1.8.1(a) through (d) have had on the premiums for the Required Minimum Insurance Policies, and (iv) a confirmation that there is no Excluded Premium Increase or the dollar amount of any Excluded Premium Increase and an explanation of the reason there is Excluded Premium Increase.

(d) Concessionaire's obligations under this Section 11.1.8.11 precede and are in addition to those pertaining to Insurance Unavailability in Section 11.1.7.

### **11.1.9 Additional Excess Liability, Excess Liability Allowance**

**11.1.9.1** Exhibit 4A identifies an amount (the "Excess Liability Allowance" amount) budgeted by Owner to pay the cost of placing Excess Liability insurance required under Exhibit 7A, Part A, Section 1.2(c). These funds will be used by Owner to reimburse Concessionaire for such costs, without markup, or to pay such costs directly.

**11.1.9.2** No Change Order is required for invoicing amounts within the

Excess Liability Allowance amount.

**11.1.9.3** Concessionaire has no obligation to pay premiums for Excess Liability insurance that exceed the available Excess Liability Allowance amount. Concessionaire shall promptly notify Owner if it becomes apparent that the Excess Liability Allowance amount will not be sufficient to pay actual premiums. Subject to Section 11.1.9.4, if at any time the actual cost of placing the Excess Liability Insurance Policy or Policies exceeds the remaining balance of the Excess Liability Allowance amount, the Parties shall execute a Change Order to increase the Excess Liability Allowance amount to cover the additional costs.

**11.1.9.4** If Concessionaire fails to obtain the Additional Excess Liability insurance required under Exhibit 7A, Part A, Section 1.2(c), or if Owner elects to obtain the Additional Excess Liability insurance because Owner determines that its costs are lower than Concessionaire's, then Owner may notify Concessionaire that it will place such insurance itself, whereupon Owner may use the Excess Liability Allowance amount to pay for costs that would otherwise have been payable to Concessionaire from the Excess Liability Allowance. Owner shall have no liability or responsibility to Concessionaire arising out of, relating to or resulting from Owner's placement of the Additional Excess Liability Insurance Policy or Policies or draws against the Excess Liability Allowance, and such actions shall not constitute a Relief Event or other basis for a Claim.

## **11.2 Payment and Performance Security**

### **11.2.1 Design and Construction Security Requirements**

**11.2.1.1** Concurrently with Financial Close, and in no event later than the start of Construction Work, Concessionaire shall obtain and deliver to Owner (a) one or more Payment Bonds with an aggregate value equal to 55% of the "Total Value of D&C Construction Work" specified in Exhibit 4A; and (b) separate Performance Security in the same aggregate amount.

**11.2.1.2** The Payment Bond(s) shall be substantially in the form of Exhibit 6B, issued by an Eligible Surety, and otherwise to the reasonable satisfaction of Owner. A Payment Bond shall be obtained from each Design-Build Contractor and any other Prime Contractor performing Construction Work during the Design-Build Period.

**11.2.1.3** The Performance Security shall be obtained by Concessionaire from each Design-Build Contractor and any other Prime Contractor performing Construction Work, shall cover each Design-Build Contractor's and any other Prime Contractor's obligations under this Agreement, and shall remain in force until said obligations have been fulfilled. The Performance Security required under this Section 11.2.1 is not required to cover the LRV Supplier's obligations. The Performance Security shall be to the reasonable satisfaction of Owner and shall be:

(a) Surety bond(s) substantially in the form(s) of Exhibit 6C with a multiple obligee rider naming Owner as an additional obligee in the form of Exhibit 6D or 6E, as applicable, issued by Eligible Sureties, covering all obligations under the Contract Documents relating to the Work to be performed by such Contractor, including any obligations to pay liquidated damages and to perform warranty Work, and maintained in force until all obligations related to the Work to be performed by such Contractor have been fulfilled; or

(b) Letter(s) of credit meeting the requirements of Section 11.2.1.4 (or replacement letter(s) of credit provided to Owner at least 30 days before the expiration of the existing letter(s) of credit).

**11.2.1.4** If the Performance Security is in the form of a letter of credit, it shall be substantially in the form of Exhibit 6E, subject to draw as and when provided in Section 17.2.6 due to breach or failure to perform the D&C Work; and maintained in effect until the Final Completion Date. The letter of credit shall:

(a) Expressly provide an original expiry date not earlier than the Final Completion Deadline;

(b) Expressly provide for successive automatic renewals of at least six months each, taking effect no later than 30 days before the expiry date, until the Final Completion Date; and

(c) Comply with requirements in Section 11.3.1.

**11.2.1.5** The requirements to provide Payment Bonds under this Section 11.2.1 shall also apply to each Major Construction Contract during the O&M Period, except that the Payment Bond amount shall be 100% of the total value of Construction Work to be performed under the Major Construction Contract. The requirement to provide Performance Security shall also apply to such Contracts to the extent required by Law. Before allowing Work to commence under any Major Construction Contract, Concessionaire shall obtain Owner's approval of the form and amount of the Payment Bond for such Contract, and if Performance Security is required, shall also obtain Owner's approval of the form and amount of such security. Such bond and other security may be provided either by the O&M Contractor or the Subcontractor that is a party to the Major Construction Contract.

## **11.2.2 LRV Supply Security**

**11.2.2.1** If Concessionaire obtains security for payment and/or performance from the LRV Supplier, then Concessionaire shall obtain the following from the issuer, maker or guarantor, as applicable, of such payment and/or performance security for delivery to Owner:

(a) A certified copy of the payment and/or performance security;

(b) In the case of a letter of credit, documentation naming Owner as a transferee beneficiary and providing for transfer of such facility to Owner in certain circumstances, on the same terms as permitted with respect to letters of credit under Section 11.2.1.4(c);

(c) In the case of a bond, a dual-obligee rider naming Owner an additional obligee under the bond, on the same terms as permitted with respect to bonds under Section 11.2.1.3(a); and

(d) In the case of a guaranty, the documentation stated in Section 11.4.

**11.2.2.2** The documentation required under Section 11.2.2.1 shall be provided by Concessionaire to Owner within 10 days after delivery of the payment and/or performance security to Concessionaire.

**11.2.2.3** As of the Effective Date, the Parties acknowledge that Concessionaire has not obtained security for payment and/or performance from the LRV Supplier in favor of Concessionaire that is subject to this Section 11.2.2.

### **11.2.3 Operations and Maintenance Security**

**11.2.3.1** If Concessionaire obtains security for payment and/or performance from any O&M Contractor, then Concessionaire shall obtain the following from the issuer, maker or guarantor, as applicable, of such payment and/or performance security for delivery to Owner:

(a) A certified copy of the payment and/or performance security in form of Exhibit 6H;

(b) In the case of a letter of credit, documentation naming Owner as a transferee beneficiary and providing for transfer of such facility to Owner in certain circumstances, on the same terms as permitted with respect to letters of credit under Section 11.2.1.4(c);

(c) In the case of a bond, a dual-obligee rider naming Owner an additional obligee under the bond, on the same terms as permitted with respect to bonds under Section 11.2.1.3(a); and

(d) In the case of a guaranty, the documentation stated in Section 11.4.

**11.2.3.2** The documentation required under Section 11.2.3.1 shall be provided by Concessionaire to Owner within 10 days after issuance of the payment and/or performance security.

## **11.3 Letters of Credit**

### **11.3.1 General Provisions**

Wherever in the Contract Documents Concessionaire has the option or obligation to deliver to Owner a letter of credit, the following provisions shall apply.

**11.3.1.1** Except to the extent expressly provided otherwise in the Contract Documents, the letter of credit shall:

(a) Be a standby letter of credit;

(b) Be issued by a financial institution that is not an Affiliate, has a credit rating for long-term, unsecured debt of not less than "A/A2" from one of the Rating Agencies or as otherwise approved in writing by Owner, and has an office in the United States at which the letter of credit can be presented for payment by facsimile or by electronic means. Unless otherwise approved in writing by Owner, if the bank issuing the letter of credit fails to maintain such credit rating, Concessionaire shall deliver a substitute letter of credit issued by a qualified financial institution within 30 days of the date that the prior financial institution failed to maintain such credit rating or otherwise furnish additional security acceptable to Owner as may be required from time to time to protect the interests of Owner;

(c) Be in form approved by Owner;

(d) Be payable on demand, conditioned only on written presentment from Owner to the issuer of a sight draft drawn on the letter of credit and a certificate stating that Owner has the right to draw under the letter of credit in the amount of the sight draft, up to the amount due to Owner, without requirement to present the original letter of credit;

(e) Be in place for the entire period of time for which the letter of credit is providing security. Letters of credit with an expiration date shall provide for automatic renewal unless the issuer provides notice to Owner and to Concessionaire to the contrary no later than 30 days before the expiration date;

(f) Allow for multiple draws;

(g) Name Owner as a beneficiary, and not provide for any other dual or multiple beneficiaries; and

(h) Be consistent with the requirements of this Section 11.3.

**11.3.1.2** Except to the extent expressly provided otherwise in the Contract Documents, if Concessionaire has failed to pay or perform when due the duty, obligation or liability under the Contract Documents for which the letter of credit is held, Owner has the right to draw on the letter of credit as and when provided in Section 17.2.6. If Owner makes such a draw on the letter of credit, Owner shall use and apply the proceeds as provided in this Agreement for such letter of credit.

**11.3.1.3** Except to the extent expressly provided otherwise in the Contract Documents, Owner has the right to draw on the letter of credit, without prior notice to Concessionaire, if (a) for any reason Concessionaire fails to deliver to Owner a new or replacement letter of credit, on the same terms, at least 30 days before such expiration date, unless the applicable terms of the Contract Documents expressly provide that no further letter of credit is required with respect to such duty, obligation or liability, or (b) the financial institution issuing the letter of credit fails to meet the requirements in Section 11.3.1.1(b) and Concessionaire fails to provide a substitute letter of credit issued by a qualified financial institution within 30 days before its expiration date. If Owner makes such a draw on the letter of credit, Owner shall be entitled to draw on the full face amount of the letter of credit and shall retain such amount as cash security to secure the obligations under the letter of credit, without payment of interest to Concessionaire.

**11.3.1.4** Except to the extent expressly provided otherwise in the Contract Documents, draw on letters of credit shall not be conditioned on prior resort to Concessionaire or any other security of Concessionaire. For all draws conditioned on prior notice from Owner to Concessionaire, no such notice shall be required if it would preclude draw before the expiration date of the letter of credit. Owner will use and apply draws on letters of credit (or cash security held from draws on letters of credit) toward satisfying the relevant obligation of Concessionaire (or, if applicable, any other Person for which the letter of credit is performance security). Subject to Owner's rights under Sections 11.3.1.2 and 11.3.1.3, if Owner receives proceeds of a draw in excess of the relevant obligation, Owner will promptly refund the excess to Concessionaire (or such other Person) after all relevant obligations are satisfied in full.

**11.3.1.5** Except to the extent expressly provided otherwise in the Contract Documents, Concessionaire's sole remedy in connection with the improper presentment or payment of sight drafts drawn under letters of credit shall be to obtain from Owner a refund of the proceeds which are misapplied, and subject to Section 17.4.3, reimbursement of the

reasonable costs Concessionaire incurs as a result of such misapplication; provided that at the time of such refund Concessionaire increases the amount of the letter of credit to the amount (if any) then required under applicable provisions of this Agreement. Concessionaire acknowledges that the presentment of sight drafts drawn upon a letter of credit could not under any circumstances cause Concessionaire injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, Concessionaire covenants (a) not to request or instruct the issuer of any letter of credit to refrain from paying any sight draft drawn under the letter of credit and (b) not to commence or pursue any legal proceeding seeking, and Concessionaire irrevocably waives and relinquishes any right, to enjoin, restrain, prevent, stop or delay any draw on any letter of credit.

**11.3.1.6** Concessionaire shall obtain and furnish all letters of credit and replacements thereof at its sole cost and expense, and shall pay all charges imposed in connection with Owner's presentment of sight drafts and drawing against letters of credit or replacements thereof.

**11.3.1.7** If Owner makes a permitted assignment of its rights and interests under this Agreement, then Concessionaire shall cooperate so that concurrently with the effectiveness of such assignment, either replacement letters of credit for, or appropriate amendments to, the outstanding letters of credit shall be delivered to the assignee naming the assignee as beneficiary, at no cost to Concessionaire.

**11.3.1.8** Owner acknowledges that if the letter of credit is performance security for a Person other than Concessionaire (e.g., a Key Contractor), Owner's draw may only be based on the underlying obligations of such Person. Furthermore, Owner agrees to forbear from exercising remedies under any such letter of credit so long as Concessionaire or a Lender is diligently pursuing remedies under such letter of credit.

### **11.3.2 Collateral Agent as Beneficiary**

**11.3.2.1** Notwithstanding Section 11.3.1.1(g) the Collateral Agent may be named as beneficiary of a letter of credit under Section 11.2.1.3(b) or 11.2.2.1(b) (or be entitled to transfer of beneficiary rights), or may transfer the beneficiary's rights under the letter of credit from Concessionaire to the Collateral Agent rather than Owner, provided the following conditions are met:

(a) The Collateral Agent is restricted in making draws on such letter of credit solely for the purpose of causing Concessionaire to perform its obligations to Contractors performing D&C Work or its obligations under the Contract Documents respecting the D&C Work (or, as applicable, causing the Contractor to perform its performance obligations under its Contract respecting the D&C Work) and

(b) Concessionaire delivers to Owner, concurrently with the issuance of such letter of credit, documents reasonably satisfactory to Owner permitting Owner to become the transferee beneficiary and make drawings under such letter of credit if Owner determines that:

(i) Contractor has breached or failed to perform such obligations; Owner has the right to draw on the letter of credit under Section 17.2.6; and the Collateral Agent has failed to draw on such letter of credit for the purpose of causing the performance of such obligations by or on behalf of Concessionaire within 10 days after Owner delivers notice of such breach to

Concessionaire and the Collateral Agent and the Cure Period (as such term is defined in the Direct Agreement) has expired, or

(ii) The letter of credit will expire within 30 days; Owner has not received a certified copy of a replacement or extension of the letter of credit with required transfer documents; and Owner has no actual knowledge of a prior, full draw on the expiring letter of credit by the Collateral Agent.

At a minimum, such transfer documents shall include a present, executed transfer and assignment of the beneficiary rights in the letter of credit from the Collateral Agent to Owner and a certified copy of the letter of credit which shall expressly authorize such transfer without condition and permit draw without presentation of the original letter of credit.

### **11.3.3 Special Letter of Credit Provisions**

The provisions of this Agreement describing particular letters of credit which Concessionaire or a Lender is required to or may provide under this Agreement include additional requirements applicable to such letters of credit.

## **11.4 Guarantees**

**11.4.1** If Concessionaire, any Affiliate or any Lender receives from any Person a guaranty of payment or performance of any obligation(s) of a Key Contractor, then either (a) Concessionaire shall cause such Person to (i) expressly include Owner as a guaranteed party under such guaranty, with the same protections and rights of notice, enforcement and collection as are available to any other guaranteed party, and (ii) deliver to Owner a duplicate original of such guaranty, which guaranty shall provide that the rights and protections of Owner shall not be reduced, waived, released or adversely affected by the acts or omissions of any other guaranteed party, other than through the rendering of payment and performance to another guaranteed party; or (b) Concessionaire shall deliver to Owner, concurrently with the issuance of such guaranty, a duplicate original of such guaranty and such other documents reasonably satisfactory to Owner permitting Owner, subject to the rights of the Collateral Agent under any Direct Agreement, to become the transferee beneficiary under such guaranty under the circumstances described in Section 11.4.2, and to enforce it, including enforcing the guaranty in favor of Owner or the Project, or both, which transfer documents shall include a certified copy of the guaranty and a present, executed transfer and assignment of the beneficiary rights from Concessionaire or Collateral Agent, as applicable, to Owner; and the guaranty shall expressly authorize such transfer without condition and permit draw without presentation of the original guaranty. Notwithstanding the foregoing, this Section 11.4.1 does not apply to security from the LRV Supplier for the benefit of the Design-Build Contractor and O&M Contractor as of the Effective Date.

**11.4.2** Owner's rights as a transfer beneficiary are exercisable if, subject to Section 11.4.3 and the Direct Agreement, Owner determines that (a) a Key Contractor has breached or failed to perform any obligations under its Contract, (b) such breach has caused, or with the passage of time reasonably may cause, a Concessionaire Default or, if a Concessionaire Default has occurred, the applicable cure period has expired without full and complete cure and (c) Concessionaire or the Collateral Agent has failed to call upon or otherwise enforce such guaranty for the purpose of causing the performance of such obligations by or on behalf of the Contractor within 10 days after Owner delivers notice of such breach or expected breach to Concessionaire and the Collateral Agent and the Cure Period (as such term is defined in the Direct Agreement) has expired.

**11.4.3** So long as Concessionaire or a Lender is diligently pursuing remedies under a guaranty, Owner agrees to forbear from (a) exercising remedies under any such guaranty that names Owner as a direct beneficiary, and (b) exercising its right to become a beneficiary under Section 11.4.1(b); provided, however, that if the Concessionaire Default giving rise to exercise remedies under any such guaranty remains uncured at the end of the Cure Period, Owner's obligation to forbear from exercising remedies as a guaranteed party shall cease. The foregoing shall not obviate any agreement by Owner to forbear from exercising its rights and remedies contained in a Direct Agreement.

## **11.5 Indemnities**

### **11.5.1 General Indemnity**

Subject to Section 11.5.5, Concessionaire shall indemnify and hold harmless the Indemnified Parties from and against any and all claims, causes of action, suits, legal or administrative proceedings, damages, losses, liabilities, response costs, costs and expenses, including any injury to or death of persons or damage to or loss of property (including damage to utility facilities), and including attorneys' and expert witness fees and costs, arising out of, relating to or resulting from:

(a) Any act, omission, neglect or misconduct by any Concessionaire-Related Entity in the manner or method of executing said Work satisfactorily or due to the failure to perform the Work, including (i) any neglect in safeguarding the Work, (ii) use of unacceptable materials in performance of the Work or other Defect in the Work, (iii) faulty, inadequate or improper temporary drainage during construction, (iv) the use, misuse, storage or handling of explosives in performance of the Work, or (v) other breach, alleged breach or violation of Concessionaire's obligations under the Contract Documents or any Contract;

(b) The failure or alleged failure by any Concessionaire-Related Entity to comply with the Governmental Approvals, any applicable Environmental Laws or other Laws (including Laws regarding Hazardous Materials Management) relating to the performance of the Work;

(c) Any Concessionaire-Related Entity's performance of, or failure to perform, the obligations under any Utility Agreement;

(d) Any Concessionaire-Related Entity's breach of or failure to perform an obligation that Owner owes to a third party, including Governmental Entities, under Law or under any agreement between Owner and a third party, where performance of the obligation is delegated to Concessionaire under the Contract Documents, or the acts or omissions of any Concessionaire-Related Entity which render Owner unable to perform or abide by an obligation that Owner owes to a third party, including Governmental Entities, under any agreement between Owner and a third party, provided the agreement was previously disclosed or known to Concessionaire;

(e) Any alleged infringement or other allegedly improper appropriation or use of Intellectual Property in performance of the Work, or arising out of, relating to or resulting from any use in connection with the Project of methods, processes, designs, information or other items furnished or communicated to Owner or another Indemnified Party under the Contract Documents; provided that this indemnity shall not apply to any infringement resulting from Owner's failure to comply with specific written instructions regarding use provided to Owner by Concessionaire that are consistent

with Concessionaire's obligations to convey and license Concessionaire Intellectual Property under this Agreement;

(f) Any Concessionaire Release of Hazardous Materials and any liabilities resulting therefrom:

(g) Any fines or penalties imposed on Owner by any Authority Having Jurisdiction arising out of, relating to or resulting from Concessionaire's breach of or failure to comply with applicable requirements of the Contract Documents;

(h) Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, the use of any property or income of any Concessionaire-Related Entity with respect to any payment for the Work made to or earned by such Concessionaire-Related Entity under the Contract Documents;

(i) Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of (i) the failure of any Concessionaire-Related Entity to comply with Good Industry Practice, requirements of the Contract Documents, the Project Management Plan or O&M Management Plan or Governmental Approvals respecting control and mitigation of construction activities and construction impacts in connection with the performance of the Work, (ii) the intentional misconduct or negligence of any Concessionaire-Related Entity in connection with the performance of the Work, or (iii) unauthorized physical entry onto or encroachment upon another's property by any Concessionaire-Related Entity in connection with the performance of the Work.

### **11.5.2 Design Defects**

Subject to Section 11.5.5, Concessionaire shall indemnify and hold harmless the Indemnified Parties from and against any and all claims, damages, losses, liabilities, costs and expenses, including attorneys' fees, arising out of, relating to or resulting from errors, omissions, inconsistencies or other defects in the Design Documents, regardless of whether such errors, omissions, inconsistencies or other defects were also included in the Contract Drawings or Reference Documents, except to the extent that an error, omission, inconsistency or other defect in the Design Documents is directly attributable to an error, omission, inconsistency or other defect in the Contract Drawings and Concessionaire did not act negligently in finalizing the design of the Project. Concessionaire agrees that, because the Contract Drawings and Reference Documents are subject to review and modification by Concessionaire, except as otherwise provided in this Section 11.5.2, it is appropriate for Concessionaire to assume liability for errors, omissions, inconsistencies and other defects in the completed Project even though they may be related to errors, omissions, inconsistencies and other defects in the Contract Drawings and Reference Documents.

### **11.5.3 Operations on Railroad Right of Way**

Concessionaire shall conduct its operations upon the right of way of any railroad company fully within the rules, regulations and requirements of the railroad company. Concessionaire shall be responsible for acquainting itself with such requirements as the railroad company may demand. Concessionaire shall be held responsible for any accidents that may happen to the railroad company as a result of Concessionaire's operations.

## **11.5.4 Property Damage; Third Party Claims; Relief Events**

Subject to Section 11.5.5, Concessionaire's obligations under this Section 11.5 include responsibility for loss (including loss of use) of or damage to real or personal property of MTA, MDOT or any other Person, and said responsibility shall continue until the end of the Term; provided, however, that the obligation with respect to loss of use with respect to MTA and MDOT is subject to Section 17.6.3. Except with respect to loss or damage to Owner's property, the requirements to provide indemnity as specified in this Section 11.5 are intended to provide protection to Owner with respect to third party claims associated with the event giving rise to the indemnification obligation, and shall not provide Owner with an alternative cause of action against Concessionaire for breach of contract. Nothing in this Section 11.5 shall be deemed to require Concessionaire to indemnify Owner for any failure of Concessionaire to perform obligations under this Agreement to the extent that such obligations are excused due to the occurrence of Relief Events, Force Majeure Events or Non-Concessionaire Caused Disruptions.

## **11.5.5 Limitations on Indemnification Obligations**

### **11.5.5.1 Damage during O&M Period**

Concessionaire's obligations with respect to repairing, restoring and replacement of loss or damage to the Project during the O&M Period are subject to Owner's obligations under Section 8.8.3 to pay for certain costs of such repair, restoring, and replacement.

### **11.5.5.2 Insured Losses**

With respect to any loss or damage of the type covered by the insurance required to be provided under this Agreement or otherwise obtained by Concessionaire for the Project, Concessionaire's indemnity obligation shall not extend to any loss, damage or expense arising out of, relating to or resulting from the sole negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party.

### **11.5.5.3 Uninsured Losses**

With respect to any Loss which is not of the type covered by the insurance required to be provided under this Agreement or otherwise obtained by Concessionaire for the Project, Concessionaire's indemnity obligation shall not extend to any loss, damage or cost to the extent that such loss, damage or cost was caused by (a) the breach by Owner of any of its obligations to Concessionaire under this Agreement or (b) the negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party. Furthermore, Concessionaire's indemnity obligations shall not include payment of punitive damages except to the extent that punitive damages are assessed as the result of culpable conduct by Concessionaire.

### **11.5.5.4 Claims by Employees**

In claims by an employee of Concessionaire or a Contractor, anyone directly or indirectly employed by Concessionaire or a Contractor, or anyone for whose acts Concessionaire or Contractor may be liable, the indemnification obligation under this Section 11.5 shall not be limited by any limitation on the amount or type of damages, compensation or benefits payable by or for Concessionaire or a Contractor under workmen's compensation, disability benefit or other employee benefits laws; provided that this provision

shall not be construed as a waiver in favor of any employee by Concessionaire or any Contractor of any limitation of liability afforded by such laws.

#### **11.5.5.5 Claims by University of Maryland**

(a) Concessionaire acknowledges that the Third Party Agreement with the University grants certain rights and remedies to the University with respect to EMI during System operations. Concessionaire agrees, subject to the limitations in this Section 11.5.5.5, to undertake mitigation measures as specified under Part 2B, Section 11.3.5.4 of the Technical Provisions.

(b) With respect to any claim filed by the University relating to EMI during System operations, if Concessionaire establishes that the Project meets the requirements of Part 2B, Section 11.3.5.1 of the Technical Provisions and that Concessionaire has complied with Part 2B, Section 11.3.5.4 of the Technical Provisions and identified and corrected anticipated system wear and failure that could create excessive EMI above the required standards, then Concessionaire's liability to the University and to Owner under this Section 11.5.5.5 relating to EMI will be limited to \$2.5 million of costs and expenses incurred, sharing responsibility with Owner, on a dollar-for-dollar basis, for such costs and expenses incurred up to \$5 million. However, such limitation shall not apply with respect to any excess EMI that is due to (i) the failure of the Project to meet requirements in Part 2B, Section 11.3.5.1 of the Technical Provisions or (ii) Concessionaire's failure to implement required mitigation, including compliance with the Owner-approved Operational Phase Mitigation Plan, if applicable.

(c) This Section 11.5.5.5 shall not be construed to limit Concessionaire's obligations under this Section 11.5 with respect to any matters other than the University's rights and remedies concerning EMI during System operations.

#### **11.5.6 Reliance on Concessionaire's Performance**

Concessionaire acknowledges and agrees that it is Concessionaire's obligation to cause the Project to be designed and to construct the Project in accordance with the Contract Documents and that the Indemnified Parties are fully entitled to rely on Concessionaire's performance of such obligation. Concessionaire further agrees that any review and/or approval by Owner and/or others under this Agreement is subject to Section 5.1.7.

#### **11.6 Indemnities by Contractors**

Concessionaire shall ensure that each Contract includes indemnity provisions appropriate to the scope of the Work to be performed by the Contractor, naming the Indemnified Parties as indemnitees.

#### **11.7 Notice of Claims by Third Parties**

In the event of any injury to persons, damage to property or other occurrence covered by the indemnities in Section 11.5, Concessionaire shall promptly notify Owner and, unless subject to evidentiary privilege, promptly furnish to Owner copies of all factual reports and factual portions of any other reports given to Concessionaire's insurance carrier or carriers.

## 11.8 Defense and Indemnification Procedures

**11.8.1** Concessionaire acknowledges that (a) the Maryland Office of the Attorney General, is required by applicable Law to represent and defend Owner, and/or may appoint counsel approved by the Maryland Office of the Attorney General to act in their stead and (b) certain other Indemnified Parties (including Montgomery County, Prince George's County, University of Maryland College Park, MDSHA and the Maryland-National Capital Park and Planning Commission) may have similar statutory representation obligations and rights. As a result, Owner and such other Indemnified Parties have the right to elect to conduct their own defense at any time but may also agree to allow defense to be conducted in whole, in part, in conjunction with, or from time to time by counsel appointed by Concessionaire or its insurer.

**11.8.2** Subject to Section 11.8.1, if the insurer under any applicable Insurance Policy accepts the tender of defense, Owner and Concessionaire shall, when in its best interest, reasonably cooperate in the defense proffered by the Insurance Policy and, for purposes of the Contract Documents and proceedings relating to such matter, each applicable Indemnified Party shall be deemed to be an Insured Party. If no insurer under potentially applicable Insurance Policies provides defense, then Section 11.8.3 shall apply.

**11.8.3** Subject to Section 11.8.1, if the defense is tendered to Concessionaire, then within 30 days after receipt of the tender, Concessionaire shall notify the Indemnified Party whether it has tendered the matter to an insurer, and, if not tendered to an insurer or if the insurer has rejected the tender, shall deliver a notice stating that Concessionaire:

(a) Accepts the tender of defense and confirms that the claim is subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter;

(b) Accepts the tender of defense but with a "reservation of rights" in whole or in part; or

(c) Rejects the tender of defense based on a determination that it is not required to indemnify against the claim under the terms of this Agreement.

(d) If Concessionaire has tendered the matter to an insurer, and the insurer has not rejected the tender, then, for purposes of the Contract Documents and proceedings relating to such matter, the applicable Indemnified Party or Parties shall be deemed to be (an) Insured Party or Parties.

**11.8.4** Subject to Section 11.8.1, if Concessionaire accepts the tender of defense under Sections 11.8.3(a) and 11.8.3(b), Concessionaire shall have the right to select legal counsel for the Indemnified Party, subject to reasonable approval by the Indemnified Party, and Concessionaire shall otherwise direct the defense of such claim, and bear the fees and costs of defending and settling such claim. Owner retains all rights with regard to settlement and Concessionaire shall seek Owner's consent to any settlement terms and conditions. During such defense:

(a) Concessionaire shall fully and regularly inform the Indemnified Party, and with respect to Owner, the Maryland Office of the Attorney General, of the progress of the defense and of any settlement discussions; and

(b) The Indemnified Party shall reasonably cooperate in said defense, provide to Concessionaire all reasonably required materials and access to personnel it

requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to the Indemnified Party, and to the extent permitted by applicable law maintain the confidentiality of all communications between it and Concessionaire concerning such defense.

**11.8.5** Subject to Section 11.8.1, if Concessionaire responds to the tender of defense as specified in Section 11.8.3(c), the Indemnified Party shall be entitled to select its own legal counsel and otherwise control the defense of such claim, including settlement.

**11.8.6** Notwithstanding Sections 11.8.3(a) and 11.8.3(b), any Indemnified Party (regardless of whether it is entitled to conduct its own defense under Section 11.8.1), may assume its own defense at any time by delivering to Concessionaire notice of such election and the reasons therefor.

**11.8.7** If an Indemnified Party elects to conduct its own defense pursuant to this Section 11.8 of a claim for which it is entitled to indemnification, Concessionaire shall reimburse on a current basis all reasonable costs and expenses the Indemnified Party incurs in investigating and defending such claim. If the Indemnified Party is entitled to and elects to conduct its own defense, then:

**11.8.7.1** In the case of a defense that otherwise would be conducted under Section 11.8.3(a), the Indemnified Party shall have the right to settle or compromise the claim with each of Concessionaire's and Concessionaire's relevant insurer(s)' prior written consent, which, in each case, shall not be unreasonably withheld or delayed;

**11.8.7.2** In the case of a defense that otherwise would be conducted under Section 11.8.3(b), the Indemnified Party and Concessionaire shall consult with each other on a regular basis to determine whether settlement is appropriate and, subject to the rights of any insurer providing coverage for the claim under a policy required under this Agreement, and the Indemnified Party shall have the right to settle or compromise the claim with Concessionaire's prior written consent without prejudice to the Indemnified Party's rights to be indemnified by Concessionaire; and

**11.8.7.3** In the case of a defense conducted under Section 11.8.3(c), the Indemnified Party shall, subject to the rights of any insurer providing coverage for the claim under a policy required under this Agreement, have the right to settle or compromise the claim without Concessionaire's prior written consent and without prejudice to its rights to be indemnified by Concessionaire.

**11.8.8** A refusal of, or failure to accept, a tender of defense, as well as any Dispute relating to assumption of control of defense by an Indemnified Party under Section 11.8.6, shall be resolved according to the Dispute Resolution Procedures. Concessionaire shall be entitled to contest an indemnification claim and pursue, through the Dispute Resolution Procedures, recovery of defense and indemnity payments it has made to or on behalf of the Indemnified Party.

## **11.9 Disclaimer**

Nothing in this Article 11 or elsewhere in the Contract Documents is intended to establish a standard of care owed to any member of the public or to extend to the public the status of a third party beneficiary for any of the insurance or indemnifications described in this Article 11.

## ARTICLE 12. LRV OPTIONS

### 12.1 Exercise of LRV Option

**12.1.1** Owner has three separate options (the “LRV Options”) to require Concessionaire to purchase Option LRVs and commission said LRVs: (a) LRV Option A for the committed number of additional LRVs required for a change from Service Level 1 to Service Level 2; (b) LRV Option B for the committed number of additional LRVs required to enable Concessionaire to meet the Peak Period Headways for Service Level 1 or Service Level 2, as applicable, if Actual Combined Tsc is 1.00 through 6.00 minutes higher than Bid Combined Tsc in a Peak Period; and (c) LRV Option C for the committed number of additional LRVs required to enable Concessionaire to meet the Peak Period Headways for Service Level 1 or Service Level 2, as applicable, if Actual Combined Tsc is 6.01 through 12.00 minutes higher than Bid Combined Tsc in a Peak Period.

**12.1.2** The number of LRVs and pricing information for each such option are specified in subparagraphs (a) through (c) below. The Owner must exercise each such option by delivery of notice to Concessionaire to such effect (an “LRV Option Notice”), identifying which option is being exercised. The LRV Options may be exercised independently of each other. LRV Option A may be exercised at any time during the period starting at Financial Close and ending on the seventh anniversary of Commercial Close. LRV Options B, and C may only be exercised during the period starting on the fifth anniversary of Commercial Close and ending on the seventh anniversary of Commercial Close.

(a) LRV Option A includes five additional LRVs: option price of \$9,234,296 per LRV, subject to escalation as specified in Section 14.1.4.1.

(b) LRV Option B includes one additional LRV: option price of \$13,796,112, subject to escalation as specified in Section 14.1.4.1; provided that if LRV Options A and B are exercised concurrently, the price per LRV under this clause (b) shall be the same price that applies under clause (a).

(c) LRV Option C includes two additional LRVs: option price of \$10,931,144 per LRV, subject to escalation as specified in Section 14.1.4.1; provided that if LRV Options A and C are exercised concurrently, the price per LRV under this clause (c) shall be the same price that applies under clause (a).

**12.1.3** The Parties acknowledge that a change from Service Level 1 to Service Level 2 will require performance of certain additional Work relating to the OMF as described in the Technical Proposal (specifically, that section of the Technical Proposal entitled “Design and Construction Technical Solutions”). Accordingly, in connection with exercise of LRV Option A, the Parties shall negotiate a Change Order in accordance with Article 14 specifying the price, delivery schedule and scope of such additional Work.

### 12.2 Delivery; Payment

Following delivery by Owner to Concessionaire of an LRV Option Notice, Concessionaire shall procure the Option LRVs for delivery and commissioning and shall notify Owner regarding the scheduled date for such delivery and commissioning. If the LRV Option Notice is delivered more than 36 months before the RSA Deadline, the scheduled date shall be the RSA Deadline. In all other cases, the scheduled date shall be no later than 36 months after the date of the LRV

Option Notice. Payments for Option LRVs shall be made based on milestones in accordance with the schedule in Part D of Exhibit 4A.

### **12.3 Option LRV Requirements**

**12.3.1** Concessionaire shall ensure that each Option LRV is (a) compatible and interchangeable with the other LRVs provided under this Agreement to the extent needed for Concessionaire to meet the Performance Requirements and provide safe and reliable operations, (b) incorporates all relevant upgrades available as of the date of manufacture that have been incorporated into the Initial Fleet as of such date; provided, however, that if a replacement or alternative LRV Supplier has been approved by Owner, then Concessionaire's obligation to ensure incorporation of "all relevant upgrades available" shall be to the maximum extent possible, so long as the Option LRV provided by the replacement or alternative LRV Supplier otherwise conforms to clauses (a), (c) and (d) of this Section 12.3.1, (c) manufactured in accordance with the requirements of Part 2B, Section 12 and to the specifications applicable to the LRVs originally procured by Concessionaire for the Project, and (d) tested as part of the manufacturing process and placement into service in accordance with Part 2B, Section 12.6.3 of the Technical Provisions.

**12.3.2** Concessionaire acknowledges and agrees that it is responsible for providing LRVs sufficient to enable Performance Requirements to be met at each Service Level described in the Contract Documents, without any right to rely on provision of additional LRVs through exercise of the LRV Option or otherwise, except as otherwise provided in Sections 12.4 through 12.5. Concessionaire shall remove and replace, or repair, any defective LRVs (including LRVs with Fleet Defects) supplied by Concessionaire, at Concessionaire's sole expense.

### **12.4 Provision of Additional LRVs for Service Level 2 or Service Level 3**

**12.4.1** Owner acknowledges that additional LRVs may be required in order for Concessionaire to meet the Performance Requirements concerning System availability for Service Level 2 or Service Level 3. Accordingly, if Owner wishes to require implementation of Service Level 2 or Service Level 3, but has not exercised one or more LRV Options that will increase the LRV fleet size to the number of LRVs that the Proposal states are required for the relevant Service Level, Owner will be responsible for providing additional LRVs for the Project that meet the requirements applicable to Option LRVs stated in Section 12.3.

**12.4.2** If Owner plans to purchase LRVs from a source other than Concessionaire, Owner shall ensure that warranties are obtained from the vendor consistent with Good Industry Practice. Concessionaire shall review and comment on the proposed contract documents, including technical specifications, and shall notify Owner of any issues that appear likely to affect Concessionaire's obligations under this Agreement, including costs of performance of the Work as well as Concessionaire's ability to meet the Performance Requirements. To the extent that an adverse impact on Concessionaire's rights and/or obligations under this Agreement is attributable to any differences between the LRVs supplied by Owner's third party vendor and the LRVs that Concessionaire would have obtained had Owner exercised an LRV Option, such differences shall be treated as an Owner Change.

**12.4.3** If Owner has exercised LRV Option A, then the start date for moving to Service Level 2 will be the date established for delivery and commissioning of the LRV Option Vehicles under Section 12.2. If Owner has made other arrangements to provide the additional LRVs required to meet the Performance Requirements for Service Level 2, then the start date for moving to Service Level 2 will coincide with the date on which such additional LRVs are

placed into service. In all cases, the Change Order described in Section 12.1.3 shall include a completion date consistent with such start date.

**12.4.4** If Owner has exercised LRV Option A, Concessionaire has the option to make LRV Deferral Payments to Owner and thereby defer the start date for moving to Service Level 2 under Section 12.4.3 by up to 24 months. The amount of each LRV Deferral Payment shall be calculated as a percentage of the total value of the relevant LRV Option order, as follows: (1) for delays up to 12 months after the established date, 0.4% per month; (2) for delays during the following six months (that is, months 13 through 18), 0.7% per month; and (3) for delays during the following six months (that is, months 19 through 24), 1.0% per month. If Concessionaire wishes to defer the start date for less than a full month, the payment for that month shall be prorated based on the actual number of days in the month and the total number of deferral days. The aggregate total of LRV Deferral Payments for an LRV Option may not exceed 15% of the total value of the relevant LRV Option order. Concessionaire shall notify Owner in writing of its intent to defer the start date at least 30 days before the scheduled start date, shall provide written updates at least monthly thereafter, and shall give Owner at least 180 days' advance notice of the actual date that the higher Service Level will commence.

## **12.5 Provision of Additional LRVs if Actual Combined Tsc Is Higher than Bid Combined Tsc in a Peak Period**

**12.5.1** Owner acknowledges that additional LRVs may be required in order for Concessionaire to maintain Peak Period headways in a Peak Period if the Actual Combined Tsc for such period is at least 1.00 minutes higher than the Bid Combined Tsc for such period. Until the seventh anniversary of Commercial Close, Owner has the right to provide such LRVs by exercising an LRV Option under Section 12.1, but after such date any additional LRVs would either be provided pursuant to a Change Order or purchased separately from this Agreement. Owner is not obligated to provide additional LRVs or direct a Minor Service Change as contemplated by Section 8.3.1 for a Peak Period unless Concessionaire demonstrates that the need for the additional LRVs is directly attributable to the fact that the Actual Combined Tsc for a Peak Period is at least 1.00 minute higher than Bid Combined Tsc for such period. Concessionaire acknowledges that it is required to maintain Peak Period headways in a Peak Period, without any obligation of Owner to provide additional LRVs or any other remedy unless (a) the Actual Combined Tsc is at least 1.00 minute higher than the Bid Combined Tsc for that Peak Period, and (b) Concessionaire demonstrates that its need for the additional LRVs is directly attributable to the fact that the Actual Combined Tsc is at least 1.00 minute higher than Bid Combined Tsc in that Peak Period.

**12.5.2** Owner may direct a Minor Service Change under Section 8.3.1, regardless of whether it has exercised an LRV Option in connection with a change between Bid Combined Tsc and Actual Combined Tsc.

**12.5.3** Regardless of whether the Actual Combined Tsc for a Peak Period is at least 1.00 minutes higher than Bid Combined Tsc for such period, the Owner has the right to elect not to exercise the LRV Options and instead to proceed with other actions identified in Section 8.3.

## **12.6 Concessionaire Obligations**

Nothing in this Article 12 shall affect Concessionaire's obligation to provide a sufficient number of LRVs to enable it to meet the Performance Requirements, nor shall it affect Concessionaire's obligation to remove and replace any defective LRVs supplied by Concessionaire whether in the original order or as part of the Option.

## ARTICLE 13. PAYMENTS TO CONCESSIONAIRE; OWNER'S COSTS

### 13.1 Design-Build Period Progress Payments; Revenue Service Availability and Final Completion Payments

**13.1.1** Owner will make payments for the D&C Work following receipt of periodic requests for payment submitted by Concessionaire in accordance with this Section 13.1.1 (or, as applicable, other provisions within this Agreement) subject to withholding or reduction as specified in this Agreement. The amount payable is subject to certain limitations and may be reduced in accordance with the Contract Documents. The periodic requests for payment shall identify amounts owing for Progress Payments, Allowances, Change Orders, incentive payments under Section 13.1.1.4, Owner's share of Independent Engineer costs, the RSA Payment and the Final Completion Payment, and shall include information as required by Owner for the purpose of allowing Owner to pass through costs to third parties.

**13.1.1.1** Certain payments will be made based on monthly invoices submitted during the Design-Build Period, based on progress determinations (the "Progress Payments"), equal to 85% of the value of D&C Work eligible for Progress Payments performed during the period covered by the invoice. Progress determinations will be based on substantiated progress and the approved Schedule of Values, subject to the following:

(a) Invoices for mobilization for Construction Work may be submitted in accordance with the following schedule, not to exceed 85% of 6% of the "Total Value of D&C Construction Work" specified in Exhibit 4A. An initial installment up to 25% of the total mobilization amount may be invoiced upon Owner approval to commence non-Construction Work as specified in Section 7.4.4; a second installment equal to 35% of mobilization (bringing the total to 60%) may be invoiced upon Owner approval to commence Construction Work; and the final installment of 40% of mobilization (bringing the total to 100%) may be invoiced when D&C Work valued at 20% of the Total Value of the D&C Construction Work is complete.

(b) Invoices for the value of materials and products for Construction Work not yet incorporated into the finished Project may be submitted only as permitted under Section 13.1.5.

(c) Invoices otherwise in accordance with the provisions of this Agreement.

(d) With respect to LRVs, excluding the O&M Spare LRV, Progress Payment amounts will be determined in accordance with Part B of Exhibit 4A.

(e) In no event shall Owner have any obligation to pay Concessionaire any Progress Payment amount that would result in payment for any activity in excess of 85% of the value of the activity under the Schedule of Values. However, if the D&C Payment Cap has not yet been reached and Work performed during a prior period was not eligible for payment because the value of the Work exceeded the payment limitation for such period, that Work may be included in subsequent invoices.

**13.1.1.2** Allowance payments will be equal to 100% of the value of Allowance Work performed during the period covered by the invoice, provided that such payments may not exceed the amounts specified in this Agreement for each Allowance, as such

amounts may be modified by Change Order. The value of Allowance Work may be determined based on measured units multiplied by unit prices, substantiated progress and Schedule of Values, or force account records. For unit priced items, full compensation for all expenses involved in conforming to the requirements for measuring and weighing materials shall be considered as included in the unit prices for the materials being measured or weighed and no additional compensation will be allowed therefor. Refer to Sections 13.1.1.5 and 13.1.1.6 regarding applicability of the D&C Payment Cap to Allowance Work.

**13.1.1.3** If, as of Final Completion or such earlier date as Allowance Work is completed, the Allowance has not been fully expended, a Change Order will be issued reducing the Allowance amount(s) to match actual expenditures made.

**13.1.1.4** As an inducement to Concessionaire to achieve certain goals, Owner has established a monetary incentive payment program applicable to certain Work, as described in Part B of Exhibit 11 for performance that meets or exceeds prescribed criteria. Incentive payments are payable following a determination by Owner regarding the amount owing, as specified in said Part B.

**13.1.1.5** The cumulative amount of Progress Payments made by Owner as of any date, in combination with mobilization payments and Allowance payments up to the allowance amounts in Exhibit 4A, Part A, may not exceed the cumulative D&C Payment Cap for such period specified in Exhibit 4A.

**13.1.1.6** Change Orders for Work to be performed during the Design-Build Period may be payable based on progress determinations, in which case the value of the Change Order Work will be determined as described in Section 13.1.1.1 except that the amount will be based on 100% of the progress determination instead of 85% and the D&C Payment Cap will not apply. Alternatively, the Change Order may provide for payments to be made on a lump sum basis, based on measured units multiplied by unit prices, substantiated progress and Schedule of Values, or force account records. If a Change Order results in a net decrease in Concessionaire's costs of performing the D&C Work, the amount of the reduction shall be applied to reduce Owner's payments during the Design-Build Period, with any change in costs of performing the O&M Work addressed through a change to the Availability Payments.

**13.1.1.7** The RSA Payment is payable following issuance of the Independent Engineer's Certificate of Revenue Service Availability under Section 7.10.2, and the Final Completion Payment is payable following achievement of Final Completion under Section 7.10.4.

**13.1.2** Requests for payment shall be made on a form acceptable to Owner. Concessionaire shall submit draft invoices to Owner with backup documentation as described in Part 2, Section 11 of the Technical Provisions before each monthly invoice review meeting. After the meeting, Concessionaire shall submit a final invoice to Owner, addressing comments received at the meeting. Requests shall be signed by Concessionaire's Authorized Representative and shall be accompanied by the following certifications:

**13.1.2.1** A certification from Concessionaire that (a) Concessionaire has made all undisputed payments to all of its Contractors from the proceeds of prior payments by Owner and other funds available, and (b) Concessionaire will make timely payments of undisputed amounts due and owing to all of its Contractors from the proceeds of the current payment by Owner and other funds available, in conformance with its contractual arrangement with them;

**13.1.2.2** A certification from each Contractor that (a) all items included in the invoice that were the subject of a previous non-conformance report have been corrected and/or resolved in accordance with the Project Management Plan or O&M Management Plan, (b) all construction documentation is completed and records and reports submitted and/or retained as required by the Project Management Plan or O&M Management Plan, and (c) it has made payment from proceeds of prior payments, and it will make timely payments from the proceeds of the current payment to its Subcontractors, Suppliers, laborers, Utility Owners and other third parties in conformance with its contractual arrangement with them;

**13.1.2.3** If the invoice includes materials or products not yet incorporated into the Project, a certification from the Contractor's quality assurance manager confirming that such materials or products have been tested and found to have conformed to the requirements of the Contract Documents or to have been accepted under an approved certification program before delivery, and have been safely stored;

**13.1.2.4** If the invoice includes Construction Work, a certification from Concessionaire's quality assurance manager confirming that (a) Design Documents for such Work have been checked and reviewed in accordance with the Project Management Plan, (b) Release for Construction Documents are on the site where the improvements are being constructed, and (c) the Construction Work included in the invoice has been inspected and sampling and testing conducted in accordance with the Project Management Plan; and

**13.1.2.5** If the invoice is for LRVs, a certification from Concessionaire's Authorized Representative stating that all requirements relating to the applicable milestone defined in Exhibit 4A, Part B have been satisfied in accordance with Part 2B, Section 12 of the Technical Provisions.

**13.1.3** As a condition precedent to consideration by Owner of any invoice under this Section 13.1, certified payrolls for all construction workers for all periods covered by the request and all prior periods shall be up to date and submitted to Owner. Refer to Exhibit 16 for additional information regarding the requirement to provide certified payrolls.

**13.1.4** If Owner makes the RSA Payment under Section 7.10.3.8(b) based on a determination by the Independent Engineer that Owner disputes, either Party may elect to submit the points of disagreement regarding compliance with the requirements for Revenue Service Availability to the Dispute Resolution Procedures. In such event, if and to the extent the Dispute is resolved in Owner's favor:

(a) Owner may require Concessionaire to repay a portion of the RSA Payment to Owner, as deemed appropriate by Owner to cover the value of the Work in question, plus interest on the amount owing, at the Late Payment Rate, from the date payment was made to Concessionaire to the earlier to occur of (i) the date that Concessionaire has fully performed all of the Work that was in dispute or (ii) the date that Concessionaire repays Owner. Following receipt of the repayment, Owner will thereafter make Progress Payments for such Work in accordance with Section 13.1.1.1, except that the amount payable will be based on 100% of the progress determination instead of 85%, or will be made in accordance with other payment arrangements agreed to by the Parties.

(b) Alternatively, if requested by Concessionaire, in lieu of requiring repayment Owner will accept a bond or letter of credit covering Concessionaire's obligation, in the repayment amount, from a surety or financial institution acceptable to Owner, in form acceptable to Owner, and naming Owner as the primary obligee or

beneficiary, as applicable. In such event, the bond or letter of credit will be released upon request by Concessionaire after Owner determines that all such Work has been satisfactorily completed.

If neither Party submits the issue to the Dispute Resolution Procedures, Concessionaire shall be conclusively deemed to have agreed to perform all disputed elements of the D&C Work as a condition to Final Completion, in accordance with Section 7.10.4.1.

**13.1.5** Concessionaire may request payment for certain elements of the Work not yet incorporated into the permanent improvements, subject to the following terms and conditions:

(a) Payment may be made for certain materials stored at the Site (including Project-Specific Locations in the vicinity of the Project ROW) as follows:

(i) For superstructure members delivered to the Site (including Project-Specific Locations in the vicinity of the Project ROW), payment equal to 85% of the material cost plus freight charges as invoiced may be made, provided the cost does not exceed 90% of the applicable WBS value. The amount payable will be based upon validated invoices or bills for material including freight charges, and a copy of such invoices or bills shall be made a part of the documented records for the project.

(ii) For reinforcement steel, piling, pipe, traffic barrier, signs and sign assemblies, and other nonperishable material in storage at the Site (excluding aggregates, cement, seed, plants, fertilizer or other perishable items), payment equal to 85% of the invoiced cost of the material plus freight charges to Concessionaire may be made, provided the cost does not exceed 90% of the applicable WBS value. Such material shall be delivered and stockpiled at the Site after being tested in accordance with the Concessionaire's Quality Program and found to have conformed to the requirements of the Contract Documents.

(iii) Only end product manufactured material or fully fabricated products that are awaiting installation or incorporation into the finished Work are eligible for prepayment under this Section 13.1.5(a). Components, elements, or ingredients of a finished product are not eligible for prepayment.

(iv) When it is considered impractical to store materials on the Site, Owner's Authorized Representative may approve other storage areas which will be considered at the Site for purposes of this Section 13.1.5(a). Concessionaire shall use reasonable efforts to provide storage in the vicinity of the Project ROW, but where storage in the vicinity of the Project ROW is not practical, Owner's Authorized Representative may approve storage elsewhere. Storage of materials outside the State of Maryland will be subject to the conditions set forth in this Section 13.1.5 and limited to materials exceeding \$25,000 in cost, which are designed and fabricated exclusively for use on the Project.

(b) For elements of the Work with a fabrication period of at least six months and that could neither be readily utilized on, nor diverted to, another job, payment equal to 85% of the material cost as invoiced may be made, provided the cost does not exceed 90% of the applicable WBS value.

(c) All material for which payment is to be made under this Section 13.1.5 shall be clearly marked with Owner's contract number on individual units. If the material is normally shipped to the Project in bundles or other forms of packaging, Owner's contract number shall be clearly marked or affixed to the package. When the material is not stored at the Site, the material shall be physically separated by fencing or equivalent barrier from other materials stored at the same site. The material shall be accessible to Owner at all times. Material for which payment has been made, either wholly or partially, shall not be removed from the approved location until such time that it is to be incorporated into the Work, unless authorized by Owner's Authorized Representative.

(d) If any of the elements of the Work for which payment has been made under this Section 13.1.5 are lost or become damaged in any manner, Concessionaire shall be responsible for repairing or replacing the damaged materials. The value of the lost or damaged material will be deducted from Concessionaire's subsequent applications for payment until replacement has been accomplished. Any invoice submitted by Concessionaire concerning materials stored on private property within the State of Maryland shall be accompanied by a release from the owner and/or tenant of such property agreeing to permit the removal of the materials from the property at no cost to Owner.

(e) No payment will be made under this Section 13.1.5 for fuels, form lumber, falsework, temporary structures or other materials of any kind which will not become an integral part of the finished construction. No payment for stored material will be made if it is anticipated that the material will be incorporated into the Work within 30 days of the written request.

(f) Concessionaire shall submit written notice to Owner's Authorized Representative regarding intent to include material in an invoice, at least two weeks before submittal of the invoice. The following items shall accompany the invoice:

(v) Consent of Surety specifying the material type and the item(s) in which the material is to be used.

(vi) Validated invoices with the signature of an officer of the company supplying the material showing actual cost.

(vii) A notarized statement from Concessionaire or the Design-Build Contractor attesting that the invoices as submitted do not include charges or fees for placing, handling, erecting, or any other charges or markups other than the actual material cost and, if applicable, sales tax(es) and freight charges.

(viii) Bills of lading showing delivery of the material, if applicable. The request for payment for any materials stored on property outside the State of Maryland shall be accompanied by a release from the owner or tenant of such property agreeing to permit verification by the inspector that the material is stored at the approved location, and to permit the removal of the materials from the property at no cost to Owner.

(ix) Inspection test reports, certifications and/or a written statement from the Construction Quality Control Manager(s) attesting to the inspection and approval of the material.

(x) A statement explaining why the material cannot be stored on the Site in the vicinity of the Project ROW, if Concessionaire is requesting to store material at another location. The statement shall include the methods of storage, separation, and identification to be used by Concessionaire. Concessionaire shall provide a method of inventory control and withdrawal satisfactory to Owner that shall be used by Concessionaire to monitor materials not stored on the project.

(xi) A cost breakdown showing the relationship of the cost of the stored material to the costs of all other materials, labor, and components of the Work.

Upon receipt of the above by Owner's Authorized Representative and verification by Owner's Authorized Representative that the material is stored at the approved location, Owner's Authorized Representative will authorize payment.

Concessionaire shall pay the material provider the amount shown on the invoice within 10 days of receipt of payment from Owner. Evidence of payment shall be provided to Owner. Failure to make invoice payments as specified will be cause to deduct the monies from future estimates and/or deny future stored materials invoices.

Copies of all pertinent data shall be made by Concessionaire and retained as part of the documented records for the Project.

## **13.2 Availability Payments**

### **13.2.1 Basis for Availability Payments**

**13.2.1.1** Except as otherwise expressly provided in this Agreement, Owner will pay Availability Payments to Concessionaire during the O&M Period as provided in this Section 13.2.

**13.2.1.2** The obligation of Owner to make Availability Payments is based on, and is subject to, the Project being open for public transit as measured through Concessionaire's compliance with the Contract Documents.

### **13.2.2 Availability Payment Calculation**

**13.2.2.1** Availability Payments shall be calculated and earned by Concessionaire according to the methodology in Exhibit 4D. The adjustments provided for in Exhibit 4D establish differential payments for different levels of service that may be provided by Concessionaire.

**13.2.2.2** In addition to any other deductions or withholdings allowed under this Agreement, the Availability Payments shall be subject to adjustment for Noncompliance Events and other adjustments resulting from other provisions under this Agreement in accordance with Exhibit 4D, subject to the limitation on adjustments during an Owner step-in under Section 16.7.

### **13.2.3 Requests for Availability Payments**

**13.2.3.1** Owner will pay the Availability Payments by making Monthly Availability Payments as partial payments of each Annual Payment, subject to the methodology in Exhibit 4D.

**13.2.3.2** Invoices shall be submitted monthly in arrears, no earlier than two business days after the end of the prior month. Each request must state the amount and calculation of the Monthly Availability Payment due, including the amount of each Monthly Availability Payment component and calculation of the Deduction(s) for all applicable Noncompliance Events for the prior month (if any) in accordance with Exhibit 4D. Any invoices that include compensation for Construction Work shall also include certified payroll, certification regarding payment to Contractors performing such Work and other backup documentation equivalent to that required for Progress Payments under Section 13.1. In addition, the invoice for the final Monthly Availability Payment for any given Contract Year must be accompanied by an attached report containing information that Owner can use to verify the Monthly Availability Payments and any adjustments for all applicable Noncompliance Events for such Contract Year. Such attached report shall include:

- (a) The calculation of the actual Availability Payment earned during such Contract Year using the methodology in Exhibit 4D;
- (b) A description of any Noncompliance Events, including the date and time of occurrence and duration;
- (c) Any adjustments to reflect previous over-payments and/or under-payments;
- (d) A detailed calculation of any interest payable with respect to any amounts owed; and
- (e) Any other amount due and payable from Concessionaire to Owner or from Owner to Concessionaire under this Agreement, including deductions Owner is entitled to make under the Contract Documents.

**13.2.3.3** Owner will return any invoices that are incomplete and/or incorrect in any material respect to Concessionaire for correction and resubmission.

**13.2.3.4** Owner will verify the amount of each Monthly Availability Payment by (a) examining the invoice, (b) verifying the results reported by Concessionaire, including through Owner's independent oversight and auditing process, and (c) reconciling the actual Monthly Availability Payment earned and any other amount due and payable from Concessionaire to Owner or from Owner to Concessionaire under this Agreement.

### **13.3 Disputed Amounts**

**13.3.1** Owner shall have the right to dispute, in good faith, any amount specified in an invoice submitted under Section 13.1 or 13.2. Owner shall pay all undisputed amounts for which payment is requested and that are not subject to withholding.

**13.3.2** Concessionaire and Owner shall use reasonable efforts to resolve any invoice dispute within 30 days after the dispute arises. If they fail to resolve the dispute within

that period, then it shall be subject to resolution according to the Dispute Resolution Procedures.

#### **13.4 Payment Due Date; Interest on Late Payments and Overpayments**

**13.4.1** Except as otherwise expressly provided in the Contract Documents, payments to Concessionaire of all undisputed amounts under this Agreement shall be made within 30 days after Owner's receipt of a proper invoice from Concessionaire, accompanied by all required documentation. A proper invoice shall include, in addition to the requirements specified in Sections 13.1 and 13.2, the contract number, Concessionaire's Federal Tax Identification Number; information regarding the payee sufficient to allow payment to be made, and the name and address of the proper invoice recipient. If payment is not made within 45 days after the date of receipt of proper invoice, then Concessionaire shall be entitled to interest, at the Late Payment Rate, on the undisputed amount owing, commencing on the 31st day after receipt of proper invoice until the date paid, subject to Section 13.4.3.

**13.4.2** If any invoice is disputed and an amount is determined to be due under the Dispute Resolution Procedures, payment of the disputed amount shall be made within 30 days following resolution of the dispute, together with interest at the Late Payment Rate on the amount owing in accordance with this Section 13.4 from the date that the payment was due (based on the agreement of the parties or the decision of the dispute resolver) until the date of payment.

**13.4.3** In order to receive payment of interest, Concessionaire must submit a proper invoice for accrued interest within 30 days after the payment due date of the amount on which the interest is claimed to have accrued or within 30 days after resolution of the dispute. Interest may not be claimed for more than one year following the 31st day after the date that a proper invoice was received, or on amounts representing unpaid interest.

**13.4.4** For the purposes of this Agreement an amount will not be deemed due and payable if:

- (a) The amount invoiced is inconsistent with the Contract Documents;
- (b) The proper invoice has not been received by the person or office specified in this Agreement;
- (c) The amount requested or performance under this Agreement is in dispute;
- (d) Concessionaire has failed to otherwise comply with the provisions of this Agreement with respect to the Work for which payment is requested;
- (e) Owner otherwise has the right to withhold payment under the terms of this Agreement;
- (f) If acceptance is a prerequisite to payment, the item or services have not been accepted;
- (g) The quantity of items delivered is less than the quantity invoiced;
- (h) The items or services do not meet the quality requirements of this Agreement;

(i) The invoice is for a Progress Payment, and the invoice for the Progress Payment has not been properly and/or timely submitted;

(j) This Agreement provides for amounts to be withheld, the invoice is for the withheld amount, and all stipulated conditions for release of the withheld amounts have not been met; or

(k) Concessionaire has not submitted satisfactory documentation or other evidence reasonably required by Owner concerning performance under the Contract Documents and compliance with its provisions.

**13.4.5** Refer to Section 17.3.1(a) for provisions concerning interest payable by Owner on late payments by Owner under this Article 13.

**13.4.6** If as a result of any inaccuracy in an invoice any overpayment is made by Owner to Concessionaire then, in addition to the adjustments to Monthly Availability Payments as provided in Section 13.2, Owner shall be entitled to deduct or receive as a payment from Concessionaire interest on such amount at the Late Payment Rate, starting on the date of Owner's payment of the invoice to the date the overpayment is deducted or paid. Owner will provide notice to Concessionaire of any Owner determination that it is entitled to deduct or receive payment for interest owed on any such overpayment. Such right of Owner to deduct or receive payment of interest is without prejudice to any other rights Owner may have under this Agreement.

### **13.5 Payments by Electronic Funds Transfer**

Concessionaire agrees to accept payments by electronic funds transfer and shall register using the State Comptroller's Office using the COT/GAD X-10 Vendor Electronic Funds (EFT) Registration Request Form. Following such registration, all State payments to Concessionaire (including payments under other State contracts regardless of value) will be disbursed via electronic funds transfer.

### **13.6 Appropriations**

**13.6.1** All obligations of Owner and the State are subject to all applicable law and appropriations by the Maryland General Assembly. The obligation of Owner to make payments under this Agreement does not constitute an indebtedness of the State within the meaning or application of any constitutional provision or limitation and does not constitute a pledge of the faith, credit or taxing power of the State or any political subdivision thereof within the meaning or application of any constitutional provision or limitation. Furthermore, Owner has no taxing power, and Concessionaire has no right to have taxes levied or to compel appropriations by the General Assembly for any payment owing under this Agreement. This clause shall not be construed to preclude Concessionaire from exercising its remedies for Owner's failure to comply with Section 13.6.3.

**13.6.2** Owner shall prepare, before the end of each fiscal year, its annual budget request submission to the Governor and include funds necessary to make scheduled payments to Concessionaire under this Agreement for the coming fiscal year under this Agreement. Owner will use its best efforts to obtain the authorization and appropriation of all necessary funds before the beginning of the coming fiscal year.

**13.6.3** If Owner becomes aware that it will not obtain appropriations for any fiscal year sufficient, in combination with other available funds, to pay all compensation owing to

Concessionaire under this Agreement for such year, Owner will promptly notify Concessionaire regarding the anticipated shortfall, and will consult with Concessionaire to discuss the situation and possible solutions. If Owner determines that it will not have funds available to make any of the payments owing, Owner will suspend all Work. If Owner determines that there will be a partial shortfall, Owner will suspend all or a portion of the Work so as to ensure that Owner has sufficient funds to make payments owing for Work performed. Any such suspension shall be considered an Owner Change.

### **13.7 Owner Right of Withholding**

Any amounts due and payable by Concessionaire to Owner, including any liquidated damages owing under the Contract Documents, may be withheld from amounts otherwise due and payable by Owner to Concessionaire, including Availability Payments payable under Section 13.2, but expressly excluding the Special Lifecycle Payments. Owner also has certain other rights to withhold payment as specified in this Agreement.

### **13.8 Full Compensation**

Concessionaire acknowledges and agrees that the payments provided for in Article 13 constitute full compensation for performance of all the Work, subject only to Concessionaire's rights under Articles 14, 15 and 19 and Section 5.10.5.

### **13.9 Adjustment of Unit Prices**

With respect to unit priced items included in Exhibit 4B, if the actual quantities of any such item vary more than 15% above or below the estimated quantity stated in said exhibit, an equitable adjustment to the unit price shall be made upon demand of either Party. The equitable adjustment shall be based on any increase or decrease in costs per unit due solely to the variation above 115% or below 85% of the estimated quantity, based on the description and scope for the relevant unit priced item included in Exhibit 4B, and a Change Order issued documenting the adjusted unit price. Prior invoices shall be recalculated using the adjusted unit prices, as appropriate. The dollar thresholds stated in Section 15.3.3.1 (relating to Hazardous Materials discovered during demolition) shall not be modified based on an adjustment to unit prices, but any prior calculations and payments made under said provision are subject to adjustment based on the adjusted unit prices.

### **13.10 Payment for Certain Backfill Material and Disposal Costs**

#### **13.10.1 Backfill Provisions**

**13.10.1.1** The Parties acknowledge that the Total Value of D&C Construction Work is based, in part, upon the assumption that excavation required for the Project will produce at least [REDACTED] tons of select backfill material for Backfill Uses during performance of the Work.

**13.10.1.2** Subject to the limitations in this Section 13.10.1 and to the Backfill Requirements, if Project excavation fails to produce select backfill material in at least the estimated quantity available for Backfill Uses or adverse weather conditions unreasonably inhibit the use of such backfill material, Concessionaire shall be entitled to a "Backfill Change Order." The Backfill Change Order shall provide for payment based on delivery tickets at a unit price of \$ [REDACTED] for each ton of #57 stone required to be obtained for Backfill Uses due to the shortfall. The procedural requirements for obtaining a Backfill Change Order under Section 13.10.1.3 apply in lieu of the procedural requirements for issuance of Change Orders under ARTICLE 15.

**13.10.1.3** In its performance of the Work, Concessionaire shall exercise diligent efforts to maximize production of select backfill material available for Backfill Uses. Concessionaire shall provide monthly reports regarding the quality and quantity of materials produced through excavation, quantities of #57 stone obtained for Backfill Uses, and an updated estimate regarding the total quantity of select backfill material that will be produced and available for Backfill Uses, including appropriate backup information and any other information reasonably requested by Owner. If Concessionaire establishes that a shortfall exists despite Concessionaire's diligent efforts as described above, Owner will process and issue a Backfill Change Order covering the estimated quantities of #57 stone required as a result of the shortfall, not to exceed \$14,000,000. As the Work proceeds, the Backfill Change Order shall be subject to adjustment (increased or decreased) based on updated estimates and actual quantities, but shall in no event exceed \$14,000,000.

**13.10.1.4** In its performance of the Work, if Concessionaire determines in its reasonable discretion that available material does not meet the standard for suitable select backfill material available for Backfill Uses at a given location, then Concessionaire shall notify Owner of Concessionaire's intent to arrange for and use of #57 stone at such location. Concessionaire shall use good faith efforts for such notification to occur at least 1 Business Day prior to making such arrangements; provided, however, that after giving such notice, Concessionaire may arrange for and use #57 stone at such location.

**13.10.1.5** Concessionaire acknowledges and agrees that (a) other payments to Concessionaire provided under this Agreement provide compensation for its costs relating to Backfill Uses not covered by the unit prices, as well as any costs exceeding the maximum amount of the Backfill Change Order, and (b) any delay arising out of or relating to obtaining, hauling or otherwise utilizing #57 stone due to a shortfall in select backfill material available for Backfill Uses shall not constitute an Owner-Caused Delay, Owner Change, Relief Event, Force Majeure Event or other basis for a Claim.

## **13.10.2 Landfill Provisions**

**13.10.2.1** The Parties acknowledge that the Total Value of D&C Construction Work is based, in part, upon the assumption that (a) the Gude Drive Landfill in Montgomery County will accept delivery of up to 90,000 cubic yards of soil and construction or demolition debris, at 8.5 cubic yards/truckload ("Fill") without assessing a fee and (b) the Brown Station Road Landfill in Prince George's County will accept delivery of up to 40,000 cubic yards, at 8.5 cubic yards/truckload of Fill without assessing a fee.

**13.10.2.2** Subject to the limitations in this Section 13.10.2, Concessionaire shall be entitled to a Change Order covering its cost of alternative disposal of Fill (the "Landfill Change Order") if Concessionaire has complied with applicable Landfill Requirements but the Gude Drive Landfill or Brown Station Landfill (as applicable) has refused to accept Fill as described in Section 13.10.2.1. The procedural requirements for obtaining a Landfill Change Order under Section 13.10.2.3 apply in lieu of the procedural requirements for issuance of Change Orders under ARTICLE 15. The amount of the Change Order shall be based on the following:

(a) \$21.80/cubic yard for each cubic yard of Fill that is either rejected by the Gude Drive Landfill and deposited at a landfill other than the Brown Station Road Landfill or for which the Gude Drive Landfill assesses a fee, provided that such Fill is under the 90,000 cubic yard limit and Concessionaire has met all other applicable Landfill Requirements;

(b) \$24.25/cubic yard for each cubic yard of Fill that is either (a) rejected by the Brown Station Road Landfill and deposited at a landfill other than the Brown Station Road Landfill or for which the Brown Station Road Landfill assesses a fee, provided that such Fill is under the 40,000 cubic yard limit and Concessionaire has met all other applicable Landfill Requirements;

**13.10.2.3** Concessionaire shall provide monthly reports regarding the Fill deposits at the Gude Drive and Brown Station Road Landfills and estimated quantities of future deposits. Concessionaire shall promptly notify Owner if either landfill rejects Fill that meets applicable Landfill Requirements or assesses a fee to accept such Fill, including backup documentation. If Concessionaire establishes that such Fill has been rejected or that it has been assessed a fee to deposit such Fill, Owner will process and issue a Landfill Change Order in the amount of (a) tipping fees charged by the landfill that Concessionaire used (in the event of a rejection by the Gude Drive or Brown Station Road Landfill, as applicable) or (b) the fee charged by either such landfill (in the event of a fee charged), subject to the limitations on total Fill specified above and not to exceed \$2,932,000 in the aggregate. As the Work proceeds, the Landfill Change Order shall be subject to adjustment (increased or decreased) based on updated estimates and actual quantities, but shall in no event exceed \$2,932,000 in the aggregate.

**13.10.2.4** If Concessionaire deposits Fill in excess of 90,000 cubic yards at the Gude Drive Landfill or deposits Fill in excess of 40,000 cubic yards at the Brown Station Road Landfill, and is not assessed a fee with respect to either deposit(s), Owner shall be entitled to issue a deductive Change Order reducing the compensation otherwise payable for D&C Construction Work, as follows:

(a) A credit of \$21.80/cubic yard shall be allowed for each cubic yard of Fill in excess of 90,000 cubic yards deposited at the Gude Drive Landfill without assessment of a fee;

(b) A credit of \$24.25/cubic yard shall be allowed for each cubic yard of Fill in excess of 40,000 cubic yards deposited at the Brown Station Road Landfill without assessment of a fee;

Based on the reports provided by Concessionaire, Owner may determine the amount of credit owing and withhold such amount for payments otherwise due and payable by Owner to Concessionaire, pending finalization of the deductive Change Order under this Section 13.10.2.4.

**13.10.2.5** Concessionaire acknowledges and agrees that (a) other payments to Concessionaire provided under this Agreement provide compensation for its costs relating to the disposal of Fill not covered by the unit prices and quantities under the Landfill Change Order and (b) any delay arising out of or relating to rejection of Fill by either or both the Gude Drive Landfill or Brown Station Road Landfill shall not constitute an Owner-Caused Delay, Owner Change, Relief Event, Force Majeure Event or other basis for a Claim.

## **ARTICLE 14. OWNER CHANGES; CONCESSIONAIRE MODIFICATION REQUESTS; DIRECTIVE LETTERS**

This Article 14 concerns (a) Change Orders or other Modifications unilaterally issued by Owner, (b) Change Orders or other Modifications issued by Owner following a Request for Change Proposal or Modification Request, and (c) Change Orders for performance of Betterment Work issued by Owner under Section 7.6.6.

### **14.1 Owner Changes**

#### **14.1.1 Owner Right to Issue Change Order**

**14.1.1.1** Owner may, at any time and from time to time, without notice to any Lender or Surety, authorize and/or require, under a Change Order or other Modification, changes to the Work (including reductions in the scope of the D&C Work or O&M Work), changes to requirements of the Technical Provisions (including changes in the standards applicable to the Work), changes in the Service Plan and changes relating to Betterments, except Owner has no right to require any change that would give rise to a threat to health and safety or would be inconsistent with Law.

**14.1.1.2** Changes in service directed by Owner in accordance with Section 8.2 do not require a Change Order except as specified under that Section. A negotiated Modification would be required under Section 14.1.4 in connection with establishment of a Service Level higher than Service Level 3 as well as for any equitable adjustments to the Availability Payments under Section 2.2(c) of Part B of Exhibit 4D and the appropriate action under Exhibit 4D, Part B, Section 3.3.

**14.1.1.3** Owner (a) may agree with one or more Third Parties or Utility Owners to modify the Third Party Agreements or Owner Utility Agreements (including modifying assumed terms and conditions of such agreements set forth in the Technical Provisions), and (b) may identify a new Third Party at any time. Owner will promptly notify Concessionaire of any changes in the terms and conditions of such agreements that affect the Work, and will promptly provide Concessionaire with information regarding any new Third Parties. Any changes in the scope of the Work due to modifications to the terms and conditions (or assumed terms and conditions) of Third Party Agreements or Utility Agreements or identification of a new Third Party which delay the Critical Path or otherwise have a material impact on Concessionaire's obligations under the Contract Documents during the Design-Build Period will be implemented through an Owner Change in accordance with this Article 14.

#### **14.1.2 Owner Request for Change Proposal**

**14.1.2.1** If Owner desires to initiate or evaluate whether to initiate a Change Order, then Owner may issue a Request for Change Proposal. The Request for Change Proposal shall state the nature, extent and details of the proposed Owner Change. Owner's delivery of notification to Concessionaire under Section 14.1.1.3 shall be considered a Request for Change Proposal with respect to any material changes to the terms and conditions (or assumed terms and conditions) of the Third Party Agreement or Owner Utility Agreement identified in the notice, provided that if Owner notified Concessionaire regarding any such material changes before the Effective Date, the Request for Change Proposal shall be deemed delivered as of the Effective Date.

**14.1.2.2** Within five business days after Concessionaire receives a Request for Change Proposal, or such longer period approved by Owner, the Parties shall consult to define the proposed scope of the change. Within five days after the initial consultation, or such longer period approved by Owner, Owner and Concessionaire shall consult concerning the estimated Incremental Cost and extensions of time, excuse from compliance with the Contract Documents, effect on the LRV Option and other impacts.

**14.1.2.3** Owner may at any time provide a written analysis to Concessionaire regarding Owner's assessment of avoided costs and impacts on the Project Schedule and Contract Deadlines associated with a proposed Owner Change, as well as any other relevant information related to carrying out the proposed Owner Change.

### **14.1.3 Response to Request for Change Proposal**

As soon as possible through the exercise of diligent efforts, and in any event within 30 days following Owner's delivery to Concessionaire of a request for a change in the Service Plan or within 60 days following Owner's delivery to Concessionaire of any other Request for Change Proposal, Concessionaire shall provide Owner with a response as to whether, in Concessionaire's opinion, the proposed Owner Change results in entitlement to additional compensation, an extension of time, excuse from compliance or other relief in accordance with this Agreement, including the following:

**14.1.3.1** With respect to a request for change in the Service Plan, a Change to a Service Plan Report and with respect to any other Request for Change Proposal, Concessionaire's detailed estimate regarding how the proposed Owner Change will affect Concessionaire's costs of performing the D&C Work and O&M Work;

**14.1.3.2** If the Change Notice is issued before the Revenue Service Availability Date, the effect of the proposed Owner Change on the Project Schedule, including any impacts on Contract Deadlines, taking into consideration Concessionaire's duty to mitigate any delay, and including a time impact analysis meeting the requirements of Section 15.2.3.1(f) if any extension of the Contract Deadlines will be requested in connection with the change;

**14.1.3.3** Where a request for an extension of time to any Contract Deadline is made, a time impact analysis meeting the requirements of Section 15.2.3.1(f) to support such request, and an assessment regarding feasibility of accelerating the Work to meet the original deadline or to reduce the total delay period and, if acceleration is feasible, an estimate of the cost to accelerate;

**14.1.3.4** Concessionaire's planned actions to mitigate, the additional compensation, extension of time, excuse from compliance and other consequences of the Owner Change required under Section 15.11;

**14.1.3.5** The effect (if any) of the proposed Owner Change on Performance Requirements, the Activity Noncompliance Occurrence Table, Noncompliance Events, the Payment Mechanism, the Asset Management Plan and Handback Requirements; and

**14.1.3.6** Any other relevant information related to the proposed Owner Change.

#### **14.1.4 LRV Option; Service Changes**

**14.1.4.1** Owner's exercise of LRV Option A shall be considered direction to Concessionaire to prepare a draft Change Order adding supply of additional LRVs as specified in the LRV Option Notice for the LRV Option Price, adjusted to account for escalation as provided in this Agreement, and to prepare a draft Change Order as described in Section 12.1.3. It shall also be considered direction to start Work to the extent specified in the LRV Option Notice, regardless of the status of the Change Order. Escalation of the LRV Option Price shall be based on:

(a) 25% of the percentage change between (i) an average of the previous 12 months of monthly index values to be determined by reference to the most recently published Escalation Index 1 monthly index value as of the Proposal Date and (ii) an average of the previous 12 months of index values to be determined by reference to the most recently published Escalation Index 1 monthly index value as of the business day immediately preceding the date on which the LRV Option is exercised,

(b) 25% of the percentage change between (i) an average of the previous 12 months of monthly index values to be determined by reference to the most recently published Escalation Index 3 monthly index value as of the Proposal Date and (ii) an average of the previous 12 months of the index values to be determined by reference to the most recently published Escalation Index 3 monthly index value as of the business day immediately preceding the date on which the LRV Option is exercised, and

(c) 50% of the percentage change between (i) an average of the previous 12 months of monthly index values to be determined by reference to the most recently published Escalation Index 4 monthly index value as of the Proposal Date and (ii) an average of the previous 12 months of the index values to be determined by reference to the most recently published Escalation Index 4 monthly index value as of the business day immediately preceding the date on which the LRV Option is exercised.

**14.1.4.2** The Parties acknowledge that a change from Service Level 2 to Service Level 3 will require performance of certain additional Work relating to the OMF as described in the Technical Proposal (specifically, that section of the Technical Proposal entitled "Design and Construction Technical Solutions"). Accordingly, in connection with direction by Owner to change to Service Level 3, the Parties shall negotiate a Change Order specifying the price, delivery schedule and scope of such additional Work. The schedule established by such Change Order shall be consistent with the schedule for delivery of additional LRVs as described in Section 12.4.

**14.1.4.3** If it becomes apparent that demand warrants implementation of service providing greater Peak Period capacity than is required for Service Level 3, the Parties shall consult regarding changes that would be required to meet demand and enter into negotiations regarding a Modification to implement such changes and provide additional compensation to Concessionaire. Any change to service providing greater Peak Period capacity than is required for Service Level 3 shall require mutual agreement of the Parties. Section 8.2 identifies certain other circumstances under which a Change Order is required for service changes.

**14.1.4.4** A Modification establishing a Service Level with higher Peak Period capacity than Service Level 3 or implementing direction issued by Owner under

Section 12.4 shall include revised commitments regarding maximum power usage for Service Level 3, replacing the commitments in Attachment 2 to Appendix E of Exhibit 4D.

#### **14.1.5 Negotiation and Directed Changes**

**14.1.5.1** Following Owner's receipt of Concessionaire's response provided under Section 14.1.3 and Owner's further assessment of the cost, schedule and other impacts of the proposed Owner Change, Owner and Concessionaire, giving due consideration to such assessments, shall engage in good faith negotiations to reach agreement on the terms of a Change Order including (a) adjustment of the Contract Deadlines as appropriate and/or (b) either (i) the Compensation Amount to which Concessionaire is entitled, determined in accordance with Exhibit 13A, or (ii) any net cost savings and schedule savings to which Owner is entitled under Exhibit 13A. The Change Order shall specify, as applicable, the timing and method for payment of any Compensation Amount or for realizing any net savings in the cost of the Work.

**14.1.5.2** If Owner and Concessionaire are unable to reach agreement on a Change Order, Owner may seek to resolve the Dispute under the Dispute Resolution Procedures without issuing a Directive Letter, or it may issue a Directive Letter under Section 14.3.1 directing Concessionaire to proceed with the performance of some or all of the proposed Owner Change notwithstanding such disagreement. Concessionaire shall proceed immediately with the Work as directed, pending execution of a formal Change Order (provided that, if Concessionaire disagrees with the description of the original scope of Work in the Directive Letter, Concessionaire shall proceed as directed but shall have the right to assert a Claim that an Owner Change has occurred with respect to such Work). If Work proceeds based on a Directive Letter, Concessionaire shall maintain force account records for such Work in accordance with Exhibit 13A, pending execution of a Change Order.

#### **14.2 Concessionaire Modification Requests**

**14.2.1** By submittal of a Modification Request using a form approved by Owner, Concessionaire may request Owner to approve (a) a Change Order increasing compensation as described in Section 14.2.2, (b) modifications to the requirements of Books 2 through 5, (c) modifications to Exhibits 2 and 17, or (d) adjustments to the Project ROW. The Modification Request shall state Concessionaire's detailed estimate of net impacts (positive and negative) on costs and schedule attributable to the requested change, the effect (if any) of the requested change on Performance Requirements, the Activity Noncompliance Occurrence Table, the Asset Management Plan and Handback Requirements and such other relevant information related to carrying out the requested change.

**14.2.2** Before Financial Close, the Parties shall ascertain whether Concessionaire is entitled to an increase in compensation as specified in Article 4 and Owner will issue a Change Order as appropriate. No increase in compensation will be allowed for costs due to negligence, willful misconduct or breach of contract by any Concessionaire-Related Entity.

**14.2.3** Except with respect to Modifications under Section 7.5.1.4, 8.2.5, 14.2.2 or 14.2.6, Owner's consideration of any Modification Request is a courtesy to Concessionaire and Owner may accept or reject any Modification Request proposed by Concessionaire for any reason or for no reason. If Owner is prepared to accept a Modification Request (or if Section 7.5.1.4, 8.2.5, 14.2.2 or 14.2.6 applies), the Parties shall engage in good faith negotiations to reach agreement on the terms of a Change Order.

**14.2.4** In determining the Compensation Amount for any Change Order issued under this Section 14.2, the Parties shall consider Owner's overhead, administrative and out-of-pocket costs resulting from the change as well as Concessionaire's costs.

**14.2.5** Certain minor changes without significant cost savings or revenue benefits may be approved by Owner as Deviations on a "no-cost" basis, as described in Sections 7.2.3 and 8.1.3, and in such event shall not require a Change Order. Any other change in the requirements of the Contract Documents shall require a Change Order.

**14.2.6** Owner shall not be entitled to reject any element of a Modification Request that is required in order for Concessionaire to comply with applicable Law or the Owner-Provided Approvals.

### **14.3 Directive Letters**

**14.3.1** Owner may at any time issue a Directive Letter to Concessionaire regarding any matter for which a Change Order can be issued or in the event of any Dispute regarding the scope of the Work or whether Concessionaire has performed the Work in accordance with the requirements of the Contract Documents. The Directive Letter will state that it is issued under this Section 14.3, will describe the Work to be performed and will state the basis for determining compensation, if any and schedule adjustment, if any. Concessionaire shall proceed immediately as directed in the letter, pending the execution of a formal Change Order (or, if the letter states that the Work is within Concessionaire's original scope of Work or is necessary to comply with the requirements of the Contract Documents, Concessionaire shall proceed with the Work as directed but shall have the right to assert a Claim that an Owner Change has occurred).

**14.3.2** The fact that a Directive Letter was issued by Owner shall not be considered evidence that an Owner Change has occurred. The determination whether an Owner Change has occurred shall be based on an analysis of the original requirements of the Contract Documents and a determination as to whether the Directive Letter in fact constituted a change in those requirements.

### **14.4 Betterment Change Orders**

The process for negotiation and issuance of Change Orders relating to Betterments is stated in Section 7.6.6.

### **14.5 Allowable Costs**

Except as otherwise provided in Exhibit 13A, Concessionaire shall not be entitled to any indirect costs under any Change Order, regardless of whether the Change Order amount is based on force account records, based on mutual agreement or determined under the Dispute Resolution Procedures.

### **14.6 Payments and Credits**

**14.6.1** If a Change Order issued under this Article 14 involves a net increase in the costs of Work to be performed during the Design-Build Period, the Change Order will provide for the Compensation Amount to be paid as specified in Section 13.1.1.6. If the Change Order involves a net increase in the costs of Work to be performed during the O&M Period, Owner will pay the Compensation Amount through adjustments to the Availability Payments, calculated to result in a neutral monthly cash flow for Concessionaire.

**14.6.2** If a Change Order issued under this Article 14 involves a net reduction in costs of Work, the Change Order will provide for the credit to be applied either to payments during the Design-Build Period or to Availability Payments, as applicable, as the savings accrue. In either case the credit will be determined in accordance with Section 1.1.5 of Exhibit 13A.

**14.6.3** If a Change Order issued under this Article 14 affects Concessionaire's cost of supplying Option LRVs, the Change Order shall either provide for an increase in the LRV Option Price to pass through the additional costs to Owner or a reduction in the LRV Option to pass through the reduction in costs to Owner.

## **ARTICLE 15. RELIEF EVENTS; FORCE MAJEURE EVENTS; NON-CONCESSIONAIRE CAUSED DISRUPTIONS**

### **15.1 Overview**

#### **15.1.1 General**

This Article 15 sets forth the requirements for obtaining relief with respect to Relief Events (excluding Owner Changes which are addressed in Article 14), Force Majeure Events and Non-Concessionaire Caused Disruptions. Refer to Exhibit 13A for additional information regarding determination of (a) Incremental Costs incurred in performance of Extra Work and changes in the Work due to Relief Events and (b) Delay Costs and Delay Interest for Relief Events and Force Majeure Events.

#### **15.1.2 General Limitations**

**15.1.2.1** Notwithstanding anything to the contrary in this Agreement, the occurrence of the Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption shall not excuse Concessionaire from liability that arose before such occurrence or that occurs concurrently.

**15.1.2.2** Concessionaire shall not be entitled to assert a Relief Event, Force Majeure Event, Non-Concessionaire Caused Disruption or other basis for a Claim with respect to the consequences of any violation of Law or Governmental Approval, or negligence, recklessness, willful misconduct, fault, breach of contract, fraud, or other noncompliance with the requirements of the Contract Documents (including Safety Standards) by any of Concessionaire-Related Entities.

### **15.2 Relief Event, Force Majeure Event and Non-Concessionaire Caused Disruption Claim Process**

This Section 15.2 establishes the process to be followed to obtain a Change Order for a Relief Event (excluding Owner Changes), Force Majeure Event and Non-Concessionaire Caused Disruption. Owner Changes will be processed in accordance with Article 14.

#### **15.2.1 General Provisions**

**15.2.1.1** Concessionaire's rights under this Article 15 will be determined based on the terms of the Contract Documents, without regard to the fact that a Contractor may have agreed to be responsible for the consequences of events if Concessionaire cannot obtain relief with respect to such events under this Article 15. In such case, for purposes of evaluating the merits of any Request for Change Order under this Article 15, the costs incurred or impact on schedule or performance of Work will be deemed to be directly incurred by Concessionaire.

**15.2.1.2** Concessionaire acknowledges and agrees that it is not entitled to any Incremental Costs associated with a Force Majeure Event or Non-Concessionaire Caused Disruption except as otherwise provided in Section 15.3.5.3 and to the extent Delay Interest is payable in relation to a Force Majeure Event.

## **15.2.2 PCO Notice Concerning Relief Event or Force Majeure Event**

**15.2.2.1** As a condition precedent to a Change Order for a Relief Event or Force Majeure Event under this Agreement, Concessionaire shall deliver to Owner a notice ("PCO Notice") stating the event or situation which Concessionaire believes justifies issuance of a Change Order.

**15.2.2.2** The PCO Notice shall include, to the maximum extent of the information then available:

(a) A description of the Relief Event or Force Majeure Event and its date and time of occurrence or inception in reasonable detail;

(b) Concessionaire's preliminary good faith estimate of the allowable Incremental Costs and/or Delay Costs, if any, and of any anticipated net reduction in cost of the work that will occur, and the basis for such estimates;

(c) Concessionaire's preliminary good faith estimate of any (i) impacts on the Critical Path directly attributable to the Relief Event or Force Majeure Event, and (ii) Delay Interest payable during the RSA Extension Period associated with the Critical Path delay, and the basis for such estimate;

(d) Concessionaire's preliminary good faith analysis of any adverse effect of the Relief Event or Force Majeure Event on its ability to perform its obligations under this Agreement;

(e) The actions Concessionaire has taken and will take to mitigate the consequences of the Relief Event or Force Majeure Event required under Section 15.11; and

(f) The type and amount of insurance that may be applicable and amounts that have been or are anticipated to be collected under such insurance.

**15.2.2.3** The nature and scope of the potential Change Order stated in the PCO Notice shall remain consistent (except for reductions) for the remainder of the Change Order and Claim process and, if applicable, during any subsequent dispute resolution proceeding. Concessionaire may assert new consequences of a Relief Event or Force Majeure Event if the consequences (a) are of a different nature or scope, (b) first arise or occur after the PCO Notice is delivered, and (c) could not have been anticipated through the exercise of Good Industry Practice before delivering the PCO Notice. If any such new consequences arise or occur, or otherwise come to Concessionaire's attention, before Owner's issuance of a Change Order relating to the PCO Notice, Concessionaire shall report them to Owner by a supplemental PCO Notice and incorporate them into the Request for Change Order.

**15.2.2.4** Concessionaire shall submit the PCO Notice on a standardized form approved by Owner.

**15.2.2.5** Concessionaire shall assign an exclusive identification number for each PCO Notice, determined by chronological sequencing. The exclusive identification number shall be used on each of the following corresponding documents: (i) Request for Change Order; (ii) supplemental notices and submissions pertaining to the PCO Notice; and (iii) the final Change Order.

**15.2.2.6** If a single Relief Event or Force Majeure Event is a continuing cause of delay or interference, only one PCO Notice will be necessary.

### **15.2.3 Request for Change Order for Relief Event or Force Majeure Event**

**15.2.3.1** Concessionaire shall, within 60 days after the date of the PCO Notice, submit to Owner a Request for Change Order that provides Concessionaire's complete reasoning for any Incremental Costs, Delay Costs or Delay Interest, any extension of time and any other requested relief relating to the Relief Event or Force Majeure Event. The "Request for Change Order" shall be consistent with the PCO Notice and include the following information, to the maximum extent then available:

(a) Full details of the Relief Event or Force Majeure Event, including its nature, the date of its occurrence, its duration (if the Relief Event or Force Majeure Event and its effects have ceased) or estimated duration (if the Relief Event or Force Majeure Event and its effects have not ceased), affected locations, and items of Work affected or necessary Extra Work. Impacts to the O&M Work, if any, shall be stated by Contract Year;

(b) Identification of all pertinent documents and the substance of any oral communications, if any, relating to the Relief Event or Force Majeure Event and the name of the person or persons making such material oral communications;

(c) Identification of the particular provisions of the Contract Documents that are claimed to entitle Concessionaire to the relief sought, and a statement that sets forth the reasons why such provisions entitle Concessionaire to such relief;

(d) Where a request for a Contract Deadline adjustment is made, an assessment regarding feasibility of accelerating the Work to meet the original deadline or to reduce the total delay period and, if acceleration is feasible, an estimate of the cost to accelerate;

(e) If a request for an extension of time, combined with previous extension requests, evidences a delay equal to 10% or more of the Baseline Schedule, and if Owner so requests, evidence that consent of the Lender and Sureties has either been obtained or is not required, either by providing written consent from the Lender and Sureties or a certification from Concessionaire that such consent is not required;

(f) Where a request for an extension of time is made, a time impact analysis that identifies Critical Path impacts (with activity numbers, durations, predecessor and successor activities, resources, costs and reasons why Float is not available), illustrates the effect of schedule changes or disruptions on the Contract Deadlines and complies with the requirements of Part 2A, Section 9.4 of the Technical Provisions. In connection with its time impact analysis, the Request for Change Order shall include:

(i) A Project Schedule update comparing the proposed new schedule to the Baseline Schedule or most recent update to the Project Schedule, as appropriate. The Project Schedule update shall demonstrate to Owner's reasonable satisfaction that the event or circumstance (A) had a specific impact on the Critical Path and either was the sole cause of such impact or is

concurrent with other identified delay(s), and (B) could not have reasonably been avoided by re-sequencing of the Work or other reasonable alternatives;

(ii) Information regarding the estimated costs of accelerating the schedule to reduce or avoid delay to the extent practicable, as well as information regarding the Delay Costs and Delay Interest payable by Owner if the schedule is not accelerated; and

(iii) Such other supporting documentation as may reasonably be required by Owner;

(g) A detailed, itemized estimate of all allowable amounts claimed under Sections 15.3 through 15.7. To the extent appropriate, the estimate shall be presented in terms of the eligible direct costs as described in Exhibit 13A;

(h) For Requests for Change Order submitted during the O&M Period, separate estimates for capital costs, operations and maintenance costs and other allowable costs, meeting the requirements of clause (g). The capital cost estimate shall be based on the assumption that the work will be paid for through progress payments; the operating cost estimate shall be based on the assumption that the work will be paid for through an adjustment to Availability Payments; and the estimate of other costs shall be based on the assumption that payments will be made as costs are incurred. If a Change Order is issued that includes an adjustment to the Availability Payment, the adjustment shall, unless otherwise agreed by the Parties, (i) be allocated among each of the remaining Contract Years, (ii) be stated in current Contract Year dollars and identify the current Contract Year as the base date for escalation, and (iii) be accompanied by a narrative justification regarding the proposed allocation and schedules updating the Availability Payments to current year dollars as well as accounting for the adjustment due to the change in the O&M Work;

(i) The effect of the Relief Event or Force Majeure Event on Concessionaire's ability to perform any of its obligations under this Agreement, including details of the relevant obligations, the effect on each such obligation, and the likely duration of that effect;

(j) An explanation of the measures that Concessionaire has previously taken to prevent, and proposes to undertake to prevent or mitigate the consequences of the Relief Event or Force Majeure Event required under Section 15.11; and

(k) The type and amount of insurance that may be applicable and amounts that have been or are anticipated to be collected under such insurance.

**15.2.3.2** Concessionaire shall submit the Request for Change Order on a standardized form approved by Owner.

**15.2.3.3** If, following issuance of any Request for Change Order, Concessionaire receives or becomes aware of any further information relevant to the Request for Change Order with respect to the Relief Event or Force Majeure Event and/or impact on cost, schedule, Closures or performance of Work, including information on new consequences as described in Section 15.2.2.3, Concessionaire shall submit such further information to Owner as a supplement to its original Change Order documentation as soon as possible but in no event later than the date the Change Order is issued. Concessionaire may not use such a

supplement as the basis for avoiding time limitations applicable to PCO Notices and Requests for Change Order. Owner may request from Concessionaire any further information that Owner may reasonably require, and Concessionaire shall supply the same within a reasonable period after such request.

**15.2.3.4** All Change Orders issued by the Owner shall be in writing, and neither the fact that Concessionaire submits to Owner a Request for Change Order, nor the fact that Owner monitors force account costs or orally discusses the Work or Change Order in connection with such request, shall in any way be construed as an agreement by Owner that a Relief Event or Force Majeure Event has occurred or that the method of computing any compensation or extension of time, as applicable, is appropriate.

#### **15.2.4 Owner Evaluation and Response to Request for Change Order; Negotiations**

**15.2.4.1** Owner will evaluate the information presented in the Request for Change Order and provide a response to Concessionaire within 45 days, either notifying Concessionaire that the Change Order will be issued as requested or advising Concessionaire regarding issues that remain to be resolved. If Concessionaire complies with the notice and information requirements in Sections 15.2.2 and 15.2.3, but Owner does not provide Concessionaire a response within such 45-day period, then, except as otherwise provided in Section 15.2.6, Concessionaire shall have the right to assert a Claim against Owner for the relevant Relief Event or Force Majeure Event and have its rights with respect to such Claim determined according to the Dispute Resolution Procedures.

**15.2.4.2** If Concessionaire timely complies with the notice and information requirements in Sections 15.2.2 and 15.2.3 and Owner provides a response within the 45-day period indicating that there are matters in dispute regarding the Request for Change Order, then the Parties may mutually elect to commence good faith negotiations to determine the matters in dispute, or Concessionaire may elect to assert a Claim against Owner for the matters in dispute and have its rights with respect to such Claim determined according to the Dispute Resolution Procedures.

**15.2.4.3** If Owner or Concessionaire determines, after engaging in good faith negotiations, that continuation of such negotiations is not likely to resolve the matters in dispute, then, except as otherwise provided in Section 15.2.6, either Party may initiate the Dispute Resolution Procedures.

#### **15.2.5 Notice of Non-Concessionaire Caused Disruption**

**15.2.5.1** As a condition precedent to Concessionaire's right to be excused from compliance or obtain relief from Deductions for a Non-Concessionaire Caused Disruption under this Agreement, Concessionaire shall have (a) identified such Non-Concessionaire Caused Disruption in the O&M Daily Report required by Part 3, Section 1.13.3 of the Technical Provisions for each of the days on which the Non-Concessionaire Caused Disruption occurred or was continuing and (b) provided detailed information regarding each such Non-Concessionaire Caused Disruption that occurred during the month in a written notice (the "NCD Notice") delivered concurrently with its Monthly Performance Monitoring Report required by Part 3, Section 1.13.3 of the Technical Provisions.

**15.2.5.2** The NCD Notice shall include information regarding:

(a) The time of occurrence and duration of the Non-Concessionaire Caused Disruption;

(b) The effect of the Non-Concessionaire Caused Disruption on Concessionaire's ability to perform any of its obligations under the Agreement, including details of the relevant obligations, the effect on each such obligation, and the likely duration of that effect;

(c) An explanation of the measures that Concessionaire has previously taken to prevent, and proposes to undertake to mitigate the consequences of the Non-Concessionaire Caused Disruption required under Section 15.11; and

(d) The type and amount of insurance that may be applicable and amounts that have been or are anticipated to be collected under such insurance if there was any associated Loss suffered by Concessionaire.

Such information may be provided by cross-referencing relevant provisions in the Monthly Performance Monitoring Report, as appropriate.

#### **15.2.6 Waiver**

**15.2.6.1** Time is of the essence in Concessionaire's delivery of its PCO Notice, NCD Notice, supplemental PCO Notice and Request for Change Order.

**15.2.6.2** If any PCO Notice is delivered more than 45 days after Concessionaire first discovered (or should have discovered in the exercise of reasonable prudence) the relevant condition or occurrence, Concessionaire shall have no right to make a Claim with respect to the Relief Event or Force Majeure Event for (as applicable) (a) any costs incurred before the date of delivery of the PCO Notice that could have been avoided had the PCO Notice been timely delivered, (b) an extension of time with respect to any delay in a Critical Path which accrued before the date of delivery of the PCO Notice or that could have been avoided had the PCO Notice been timely delivered, or (c) an excuse from compliance during the O&M Period to the extent the noncompliance could have been avoided had the PCO Notice been timely delivered.

**15.2.6.3** If any PCO Notice is delivered later than 90 days after Concessionaire first discovered (or should have discovered in the exercise of reasonable diligence) the relevant condition or occurrence, Concessionaire shall have no right to make any Claim with respect to the Relief Event or Force Majeure Event, unless Concessionaire can show, based on a preponderance of the evidence, that Owner was not materially prejudiced by the lack of notice.

**15.2.6.4** Without limiting Sections 15.2.6.2, 15.2.6.3 or 15.3, if any PCO Notice concerns a Relief Event involving conditions for which inspection and/or investigation by Owner is necessary to verify the conditions before the area is disturbed or circumstances change, Concessionaire shall be deemed to have waived the right to make a Claim with respect to the Relief Event to the extent that Owner is not afforded the opportunity to make such inspection or investigation except in circumstances where emergency action is necessary and precludes such prior inspection or investigation. This requirement applies to the Relief Events described in items (a) through (g) and item (l) of the definition of Relief Event. In addition, Concessionaire shall be deemed to have waived the right to make a Claim with respect to any

impacts of a Relief Event that could have been avoided or mitigated had the PCO Notice been timely delivered.

**15.2.6.5** If Concessionaire fails to identify a Non-Concessionaire Caused Disruption in the relevant O&M Daily Report or if it fails to provide required information regarding a Non-Concessionaire Caused Disruption in its monthly NCD Notice as required under Section 15.2.5, Concessionaire shall have no right to claim excuse from performance or assert entitlement to relief from Deductions with respect to such event.

### **15.2.7 Open Book Basis**

Concessionaire shall share with Owner all data, documents and information, and shall conduct all discussions and negotiations, pertaining to a claimed Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption on an Open Book Basis.

## **15.3 Provisions Relating to Compensation for Certain Relief Events**

### **15.3.1 Differing Site Conditions**

For Relief Events under clause (b) of the Relief Event definition (concerning Differing Site Conditions), subject to Section 6.2, compensation payable by Owner shall be limited as follows:

- (a) Concessionaire shall bear the first \$7,500,000 of aggregate Incremental Costs;
- (b) The Parties shall share equally in the next \$7,500,000 of aggregate Incremental Costs; and
- (c) Owner will be responsible for all aggregate Incremental Costs exceeding \$15,000,000 (to the extent that costs are not fully addressed by clauses (a) and (b) above).

### **15.3.2 Utility-Related Relief Events**

**15.3.2.1 Materially Inaccurate Utility Information.** For Relief Events under clause (e) of the Relief Event definition, compensation payable by Owner shall be limited as follows:

- (a) Concessionaire shall bear the first \$2,750,000 of aggregate Incremental Costs (including payments by Concessionaire to Utility Owners) that would not have been required had the information provided been accurate;
- (b) The Parties shall share equally in the next \$2,750,000 of aggregate Incremental Costs;
- (c) Owner will be responsible for all aggregate Incremental Costs exceeding \$5,500,000 to the extent that costs are not fully addressed by clauses (a) and (b) above; and
- (d) Owner will be responsible for Delay Costs and Delay Interest as provided in Sections 15.6 and 15.7.

In the event that any Utility Owner has agreed to be responsible for costs incurred due to Materially Inaccurate Utility Information, the Parties shall take appropriate steps to seek recovery from the Utility Owner. If Owner receives payment from the Utility Owner on account of costs incurred by Concessionaire, such amounts will be paid to Concessionaire and the amounts reimbursed will not be considered "Incremental Costs" for purposes of this Section 15.3.2.1.

**15.3.2.2** Utility Owner Delays. For Relief Events under clause (o) of the Relief Event definition, compensation payable by Owner shall be limited as follows:

(a) Until the \$5,000,000 limit identified in clause (c) below has been reached, Owner will be responsible for Delay Interest as provided in Section 15.7 only with respect to Owner's 50% share of the Utility Owner Delay;

(b) Concessionaire shall bear the first \$750,000 of aggregate Incremental Costs directly attributable to the Utility Owner Delays;

(c) The Parties shall share equally in aggregate Incremental Costs in excess of \$750,000 until the total Incremental Costs plus interest on Project Debt directly attributable to Utility Owner Delays (including Delay Interest as well as interest paid by Concessionaire with respect to its 50% share of the Utility Owner Delay) reach \$5,000,000; and

(d) Once the \$5,000,000 limit identified in clause (c) above has been reached, Owner will be responsible for Delay Interest and all aggregate Incremental Costs incurred directly attributable to the Utility Owner Delays, to the extent that such costs are not fully addressed by clauses (a), (b) and (c) above.

### **15.3.3 Hazardous Materials Relief Events**

**15.3.3.1** Hazardous Materials Remediation During Demolition. With respect to Relief Events under clause (f) of the Relief Event definition (Hazardous Waste required by applicable Law to be recycled, treated, stored or disposed at a "Designated Facility" as defined in COMAR 26.13.01.03, discovered during or in connection with the demolition of buildings, fixtures, in-ground utilities or other improvements, in the categories for which unit prices are provided in Exhibit 4B, Table 2), the Parties shall share the risk as follows:

(a) Concessionaire shall bear the first \$595,000 of aggregate costs of such Hazardous Materials Management relating to demolition, determined based on actual quantities and applicable unit prices;

(b) The Parties shall share equally in the next \$198,333.33 of aggregate costs of such Hazardous Materials Management relating to demolition, determined based on actual quantities and applicable unit prices; and

(c) Owner will be responsible for costs of such Hazardous Materials Management relating to demolition that are not fully addressed by Sections 15.3.3.1(a) and 15.3.3.1(b), determined based on actual quantities and applicable unit prices.

No compensation will be allowed under this Section 15.3.3.1 for any Work relating to Hazardous Materials Management relating to demolition except to the extent that such Work is

covered by the definition of the relevant unit-priced items. No time extension will be allowed with respect to Relief Events under clause (f) of the Relief Event definition.

**15.3.3.2 Unanticipated Hazardous Materials.** With respect to Relief Events under clause (g) of the Relief Event definition (that is, discovery of certain unanticipated Pre-Existing Hazardous Materials or sudden spills), Owner will be responsible for certain costs of Hazardous Materials Management, determined as follows:

(a) If the Hazardous Materials Relief Event concerns a type of Hazardous Materials for which a unit price is provided but the conditions associated with such Hazardous Materials differ materially from those forming the basis for the original unit pricing, compensation shall be determined based on actual quantities and the specified unit prices, as equitably adjusted to account for the differences in conditions.

(b) If the Hazardous Materials Relief Event concerns Hazardous Materials for which unit prices are not provided, compensation is limited to reasonable Incremental Costs of Hazardous Materials Management directly attributable to such discovery, as documented and justified by Concessionaire in accordance with Exhibit 13A.

**15.3.3.3 General Limitations.** Concessionaire's rights to compensation with respect to Hazardous Materials Relief Events are limited as specified in Section 7.8.2 and this Section 15.3.3. Nothing in this Section 15.3.3 shall affect Owner's and Concessionaire's respective responsibilities and liabilities under Section 7.8.

#### **15.3.4 Non-Discriminatory Change in O&M Standards**

##### **15.3.4.1 Capital Asset Work.**

(a) Subject to Section 15.3.4.1(b), Owner will compensate Concessionaire for Incremental Costs of Work to obtain or modify capital assets (including Renewal Work) required as a direct result of a Non-Discriminatory Change in O&M Standards or change in federal Law and which is either (i) not contemplated by the Operating Plan, Maintenance Plan or Asset Management Plan; or (ii) directed by Owner to be undertaken earlier than contemplated by the Operating Plan, Maintenance Plan or Asset Management Plan; provided that Concessionaire is not be entitled to compensation for costs incurred with respect to Work under clause (i) or acceleration of development under clause (ii) if Concessionaire would be unable to meet the Performance Requirements without such Work.

(b) Incremental Costs under Section 15.3.4.1(a) shall be determined with reference to (i) the actual, reasonable costs incurred and (ii) the avoided Renewal Work (Lifecycle) costs that would have been incurred had the capital asset Work been undertaken as contemplated by the Operating Plan, Maintenance Plan or Asset Management Plan. Concessionaire shall obtain prior written authorization from Owner before undertaking any Work under Section 15.3.4.1(a), and may not seek a Change Order with respect to any Work undertaken without prior written authorization.

##### **15.3.4.2 Incremental Operations Costs.**

(a) If during a Contract Year the total Incremental Costs directly attributable to all Non-Discriminatory Changes in O&M Standards, excluding costs covered by Section 15.3.4.1, exceed \$100,000 (in Base Date dollars), Owner will

compensate Concessionaire for 50% of the excess amount up to \$200,000 (in Base Date dollars) incurred during such year, and will compensate Concessionaire for 100% of Incremental Costs exceeding \$200,000 incurred during such year (in Base Date dollars).

(b) Conversely, if during a Contract Year the net savings to Concessionaire directly attributable to all Non-Discriminatory Changes in O&M Standards exceed \$100,000 (in Base Date dollars), Owner will be entitled to a credit against the Availability Payments equal to 50% of the net savings up to \$200,000 (in Base Date dollars) incurred during such year and 100% of the net savings exceeding \$200,000 incurred during such year.

(c) At the beginning of each Contract Year, the Parties shall escalate and document the revised threshold limits for the risk sharing under this Section 15.3.4.2 based on the General Escalation Factor (ESCG<sub>n</sub>) for that year.

### **15.3.5 Relief Event Damage or Destruction to Project Improvements**

For the Relief Events under clauses (l) and (m) of the Relief Event definition (concerning damage or destruction to Project improvements or assets due to Force Majeure Events), subject to Section 8.10.2.1, and notwithstanding the principle in the Contract Documents that Concessionaire is not entitled to Incremental Costs arising out of, relating to or resulting from Force Majeure Events:

**15.3.5.1 Costs Covered by Builder's Risk Insurance.** During the Design-Build Period, if the event in question is required to be covered by builder's risk insurance under this Agreement, Concessionaire shall bear all costs of repair, restoration or replacement of damage or destruction to the improvements, subject to the right to receive insurance proceeds and the right to receive reimbursement from Owner for reasonable costs of repair, restoration or replacement of the improvements exceeding the required insurance limits (or actual insurance limits, if higher).

**15.3.5.2 Costs Not Covered by Builder's Risk Insurance.** During the Design-Build Period, if the event in question is not required to be covered by builder's risk insurance under this Agreement, Owner will reimburse Concessionaire for reasonable costs of repair, restoration or replacement of the improvements except to the extent that proceeds of other insurance (required under this Agreement or otherwise held or placed by any Concessionaire-Related Entity for the Project) are available to pay such costs.

**15.3.5.3 O&M Damage Deductible.** During the O&M Period, Incremental Costs incurred to repair, restore or replace Project capital assets required as the result of such Relief Events will be reimbursed by Owner only after the O&M Damage Deductible under Section 8.8.3.5(b) has been exceeded. Once the deductible limit is reached, Owner will compensate Concessionaire for eligible Incremental Costs of such repair, restoration or replacement in excess of the deductible limit (excluding such costs covered by insurance, and excluding deductibles and self-insured retention).

### **15.3.6 Compensation for Relief Events in General**

Subject to the limitations in this Article 15 and Exhibit 13A, upon the occurrence of a Relief Event, Concessionaire will be allowed compensation for Incremental Costs incurred. In addition, upon the occurrence of certain types of Relief Events, Concessionaire may be entitled to compensation pursuant to Sections 15.6 through 15.8, and upon the occurrence of Extended

Delays during the Design-Build Period, Concessionaire may be entitled to compensation pursuant to Section 15.9.

### **15.3.7 Sales Tax on LRVs.**

With respect to a Relief Event under clause (p) of the Relief Event definition (concerning assessment of sales or use tax on LRVs delivered to Concessionaire), compensation payable to Concessionaire shall be limited to the dollar amount of such sales or use tax, without markup, and may be invoiced no earlier than payment to the taxing Governmental Authority by or on behalf of Concessionaire.

## **15.4 Time Extension**

### **15.4.1 General**

Concessionaire shall be entitled to extension of applicable Contract Deadlines by the period that a Relief Event or Force Majeure Event results in a delay to the Critical Path required to achieve Revenue Service Availability or Final Completion, as applicable, beyond the original Contract Deadline, subject to the limitations set forth in this Article 15 and satisfaction of relevant conditions or requirements set forth in the Contract Documents, including provision of a time impact analysis under Section 15.2.3.1(f) regarding responsibility for concurrent delays and undertaking appropriate measures to mitigate delays under Section 15.11.

### **15.4.2 Extension of Long Stop Date for Certain TIFIA Loan Terms**

If the credit agreement for the TIFIA Loan fills in the blanks in clause (a)(ii) of the definition of "Development Default" in the TIFIA Term Sheet with a number greater than zero (i.e. if the TIFIA Loan provides that Concessionaire will be in default for failure to achieve "Substantial Completion" earlier than 12 months after the RSA Deadline), then the Long Stop Date shall be extended by the same number of months. For example, if the blank is filled in with the number 3, then the Long Stop Date will be extended by three months.

## **15.5 Excuse from Compliance**

**15.5.1** Except as expressly provided in this Agreement, where a Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption occurs, the obligations of each Party in accordance with this Agreement which are affected by the Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption will be suspended, but only to the extent that, and for so long as the Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption prevents that Party from meeting its obligations in accordance with this Agreement.

**15.5.2** A Party's failure to perform its obligations in accordance with this Agreement which are suspended in accordance with Section 15.5.1:

- (a) Will not be a breach of this Agreement, a Concessionaire Default, a Default Termination Event or give rise to a right to terminate other than either Party's right to terminate this Agreement under Section 19.2 for an Extended Delay;
- (b) Subject to Sections 15.5.4 through 15.5.8, will not result in the accrual of Noncompliance Points;
- (c) Subject to Sections 15.5.4 through 15.5.8, will not result in Deductions being applied or OTP Factors being allocated in accordance with Section 15.5.1 in the

case of a suspension as a result of (i) a Relief Event; (ii) an event set out in clause (a), (i), (j) or (l) of the definition of Non-Concessionaire Caused Disruption; or (iii) the initial 48 hours of any Grace Period Event or combination of Grace Period Event(s) during a 30-day period (each a “Relevant Event”);

(d) Subject to Section 15.5.3 and 15.5.6 and notwithstanding the non-accrual of Noncompliance Points under Section 15.5.2(b), during a 30-day period in which a suspension occurs due to a Grace Period Event, following expiration of the Grace Period, Deductions may be applied or OTP Factors may be allocated.

**15.5.3** The total of any Deductions applied under Section 15.5.2(d) and OTP Factors allocated under Section 15.5.6 may not reduce the Availability Payment below the sum of (a) the Partial Service Payment and (b) the value of scheduled principal repayments and interest on Concessionaire’s Project Debt obligations for the relevant period.

**15.5.4** If any Activity Noncompliance Occurrence is directly attributable to a Relevant Event, the obligations of the Concessionaire will be suspended by extending the Response Time, Rectification Time or Application (Maximum Exposure) Time applicable to such Activity Noncompliance Occurrence. If no Response Time, Rectification Time or Application (Maximum Exposure) Time applies to the Activity Noncompliance Occurrence, the corresponding Activity Noncompliance Event will be deferred. The extension or deferral shall be for a reasonable period of time under the circumstances, taking into account the scope of the efforts necessary to cure, the effect of the relevant Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption on Concessionaire’s ability to respond to or rectify (as applicable), availability of temporary remedial measures, and need for rapid action due to impact of the Activity Noncompliance Occurrence on safety or traffic movement.

**15.5.5** Subject to Sections 15.5.7 and 15.5.8, if any Operations Availability Noncompliance Event is directly attributable to a Relevant Event, the Concessionaire will not be allocated OTP Factors.

**15.5.6** Subject to Sections 15.5.7 and 15.5.8, if any Operations Availability Noncompliance Event is directly attributable to a Grace Period Event and continues after expiration of the Grace Period, then:

(a) for the first 13 days following the expiration of the Grace Period only 10% of the applicable OTP Factors may be allocated to Concessionaire;

(b) for the next 15 days following the time period under Section 15.5.6(a), only 5% of the applicable OTP Factors may be allocated to Concessionaire; and

(c) if the Operations Availability Noncompliance Event continues beyond the time period under Section 15.5.6(b), a new Operations Availability Noncompliance Event will be deemed to start on the day after expiry of such time period and the Operations Availability Noncompliance Event will be subject to a new Grace Period and OTP Factor reductions in accordance with Sections 15.5.6(a) and (b) until the Operations Availability Noncompliance Event ceases to be directly attributable to the Grace Period Event.

**15.5.7** Concessionaire will not be entitled to a waiver or reduction of OTP Factors under Sections 15.5.5 and 15.5.6, if Concessionaire fails to take appropriate action to rectify the Operations Availability Noncompliance Event and restore Normal Service as quickly as possible and, if applicable, within the times and in the manner stipulated in the approved Operating Plan,

the approved Alternate Service Plan and the requirements of Part 3, Section 3.2 of the Technical Provisions.

**15.5.8** With respect to events covered by business interruption insurance required under this Agreement or otherwise obtained by Concessionaire, the waiver or reduction of OTP Factors under Sections 15.5.5 and 15.5.6 and the benefit of the 48-hour Grace Period shall apply only during the waiting period under said insurance and during any period after the limits of such policy are exhausted.

**15.5.9** Nothing in this Section 15.5 entitles Concessionaire to any relief from its obligations in accordance with this Agreement which are not affected by the Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption.

**15.5.10** Neither Party shall be excused from timely payment of monetary obligations under this Agreement based on the occurrence of a Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption.

## **15.6 Reimbursement of Delay Costs**

If the Revenue Service Availability Date is extended due to a Relief Event under items (a) through (g), (h)(1) and item (n) of the definition of Relief Event, Delay Costs (if any) payable to Concessionaire will be determined in accordance with Exhibit 13A. If, after Owner pays Delay Costs, determined in accordance with Exhibit 13A, Concessionaire receives delay in start-up or business interruption insurance proceeds from Insurance Policies required under this Agreement or otherwise obtained by Concessionaire, then Concessionaire shall, by written notice, inform Owner of the amount(s) received, and Owner will be entitled to reimbursement from Concessionaire of the amounts paid by Owner, to the extent of the duplicative recovery.

## **15.7 Reimbursement of Delay Interest**

**15.7.1** The Parties acknowledge that, if the Revenue Service Availability Date is delayed, Concessionaire may be liable to its Lenders for interest accruing during the RSA Extension Period. Except as otherwise provided in Section 15.7.2 or 15.7.3, during any RSA Extension Period, and if Concessionaire's expenses include Delay Interest, Owner will issue a Change Order allowing Concessionaire to be reimbursed for Delay Interest monthly in arrears. No other expenses incurred with respect to the Project Debt will be allowed except in accordance with Section 15.9 concerning Extended Delays. No compensation will be made for loss of anticipated profits or return on equity.

**15.7.2** If the delay is attributable to an event or occurrence for which delay in startup insurance is required under the Contract Documents, Concessionaire shall have no right to be reimbursed for Delay Interest with respect to such event or occurrence, regardless of whether the proceeds available are sufficient to cover the full interest expense incurred during the delay period. In addition, if interest payable during the delay period is recoverable under any other insurance policies required under this Agreement or otherwise obtained by Concessionaire for the Project, Owner's obligation to pay Delay Interest shall be reduced by the insurance proceeds available to make such payments.

**15.7.3** If the Revenue Service Availability Date is concurrently delayed by an event or occurrence that does not qualify as a Relief Event or Force Majeure Event, the RSA Extension Period will not include the period of concurrent delay and therefore Delay Interest will not be reimbursable during the period of concurrent delay.

**15.7.4** If reimbursement of Delay Interest by Owner during the RSA Extension Period would result in a windfall to Concessionaire (for example, if the term of the debt is fixed and as a result of the payment of Delay Interest the obligation will be paid off earlier in the O&M Period than otherwise or if the only Incremental Cost incurred by Concessionaire was the cost of the undrawn lending commitment), Owner shall be entitled to a credit against future Availability Payments to avoid such windfall.

**15.7.5** Notices and requests concerning Delay Interest under this Section 15.7 shall be submitted in accordance with Section 15.2, and Concessionaire shall be required to prove the existence, cause, effect, and timing of any delays due to Relief Events and Force Majeure Events in accordance with Section 15.2.

## **15.8 Return on Equity Invested for Specific Relief Events**

Subject to the limitations in this Article 15 and Exhibit 13A, to the extent that the Critical Path is delayed solely due to an Owner-Caused Delay or delay arising out of a Discriminatory Change in Law (that is, without any concurrent cause), then in addition to compensation otherwise allowed under this Article 15, Concessionaire shall be entitled to compensation to return the Equity IRR to the rate that would have been in effect but for such delay in the Critical Path and resulting delay in commencement of Availability Payments, but in no case greater than the rate of the Original Equity IRR. Such compensation shall be calculated by first updating the most recent Financial Model to account for all other Modifications to the extent not previously incorporated, and then further updating the updated Financial Model to account for the effect of such Owner-Caused Delay or Discriminatory Change in Law. The Availability Payments shall be increased as necessary to eliminate the difference in the Equity IRR between the two updates.

## **15.9 Extended Delays During Design-Build Period**

**15.9.1** The Parties acknowledge that principal payments under the Project Debt are scheduled to commence after the originally-scheduled RSA Deadline, and the Project Debt allows such commencement date to be extended as the RSA Deadline is extended, up to at least 365 days after the originally scheduled RSA Deadline.

**15.9.2** If an Extended Delay occurs, each Party has certain termination rights under Section 19.2. If Concessionaire issues a conditional election to terminate this Agreement due to an Extended Delay, and if Owner elects to continue this Agreement in accordance with Section 19.2, then:

**15.9.2.1** If the RSA Date has not occurred before 366 days after the original RSA Deadline, then for the purposes specified in this Section 15.9.2 only, the RSA Date shall be deemed to be the later of (a) 366 days after the original RSA Deadline or (b) the date on which Revenue Service Availability would have been achieved but for the Critical Path delays caused by Force Majeure and Relief Events for which a time extension is allowable under this Agreement (the "Extended Delay Payment Date").

**15.9.2.2** After the Extended Delay Payment Date, based on an invoice submitted under Section 13.1 identifying principal payments on the Project Debt scheduled to be paid from the RSA Payment, Owner shall pay a portion of the RSA Payment sufficient to enable such principal payments to be made.

**15.9.2.3** In addition, during the period starting on the Extended Delay Payment Date, Owner shall make Availability Payments under this Section 15.9.2 consistent

with the procedures and timing under the Contract Documents, as if Concessionaire were performing the Work during the O&M Period, reduced by an amount equal to Concessionaire's avoided costs (including avoided operations, maintenance and financing costs, if any). Owner acknowledges that Special Lifecycle Payments are not avoidable costs.

**15.9.2.4** Any remaining portion of the RSA Payment will be made in accordance with Section 13.1 following issuance of the Independent Engineer's Certificate of Revenue Service Availability under Section 7.10.2. After the O&M Commencement Date occurs, the final Availability Payment under this Section 15.9.2 will be made, and all subsequent Availability Payments will be made in accordance with Section 13.2 until the end of the Term.

**15.9.2.5** Notwithstanding anything to the contrary in Section 2.4, the Term will end 30 years after the Extended Delay Payment Date.

**15.9.3** Concessionaire acknowledges and agrees that, if the RSA Date is delayed beyond the originally scheduled RSA Deadline due to a delay in the Critical Path that does not constitute grounds for an extension of the RSA Deadline under this Agreement, the RSA Extension Period will not include the period of delay attributable to such inexcusable delays.

**15.9.4** Notices and requests concerning Extended Delays under this Section 15.8 shall be submitted in accordance with Section 15.2, and Concessionaire shall be required to prove the existence, cause, effect, and timing of any delays due to Relief Events and Force Majeure Events in accordance with Section 15.2.

## **15.10 Insurance; Claims Against Third Parties**

**15.10.1** In coordination with Owner and without prejudice to Owner's right to pursue such claims, Concessionaire will be entitled to exercise all rights and remedies available at law to claim for and recover casualty and other damages to the Project from third parties, including the amount of any deductibles under casualty or property insurance policies.

**15.10.2** Requests under this Article 15 (including for Incremental Costs, Delay Costs, Delay Interest, or Availability Payments and debt service under Section 15.9), shall be net of all insurance available to Concessionaire, or deemed to be self-insured by Concessionaire under Section 11.1.4.6, with respect to the Relief Event or Force Majeure Event giving rise to the additional compensation.

**15.10.3** Subject to Sections 15.4 and 15.11, each request for compensation under Section 15.6 or 15.7 shall be net of all delay in start-up or business interruption insurance available to Concessionaire (if any). Proceeds from delay in start-up or business interruption insurance payable to Owner shall not reduce the amount of compensation due Concessionaire under Sections 15.6 and 15.7.

**15.10.4** Except for circumstances governed by Section 11.1.7.2, if (a) a Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption occurs that gives rise to a Loss of the type required to be covered by any Insurance Policy and (b) such Insurance Policy is not in full force and effect (with premiums paid) at the time that such Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption occurs, then Owner will owe no compensation to Concessionaire under this Article 15 or otherwise. If Insurance Policies that cover such Losses are in full force and effect (with premiums paid) at the time that such Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption occurs, and the proceeds of such Insurance Policies are less than the amount of compensation which would have been paid under this Article 15, then after applicable deductibles under this Article 15 have been applied, if

any, Concessionaire may make a request under this Article 15 for the difference (i.e., the value of the Loss net of the insurance amount paid to Concessionaire and other applicable deductions under this Agreement). In no event will Owner compensate Concessionaire for amounts relating to a Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption that, when combined with insurance, would exceed the total amount of compensation that would be paid under any part of this Article 15.

## **15.11 Mitigation of Consequences of any Relief Event, Force Majeure Event, Non-Concessionaire Caused Disruption**

**15.11.1** Concessionaire shall take all steps reasonably necessary to prevent or mitigate the consequences of any Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption, including all steps that would generally be taken in accordance with Good Industry Practice.

**15.11.2** Without limiting the effect of Section 15.11.1, Concessionaire shall not be entitled to make any request for compensation or a time extension for Incremental Costs or Critical Path delays that could have been reasonably avoided through re-sequencing and re-scheduling of the Work and/or other work-around measures (subject to the understanding that the costs of such workaround measures are allowable if justified by equal or greater savings in amounts otherwise payable by Owner for Incremental Costs, Delay Costs and Delay Interest).

**15.11.3** Whenever a Relief Event or Force Majeure Event occurs that results in a delay to the Critical Path, Concessionaire's Request for Change Order shall include an analysis of potential re-sequencing, re-scheduling and other work-around measures and a comparison of the estimated costs of the work-around to the estimated savings in the Compensation Amount that would result. Concessionaire shall cooperate with Owner to identify the re-sequencing, re-scheduling and other work-around measures that will maximize mitigation of costs to Owner taking into account the cost of potential re-sequencing, re-scheduling and other work-around measures. Owner will compensate Concessionaire for the reasonable Incremental Costs of re-sequencing, re-scheduling and other work-around measures identified in accordance with this provision, in the same manner as for Incremental Costs and Delay Costs under Exhibit 13A.

## **15.12 Limitations on Change Orders**

**15.12.1** Change Orders under this Article 15 shall exclude:

(a) 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 Owner in the regular course of business;

(b) Unallowable costs under the following provisions of the federal Contract Cost Principles, 48 CFR § 31.205: 31.205-8 (contributions or donations), 31.205-13 (employee morale, health, welfare, food service, and dormitory costs and credits), 31.205-14 (entertainment costs), 31.205-15 (fines, penalties, and mischarging costs), 31.205-27 (organization costs), 31.205-34 (recruitment costs), 31.205-35 (relocation costs), 31.205-43 (trade, business, technical and professional activity costs), 31.205-44 (training and education costs), and 31.205-47 (costs related to legal and other proceedings);

(c) Amounts paid or to be paid to Affiliates in excess of the pricing Concessionaire could reasonably obtain in an arms' length, competitive transaction with an unaffiliated Contractor;

(d) Except as allowed under Exhibit 13A, those costs incurred in investigating, analyzing, asserting, pursuing or enforcing any potential Claim or Dispute, including legal, accounting, financial advisory and technical advisory fees and expenses, and including such costs in connection with preparing PCO Notices, NCD Notices, Requests for Change Order and final documentation of Claims with respect to Relief Events, Force Majeure Events and Non-Concessionaire Caused Disruptions; and

(e) Any amounts covered by insurance required under Exhibit 7A as set out in Section 15.10.

**15.12.2** Change Orders under this Article 15 shall:

(a) Be in writing;

(b) Take into account any savings in costs or time resulting from the Relief Event or Force Majeure Event; and

(c) Be subject to Concessionaire's obligation to mitigate under Section 15.11.

**15.12.3** Notwithstanding anything in the Contract Documents to the contrary, Concessionaire shall not be entitled to submit a claim for Incremental Costs, Delay Costs, Delay Interest, an extension or other relief that (a) could have been reasonably avoided through proper sequencing, scheduling and coordination of the Work in accordance with the Contract Documents or (b) arises out of or relates to Concessionaire's oversight and coordination of the Work between or among Contractors or others in the Project area.

### **15.13 Sole Entitlement; Release of Claims**

**15.13.1** The relief provided under the Contract Documents (whether through this Article 15, Articles 14 and 19 or the Dispute Resolution Procedures) for a Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption shall represent Concessionaire's sole right to compensation, extensions of time, excuse from compliance and other relief to Concessionaire from the adverse effects of a Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption.

**15.13.2** Nothing in the Technical Provisions shall be construed to create any right of Concessionaire to a claim for additional relief outside of this Article 15 and Articles 14 and 19 and otherwise at law.

**15.13.3** As a condition precedent to Owner's obligation to pay any Compensation Amount, grant an extension of time, excuse compliance or provide any other relief, Concessionaire shall execute a full, unconditional, irrevocable waiver and release, in favor of and in a form reasonably acceptable to Owner, of any other Claims, Losses or rights to relief arising out of such Relief Event, Force Majeure Event, or Non-Concessionaire Caused Disruption that is not the subject of a Dispute.

**15.13.4** Each Change Order shall include the waiver and release required under Section 15.13.3, excluding only such Claims, Losses and rights to relief that are specifically identified as in dispute.

**15.13.5** Concessionaire shall not be entitled to any compensation or damages under this Agreement or at Law from the adverse effects of (a) a Force Majeure Event, except monetary relief available with respect to Force Majeure Events under clauses (l) and (m) of the definition of Relief Event or as otherwise set out under Section 15.5, and (b) a Non-Concessionaire Caused Disruption except as set out under Section 15.5.

#### **15.14 Alternative Arrangements**

Without limiting Owner's step-in rights under this Agreement, during the period of suspension of O&M Work due to occurrence of a Force Majeure Event, Owner may make alternative arrangements for the performance of any suspended obligations, without incurring any liability to Concessionaire.

## **ARTICLE 16. ACTIVITY NONCOMPLIANCE OCCURRENCES, NONCOMPLIANCE EVENTS AND NONCOMPLIANCE POINTS**

### **16.1 Noncompliance Points System**

A Noncompliance Point system will be used to measure Concessionaire performance levels and trigger the remedies stated or referenced in this Article 16, in parallel with the Payment Mechanism. This Article 16 solely pertains to specific remedies available to Owner on account of assessment of Noncompliance Points in conjunction with the occurrence of Noncompliance Events occurring during the O&M Period and does not affect Deductions from Monthly Availability Payments in Exhibit 4D or any other rights of Owner under this Agreement.

### **16.2 Assessment Notification and Cure Process**

#### **16.2.1 Notification Initiated by Concessionaire**

**16.2.1.1** As an integral part of Concessionaire's self-monitoring obligations, Concessionaire shall establish and maintain an electronic database of Activity Noncompliance Occurrences, Activity Noncompliance Events and Operations Availability Noncompliance Events, and shall enter each Activity Noncompliance Occurrence, Activity Noncompliance Event and Operations Availability Noncompliance Event into the database in real time upon discovery. The format and design of the database shall be subject to Owner's approval. At a minimum, the database shall:

- (a) Include a description of each Activity Noncompliance Occurrence, Activity Noncompliance Event and Operations Availability Noncompliance Event in reasonable detail;
- (b) Identify the location of the Activity Noncompliance Occurrence (if applicable);
- (c) Identify the date and time of each Activity Noncompliance Occurrence, Activity Noncompliance Event and Operations Availability Noncompliance Event;
- (d) Identify the applicable Response Time, Rectification Time and Application (Maximum Exposure) Time of the Activity Noncompliance Occurrence, if any, stated in the Activity Noncompliance Occurrence Table;
- (e) Indicate the status of the Activity Noncompliance Occurrence, Activity Noncompliance Event and Operations Availability Noncompliance Event;
- (f) Indicate date and time of Response and/or Rectification for any Activity Noncompliance Occurrence;
- (g) Indicate the Trip related to the Operations Availability Noncompliance Event;
- (h) Include a description of the Operations Availability Noncompliance Event; and

(i) If known, identify any expected exemption under Section 15.5 for each Activity Noncompliance Occurrence, Activity Noncompliance Event and Operations Availability Noncompliance Event.

**16.2.1.2** Concessionaire shall ensure that Owner has electronic access to the database at all times including the ability to enter Activity Noncompliance Occurrences and Noncompliance Events into the electronic database as provided in Section 16.2.1.1. Concessionaire shall retain each entry into the database until at least four years after the date of cure.

**16.2.1.3** Concessionaire shall prepare monthly Performance Monitoring Reports and submit them to Owner. Each Performance Monitoring Report shall include a report of all Activity Noncompliance Occurrences, Activity Noncompliance Events and Operations Availability Noncompliance Events occurring during the preceding month. Owner may require more frequent reports of Activity Noncompliance Events, Activity Noncompliance Events and Operations Availability Noncompliance Events. The monthly Performance Monitoring Report shall include all the same information required in the electronic database and shall identify each Activity Noncompliance Event for which Response and/or Rectification has not yet occurred. The monthly Performance Monitoring Report will also include a report of all Operations Availability Noncompliance Events and corresponding OTP Factors that apply for the month as well as the calculation of the Monthly Operations Performance Factor and all the Daily Operations Performance Factors for the month.

**16.2.1.4** Within a reasonable time after receiving the monthly Performance Monitoring Report (or more frequent report), Owner will deliver to Concessionaire a notice setting forth: (a) for each Activity Noncompliance Occurrence the applicable Response Time, Rectification Time and Application (Maximum Exposure) Time (if any), Owner's determination whether the Activity Noncompliance Occurrence was responded to or rectified (including whether such response or rectification occurred during the applicable Response Time, Rectification Time and Application (Maximum Exposure) Time (if any), and the Noncompliance Points to be assessed with respect to such event; and (b) for each Operations Availability Noncompliance Event, the resulting OTP Factors and the calculation of the DOPF for each day and MOPF for the month and the Noncompliance Points to be assessed with respect to such calculation (a "Notice of Determination").

## **16.2.2 Activity Noncompliance Occurrence Notification Initiated by Owner**

Upon occurrence of any Activity Noncompliance Occurrence that Concessionaire has not already entered into the electronic database, Owner may enter any Activity Noncompliance Occurrence into the database or deliver to Concessionaire a Notice of Determination stating the Activity Noncompliance Occurrence, the applicable Response Time, Rectification Time and Application (Maximum Exposure) Time (if any), Owner's determination whether the Activity Noncompliance Occurrence was responded to or rectified (as applicable) during the applicable Response Time, Rectification Time or Application (Maximum Exposure) Time (if any), and the Noncompliance Points to be assessed with respect to any corresponding Activity Noncompliance Event. Owner may deliver the Notice of Determination via the electronic database, and delivery shall be deemed given upon proper entry of the information into the electronic database.

**16.2.3 Activity Noncompliance Occurrence Response Time, Rectification Times and Application (Maximum Exposure) Time**

**16.2.3.1** Concessionaire shall respond to each Activity Noncompliance Occurrence by the end of the Response Time (if any) for each such Activity Noncompliance Occurrence.

**16.2.3.2** Concessionaire shall rectify each Activity Noncompliance Occurrence by the end of the Rectification Time (if any) for each such Activity Noncompliance Occurrence.

**16.2.3.3** For each Activity Noncompliance Occurrence identified, Concessionaire's Response Time or Rectification Time (if any) with respect to the Activity Noncompliance Occurrence shall be deemed to start on the date and time Concessionaire first obtained knowledge or had reason to know of the Activity Noncompliance Occurrence regardless of whether Owner has delivered a notice to Concessionaire or entered the Activity Noncompliance Occurrence into the electronic database.

**16.2.3.4** If the Activity Noncompliance Occurrence is not rectified by the end of the Rectification Time:

(a) A new and separate Activity Noncompliance Occurrence will be deemed to have occurred without necessity for further notice;

(b) An additional rectification period equal to the duration of the Application (Maximum Exposure) Time shall apply; and

(c) If the Activity Noncompliance Occurrence is not rectified by the end of the Application (Maximum Exposure) Time, further Deductions shall be applied and Noncompliance Points shall be assessed in accordance with Exhibit 4D.

**16.2.3.5** If the Activity Noncompliance Occurrence is not rectified by the end of the Application (Maximum Exposure) Time, the provisions of Section 16.2.3.4 will apply again until Concessionaire has demonstrated to Owner's reasonable satisfaction the Activity Noncompliance Occurrence has been rectified.

**16.2.3.6** Regardless of whether an event is considered a separate Noncompliance Event for purposes of assessing Noncompliance Points and Deductions, it is considered to be a continuing event for purposes of Owner's step-in rights under Section 17.2.4 and its work suspension rights under Section 17.2.7.

**16.2.3.7** The Application (Maximum Exposure) Time begins at the end of the Rectification Time or any previous Application (Maximum Exposure) Time (as applicable).

**16.2.3.8** For each Activity Noncompliance Occurrence identified which is not responded to or rectified (as applicable), the Noncompliance Points shall first be assessed at the end of the first Response Time or Rectification Time, and shall be assessed again at the end of each subsequent Application (Maximum Exposure) Time, as described in Section 16.2.3.4.

**16.2.3.9** The relevant Rectification Times and Application (Maximum Exposure) Times stated in the Activity Noncompliance Occurrence Table shall be the only rectification period for the Activity Noncompliance Occurrence; and if such Rectification Time or

Application (Maximum Exposure) differs from any cure period set forth in Section 17.1.2 that might otherwise apply to the Activity Noncompliance Occurrence, the Rectification Time or Application (Maximum Exposure) Time (as applicable) stated in the Activity Noncompliance Occurrence Table shall control.

#### **16.2.4 Activity Noncompliance Occurrence Notification of Response or Rectification**

**16.2.4.1** With respect to any Activity Noncompliance Occurrence for which it is being assessed Noncompliance Points, when Concessionaire determines that its Response or Rectification has been completed, Concessionaire shall make an entry in the electronic database that (a) identifies the Activity Noncompliance Occurrence, (b) states that Concessionaire has completed Response or Rectification (as applicable) and (c) briefly describes the applicable Response or Rectification, including any modifications to the Project Management Plan or O&M Management Plan to prevent future similar Activity Noncompliance Occurrences. Concessionaire shall include the same information in the next monthly Performance Monitoring Report.

**16.2.4.2** Owner may inspect the electronic database and any related factual information to verify completion of the Response or Rectification (as applicable). If satisfied that the Activity Noncompliance Occurrence is fully responded to or rectified (as applicable), Owner shall deliver to Concessionaire a certification of the applicable Response or Rectification either by entry into the database or by notice within a reasonable time from the date that Owner has completed its inspection to verify completion of the Response or Rectification.

**16.2.4.3** Owner may reject any Concessionaire database entry regarding Response or Rectification (as applicable) if Owner determines that Concessionaire has not fully responded to or rectified the Activity Noncompliance Occurrence. Upon making this determination, Owner will deliver a notice of rejection to Concessionaire either by entry into the database or by separate notice.

#### **16.3 Assessment of Noncompliance Points**

Owner may assess Noncompliance Points in accordance with Exhibit 4D, Part E if a Noncompliance Event has occurred and (a) the electronic database or monthly Performance Monitoring Report indicates a Noncompliance Event has occurred, (b) Owner is notified or otherwise becomes aware of a Noncompliance Event, or (c) Owner serves Notice of Determination under Section 16.2.2. Owner's right to assess such points is subject to the following:

**16.3.1** The date of assessment shall be deemed to be the date of the Trip for an Operations Availability Noncompliance Event and be the date of the end of the first Response Time or Rectification Time (as applicable), and the date of the end of each Application (Maximum Exposure) Time, regardless of the date of the initial Notice of Determination under Section 16.2.2 for an Activity Noncompliance Occurrence.

**16.3.2** Owner will not assess Noncompliance Points under more than one assessment category for any particular Activity Noncompliance Event. The Owner may assess Noncompliance Points for the Activity Noncompliance Event and for any related Operations Availability Noncompliance Event.

**16.3.3** A failure by Concessionaire to keep record of or report to Owner an Activity Noncompliance Occurrence or Noncompliance Event as and when required under

Section 16.2.1.1 or 16.2.1.2 constitutes a separate and distinct failure to perform and shall incur the number of Noncompliance Points (a) in the case of an Activity Noncompliance Occurrence, that would have been occurred had such Activity Noncompliance Occurrence become a Noncompliance Event; and (b) in the case of a Noncompliance Event, that are incurred for such Noncompliance Event. The Noncompliance Points for failure to report are in addition to those incurred as a result of the Activity Noncompliance Occurrence or Noncompliance Event. Where Owner enters an Activity Noncompliance Occurrence or Noncompliance Event into the electronic database or provides notice to Concessionaire under Section 16.2.2, additional Noncompliance Points will not be incurred except where Concessionaire has failed to record or report an Activity Noncompliance Occurrence or Noncompliance Event as and when required under Section 16.2.1.1 or 16.2.1.2.

**16.3.4** The number of points listed in Exhibit 4D, Appendix C, Section 1 for any particular category of Activity Noncompliance Event is the maximum number of Noncompliance Points that may be assessed for each event or circumstance that is an Activity Noncompliance Event. Owner may, but is not obligated to, assess less than the maximum number of Noncompliance Points for any particular Activity or Operations Availability Noncompliance Event.

#### **16.4 Records Regarding Assessment of Noncompliance Points**

Concessionaire shall keep and provide Owner with current records of the number of assessed Noncompliance Points for each Noncompliance Event, the date of each assessment, and the date when the Noncompliance Event is responded to or rectified (as applicable).

#### **16.5 Owner Remedies for Certain Noncompliance Events**

##### **16.5.1 Monetary Deductions**

In addition to Noncompliance Points, Noncompliance Events shall also result in Deductions from Monthly Availability Payments as stated in Exhibit 4D, Part C. Concessionaire acknowledges that damages incurred by Owner due to Concessionaire's failure to comply with the availability and performance standards for which Deductions are allowed under this Agreement would be difficult and impracticable to measure and prove, and that the Deductions allowed constitute reasonable compensation to Owner for such damages.

##### **16.5.2 Increased Oversight**

Owner has the right to increase Oversight as specified in Section 5.5.2 if Concessionaire accrues Noncompliance Points in excess of the amount stated in Section 5.5.2.

##### **16.5.3 Remedial Plan**

Owner may require development and implementation of a Remedial Plan under Section 16.6 under the circumstances specified in Section 16.6.

##### **16.5.4 Owner Step-In Rights**

Owner has certain "step-in" rights under Section 17.2.4 relating to accumulation of Noncompliance Points as specified in Section 17.2.4.

### **16.5.5 Replacement of O&M Contractor**

Subject to applicable cure period and related provisions under any Direct Agreement, if applicable, Owner has the right to require Concessionaire to replace the O&M Contractor under Section 16.8 upon accumulation of Noncompliance Points as specified in Section 16.8.

## **16.6 Remedial Plan Delivery and Implementation**

**16.6.1** Concessionaire acknowledges and agrees that any uncured Concessionaire Default will undermine the confidence and trust essential to the success of the public-private arrangement under this Agreement and will have a material, cumulative adverse impact on the value of this Agreement to Owner. Nevertheless, with respect to certain types of Concessionaire Defaults, Owner will defer exercise of its termination remedy under Section 19.3 so as to allow Concessionaire to take action under this Section 16.6, but Concessionaire acknowledges and agrees that Owner has the right to terminate if Concessionaire fails to take action in accordance with this Section 16.6.

**16.6.2** In order to mitigate such adverse impacts, if:

(a) Concessionaire fails to cure a Remedial Plan Default within the initial cure period for such default specified in Section 17.1.2; or

(b) Concessionaire accumulates (i) 2,400 Noncompliance Points for Operations Availability Noncompliance Events in any one Payment Period, or (ii) 1,440 Noncompliance Points for Activity Noncompliance Events in any one Payment Period, or (iii) a combination of 4,800 Noncompliance Points for all Noncompliance Events over the course of three consecutive Payment Periods (determined on a rolling basis);

then Owner may require Concessionaire to prepare and submit a remedial plan for Owner approval.

**16.6.3** Within 15 days after Concessionaire's receipt of notice from Owner under Section 16.6.2 requiring a Remedial Plan to be submitted, Concessionaire shall prepare a remedial plan, and submit it to Owner for approval. The Remedial Plan shall include a schedule for specific actions to be taken by Concessionaire to improve its performance and shall provide for Concessionaire to take appropriate action to improve Concessionaire's quality management practices, plans and procedures. As a condition to approval by Owner, Concessionaire shall revise the plan to include all remedial actions required by Owner, which may include requirements to revise and restate management plans, to implement changes to organizational and management structure, to undertake enhanced monitoring and inspections, to change Key Personnel and other important personnel, to replace of Contractors, and to deliver security to Owner.

**16.6.4** Following approval of a Remedial Plan by Owner, Concessionaire shall implement all remedial actions required by the plan, with the goals of:

(a) Improving Concessionaire's performance;

(b) Reducing in the next Payment Period the assessed Noncompliance Points under Section 16.3 by at least 50% when compared to the prior Contract Month; and

(c) Ensuring that any Remedial Plan Default will not continue or be repeated.

**16.6.5** Upon Concessionaire's satisfaction of the requirements in Section 16.6.4, (a) the uncured Remedial Plan Default under Section 16.6.2(a) will be cured and (b) with respect to events described under Section 16.6.2(b), Owner will reduce by 25% the number of accumulated Noncompliance Points assessed under Section 16.3 that resulted in the requirement to implement a Remedial Plan. With respect to events described under Section 16.6.2(b), the reduction in accumulated Noncompliance Points will be allocated to the Noncompliance Points that accumulated as a result of the Noncompliance Events that the Remedial Plan has corrected.

**16.6.6** Concessionaire's failure to comply with this Section 16.6 (including delivery of a draft Remedial Plan within the specified time period, making all required revisions to the draft plan, and implementation of remedial actions in accordance with the plan) shall constitute a material Concessionaire Default which Owner may determine is a Default Termination Event under Section 19.3.1 without allowing any additional cure period.

## **16.7 Special Provisions Relating to Owner Step-In**

If Owner exercises a step-in right under Section 17.2.4 with respect to any portion of the Project (the "affected Project portion"), the following provisions shall apply.

**16.7.1** While Owner is in control of the Work for the affected Project portion (the "step-in or suspension period"), neither the condition of the affected Project portion nor the performance of or failure to perform Work respecting the affected Project portion shall result in a new Noncompliance Event, assessment of new Noncompliance Points or new monetary deductions under Section 16.5.

**16.7.2** All Response Times, Rectification Times and Application (Maximum Exposure) Times that are available for Noncompliance Events respecting the affected Project portion and that arose previously and remain pending as of the date the step-in or suspension period commences shall be deemed forfeited by Concessionaire and Concessionaire shall have no right to Respond or Rectify.

**16.7.3** During the step-in or suspension period for the affected Project portion, Sections 16.2.3.4 through 16.2.3.8 shall not be applied to Noncompliance Events that arose before the date such step-in or suspension period commences.

**16.7.4** The step-in or suspension period for the affected Project portion shall be disregarded for purposes of accumulating Noncompliance Points and determining the existence of any Remedial Plan Default. Accordingly, such step-in or suspension period shall not be included in counting the consecutive time periods in Exhibit 4D and time periods shall be treated consecutive notwithstanding an intervening step-in or suspension period.

**16.7.5** No Deductions shall be applied for Noncompliance Events which first occur in the affected Project portion during the step-in or suspension period.

## **16.8 Rectification by Replacement of O&M Contractor**

**16.8.1** If at any time Concessionaire accrues 14,040 or more Noncompliance Points over the course of six consecutive Payment Periods (determined on a rolling basis), then Owner may, by notice (a "Replacement Notice") to Concessionaire, require Concessionaire to replace

the O&M Contractor. Owner's exercise of such right is in addition to all other rights and remedies available to Owner under the Contract Documents, and shall not be grounds for any Claim by Concessionaire against Owner.

**16.8.2** Upon receiving notice from Owner that Owner has exercised its rights under this Section 16.8, Concessionaire shall replace the O&M Contractor, at Concessionaire's risk and with approval from Lender(s) (if required under any (a) Security Document(s) (b) Funding Agreement relating to the TIFIA Loan, (c) other senior Funding Agreement, (d) senior loan indenture or (e) other similar document), and cause the replacement O&M Contractor, as approved by Owner and by Lender(s), if required, to start Work within 60 days of such notice. Owner shall have the right to approve or disapprove use of any proposed replacement O&M Contractor before the commencement of its Work. For purposes of determining whether accumulated points constitute an Event of Default under Section 17.1.1(t), 17.1.1(u) or 17.1.1(v), upon start of work by the replacement O&M Contractor, the total accumulated points associated with O&M Work performed by the departing O&M Contractor, as determined by Owner, will automatically be reduced by 50%.

**16.8.3** If Owner provides such notice to Concessionaire, then Concessionaire (together with the replacement O&M Contractor) shall prepare and submit a remedial plan in accordance with Section 16.6.2.

## **16.9 Resolution of Disputes Regarding Noncompliance Points**

**16.9.1** Concessionaire may object to the assessment of Noncompliance Points or the starting point for or duration of the Response Time, Rectification Time or Application (Maximum Exposure) Time (as applicable) respecting any Activity Noncompliance Event or occurrence and duration of any Operations Availability Noncompliance Event by delivering to Owner notice of such objection within five days after Owner delivers its Notice of Determination.

**16.9.2** Concessionaire may object to Owner's rejection of any certification of completion of Response or Rectification (as applicable) given under Section 16.2.4.3 by delivering to Owner notice of such objection within 15 days after Owner delivers its notice of rejection.

**16.9.3** If for any reason Concessionaire fails to deliver its notice of objection within the applicable time period, Concessionaire shall be deemed to have accepted the statements and determinations in the applicable notice, and shall be forever barred from challenging them.

**16.9.4** If Concessionaire gives timely notice of objection and the Parties are unable to reach agreement on any matter in dispute within 10 days of such objection, either Party may refer the matter within seven days for resolution under the Dispute Resolution Procedures.

**16.9.5** In the case of any Dispute as to the number of Noncompliance Points to assign for Activity Noncompliance Events, the sole issue for decision shall be how many Noncompliance Points should be assigned in comparison with the number of Noncompliance Points in the Activity Noncompliance Occurrence Table for Activity Noncompliance Events of equivalent severity.

**16.9.6** Pending the resolution of any Dispute arising under this Section 16.9, the provisions of this Article 16 shall take effect as if the matter were not in dispute. If the final decision regarding the Dispute is that (a) the Noncompliance Points should not have been assessed, (b) the number of Noncompliance Points must be adjusted, (c) the starting point or

duration of the cure period must be adjusted, or (d) a Noncompliance Event has been cured, then the respective adjustments to these elements shall be made.

## ARTICLE 17. DEFAULT; REMEDIES

### 17.1 Default by Concessionaire; Cure Periods

#### 17.1.1 Concessionaire Default

Subject to Section 15.5.10, Concessionaire shall be in breach under this Agreement upon the occurrence of any one or more of the following events or conditions (each a “Concessionaire Default”):

(a) Subject to Sections 4.4.6 and 19.6.1, Concessionaire fails to achieve Financial Close by the Financial Close Deadline;

(b) Concessionaire fails to commence Work promptly following Financial Close or to diligently prosecute the Work to completion in accordance with the Contract Documents;

(c) Concessionaire abandons all or a material part of the Project, which abandonment is deemed to occur if (i) Concessionaire demonstrates through statements, acts or omissions an intent not to continue, for any reason other than a Relief Event or Force Majeure Event that materially impairs Concessionaire’s ability to continue, to design, construct, operate or maintain all or a material part of the Project or (ii) no significant Work (taking into account the Project Schedule, if applicable, and any Relief Event or Force Majeure Event) on the Project or a material part thereof is performed for a continuous period of more than 45 days unless due to Concessionaire’s compliance with an Owner suspension order issued under this Agreement;

(d) Concessionaire fails to achieve (i) Revenue Service Availability by the Long Stop Date, or (ii) Final Completion by the Final Completion Deadline;

(e) Concessionaire (i) fails to make any payment owing to Owner under the Contract Documents when due, (ii) fails to collect, deposit and account for fare revenues as required by the Contract Documents, or (iii) fails to deposit other funds into any custodial account, trust account or other reserve or account as required by the Contract Documents;

(f) Subject to Section 21.3, (i) any representation or warranty in the Contract Documents, or SOQ (which representations and warranties of Concessionaire are incorporated into the Proposal explicitly or by reference) made by Concessionaire is false in any material respect, materially misleading or inaccurate in any material respect when made or omits material information when made, or (ii) any certificate, schedule, report, instrument or other document delivered by or on behalf of Concessionaire to Owner under the Contract Documents is false in any material respect, materially misleading or inaccurate in any material respect when made or omits material information when made;

(g) Subject to Section 11.1.7, Concessionaire fails to obtain, provide and maintain any insurance, bonds, guarantees, letters of credit or other payment or performance security as required under the Contract Documents for the benefit of relevant parties, or Concessionaire fails to comply with any requirement of the Contract Documents pertaining to the amount, terms or coverage of the insurance or security or

fails to pay the associated premiums, deductibles, retain self-insured retentions, co-insurance or any other such amounts as and when due;

(h) (i) Concessionaire makes, attempts to make or suffers a voluntary or involuntary assignment or transfer of all or any portion of the Contract Documents, the Project or Concessionaire's Interest in violation of the limitations on assignment or transfer under this Agreement, (ii) there occurs an Equity Transfer or a Change of Ownership not permitted under this Agreement, or (iii) any other violation of the limitations on assignment or transfer under this Agreement occurs;

(i) Unless excused due to occurrence of a Relief Event, Force Majeure Event or Non-Concessionaire Caused Disruption, Concessionaire fails to timely observe or perform, or cause to be observed or performed any other covenant, agreement, obligation, term or condition required to be observed or performed by Concessionaire under the Contract Documents, including failure to pay for or perform the Design Work, Construction Work, O&M Work or any portion thereof in accordance with the Contract Documents, provided that any failure to provide Option LRVs by the applicable deadline and any failure that constitutes a Noncompliance Event or Activity Noncompliance Occurrence is not considered a default under this paragraph (i) although such failure may become an Event of Default in accordance with paragraph (k), (t), (u) or (v) below;

(j) Unless continued performance of this Agreement is permitted under the terms of a debarment agreement with the State, and after any rights of appeal have been exhausted, if Concessionaire, any Equity Member, any Controlling Affiliate of Concessionaire, any Prime Contractor or LRV Supplier (i) is determined disqualified, suspended or debarred, or otherwise excluded from bidding, proposing or contracting with a federal or a State department or agency or (ii) has not dismissed any Subcontractor whose work is not substantially complete and who is determined disqualified, suspended or debarred, or otherwise excluded from bidding, or proposing or contracting with a federal or a State department or agency.

(k) If a Remedial Plan is required under the terms of Section 16.6.2, (i) Concessionaire fails to timely deliver to Owner a Remedial Plan meeting the requirements of said section or (ii) Concessionaire fails to fully comply with the schedule or specific elements of, or actions required under, the approved Remedial Plan;

(l) Concessionaire fails to comply with Owner's order to suspend Work issued in accordance with Section 9.7.4, 11.1.2.4, 17.2.3.4 or 17.2.7 within the time reasonably allowed in such order;

(m) Concessionaire commences a voluntary case seeking liquidation, reorganization or other relief with respect to Concessionaire or Concessionaire's debts under any U.S. or foreign bankruptcy, insolvency or other similar Law; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of its, or any substantial part of its, assets; becomes insolvent, or generally does not pay its debts as they become due; provides notice of its inability to pay its debts; makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing;

(n) An involuntary case is commenced against Concessionaire seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with

creditors, a readjustment of debts or other relief with respect to such Concessionaire or Concessionaire's debts under any U.S. or foreign bankruptcy, insolvency or other similar Law; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by it in good faith or shall remain undismissed and unstayed for a period of 60 days;

(o) In any voluntary or involuntary case seeking liquidation, reorganization or other relief with respect to Concessionaire or its debts under any U.S. or foreign bankruptcy, insolvency or other similar Law, this Agreement or any of the other Contract Documents, is rejected, including a rejection under 11 U.S.C. Section 365 or any successor statute;

(p) Any voluntary or involuntary case or other act or event described in clause (m) or (n) shall occur (and in the case of an involuntary case shall not be contested in good faith or shall remain undismissed and unstayed for a period of 60 days) with respect to (i) any Equity Member, partner or joint venture member of Concessionaire (unless said Person has fully met all financial obligations owing to Concessionaire in the form of a Committed Investment and payments or transfers of money or property previously made to or for the benefit of Concessionaire are not subject to Sections 544, 547, 548, or 550 of the Bankruptcy Code or any similar applicable state or federal law respecting the avoidance or recovery of preferences or fraudulent transfers, including any applicable enactment of the Uniform Fraudulent Transfer Act), (ii) any Equity Member, partner or joint venture member of Concessionaire for whom transfer of ownership or management authority would constitute a Change of Ownership, or (iii) any Guarantor of material Concessionaire obligations to Owner under the Contract Documents, unless another Guarantor of the same material Concessionaire obligations then exists, is solvent, is not and has not been the debtor in any such voluntary or involuntary case, has not repudiated its guaranty and is not in breach of its guaranty;

(q) Concessionaire draws against any custodial account, trust account, allowance or other reserve or account in violation of the Contract Documents or makes a false or materially misleading representation in connection with a draw against any such account, allowance or reserve;

(r) Concessionaire fails to comply with any applicable Governmental Approval or Law;

(s) Any use of the Project that violates requirements of applicable Governmental Approvals or Laws or otherwise is not permitted under the Contract Documents;

(t) Concessionaire receives a total of 14,640 or more Noncompliance Points over the course of three consecutive Payment Periods (determined on a rolling basis);

(u) Concessionaire receives a total of 24,240 or more Noncompliance Points over the course of six consecutive Payment Periods (determined on a rolling basis); or

(v) Concessionaire receives a total of 33,720 or more Noncompliance Points over the course of 12 consecutive Payment Periods (determined on a rolling basis).

### **17.1.2 Cure Periods**

The following list identifies Concessionaire's rights to receive notice and opportunity to cure before Owner may exercise its right to terminate this Agreement, and identifies other Concessionaire Defaults that are not subject to cure:

**17.1.2.1** Respecting a Concessionaire Default under Section 17.1.1(k)(i), a cure period of 10 days after Owner delivers to Concessionaire Notice of Concessionaire Default;

**17.1.2.2** Respecting a Concessionaire Default under Section 17.1.1(b), Section 17.1.1(c), 17.1.1(e), 17.1.1(g), 17.1.1(h), 17.1.1(q), 17.1.1(j)(ii), 17.1.1(k)(ii), 17.1.1(r) or 17.1.1(s), a cure period of 30 days after Owner delivers to Concessionaire Notice of Concessionaire Default; provided that Owner may effect cure, at Concessionaire's expense, if a Concessionaire Default under Section 17.1.1(g) continues beyond five days after such notice is delivered;

**17.1.2.3** Respecting a Concessionaire Default under Section 17.1.1(f) or 17.1.1(i), a cure period of 30 days after Owner delivers to Concessionaire Notice of Concessionaire Default; provided that

(a) if the nature of such Concessionaire Default is such that the cure cannot with diligence be completed within such time period and Concessionaire has commenced meaningful steps to cure immediately after receiving the default notice, Concessionaire shall have such additional period of time, up to a maximum cure period of 150 days, as is reasonably necessary to diligently effect cure; and

(b) as to Section 17.1.1(f), cure will be regarded as complete when the adverse effects of the breach are cured;

**17.1.2.4** Respecting a Concessionaire Default under Section 17.1.1(m), 17.1.1(n) or 17.1.1(o), no cure period is allowed, and, except for any notices to Lenders contemplated under any executed Direct Agreement, there shall be no right to notice of such Concessionaire Default;

**17.1.2.5** Respecting a Concessionaire Default under Section 17.1.1(a), 17.1.1(d), 17.1.1(l), or 17.1.1(t) through 17.1.1(v), no cure period is allowed;

**17.1.2.6** Respecting a Concessionaire Default under Section 17.1.1(p)(i) or (iii), a period of 10 days from the date of Concessionaire Default to commence diligent efforts to cure, and 30 days to effect cure of such default by (a) providing a letter of credit or payment to Owner or the Collateral Agent for the benefit of the Project, in the amount of, as applicable, (i) the member's financial obligation for equity or shareholder loan contributions to or for the benefit of Concessionaire or (ii) the Guarantor's specified sum or specified maximum liability under its guaranty, or if none is specified, the reasonably estimated maximum liability of the Guarantor, or (b) providing a replacement Equity Member or Guarantor, as applicable, satisfactory to Owner; and

**17.1.2.7** Respecting any potential Concessionaire Default under Section 17.1.1(j), Concessionaire shall take appropriate steps to obtain, or to require the

affected Equity Member, Controlling Affiliate or Contractor to obtain, a debarment agreement with the State in connection with any pending action for disqualification, suspension or debarment or any pending agreement for voluntary exclusion from bidding, proposing or contracting. If a debarment agreement is obtained that permits continued performance under this Agreement, then the disqualification, suspension, debarment or agreement for exclusion shall not be considered a Concessionaire Default. If such a debarment agreement is not obtained, Concessionaire shall have the following cure rights:

(a) With respect to a Concessionaire Default under Section 17.1.1(j)(i) involving Concessionaire, Concessionaire shall have 60 days after the effective date of the disqualification, suspension, debarment or agreement for exclusion to (i) obtain a debarment agreement allowing continued performance or (ii) otherwise cure the default;

(b) With respect to a Concessionaire Default under Section 17.1.1(j)(i) involving an Equity Member or Controlling Affiliate, Concessionaire shall have 60 days after the effective date of the disqualification, suspension, debarment or agreement for exclusion (i) to remove the affected Equity Member or Controlling Affiliate and obtain Owner's approval of the Change of Ownership to the extent required under Article 22, (ii) to obtain a debarment agreement allowing continued performance or (iii) otherwise cure the default; and

(c) With respect to a Concessionaire Default under Section 17.1.1(j)(i) involving a Prime Contractor or LRV Supplier, Concessionaire shall have 60 days after the effective date of the disqualification, suspension, debarment or agreement for exclusion to obtain a debarment agreement allowing continued performance or otherwise cure the default. If Concessionaire is unable to obtain a debarment agreement or otherwise cure the default within such 60-day period, it shall have an additional period of time, up to a maximum cure period of 150 days (for Contractors other than the LRV Supplier) or up to a maximum cure period of two years (for the LRV Supplier), to cure the default by (i) removing the affected Contractor from the Project and (ii) obtaining Owner's approval of any replacement Contractor or plan to self-perform the Work to the extent required under Section 9.3.1 or 9.10.

### **17.1.3 Default Relating to Noncompliance Events with Deduction Remedy**

Notwithstanding anything to the contrary in this Article 17, if a Noncompliance Event occurs for which Owner is entitled to assess Deductions under Exhibit 4D, Owner will not declare a default with respect to such Noncompliance Event; provided that this limitation shall not affect:

(a) Owner's right to declare a default under Section 17.1.1(t), 17.1.1(u) or 17.1.1(v) even though Owner has the right to make Deductions relating to the same Noncompliance Events for which Noncompliance Points are assessed; and

(b) Owner's right to declare a default for any other Concessionaire Default for which Owner is not entitled to Deductions under Exhibit 4D.

## **17.2 Owner Remedies for Concessionaire Default**

### **17.2.1 Termination**

In the event of a Concessionaire Default under Section 17.1.1(a), Owner may terminate this Agreement as provided in Section 19.6. In the event of a Concessionaire Default that is or becomes a Default Termination Event under Section 19.3.1, Owner may terminate this Agreement as provided in Section 19.3. In addition to the other rights afforded to Owner under this Agreement, such termination under Section 19.3.1 shall automatically terminate all of Concessionaire's rights under Article 2, whereupon the Parties shall proceed in accordance with Section 19.7.

### **17.2.2 Immediate Owner Entry and Cure of Wrongful Use**

Without notice and without awaiting lapse of the period to cure, in the event of any Concessionaire Default under Section 17.1.1(s) (wrongful use of Project), Owner may enter and take control of the relevant portion of the Project to restore the permitted uses and reopen and continue traffic operations for the benefit of the public, until such breach is cured or Owner terminates this Agreement. Concessionaire shall pay to Owner on demand Owner's Recoverable Costs in connection with such action, which payment will be reimbursed by Owner if a determination is ultimately made that no Concessionaire Default occurred, promptly following such a determination. So long as Owner undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a Concessionaire Default, such action shall not be deemed unlawful or a breach of this Agreement, shall not expose Owner to any liability to Concessionaire, other than the reimbursement obligation described above, and shall not entitle Concessionaire to any other remedy except if Owner's action constitutes gross negligence, recklessness or willful misconduct. Concessionaire acknowledges that Owner has a high priority, paramount public interest in maintaining the authorized uses of the Project and continuous public access to the Project. Owner's good faith determination that such action is needed shall be deemed conclusive in the absence of clear and convincing evidence to the contrary. Owner will promptly relinquish control and possession of the relevant portion of the Project to Concessionaire once Owner determines that such Concessionaire Default has been cured.

### **17.2.3 Remedies for Failure to Meet Safety Standards or Perform Safety Compliance**

**17.2.3.1** If at any time Concessionaire or its Surety fails to meet any Safety Standard or timely perform Safety Compliance or if Owner and Concessionaire cannot reach an agreement regarding the interpretation or application of a Safety Standard or the valid issuance of a Safety Compliance Order within a period of time acceptable to Owner, Owner may undertake or direct Concessionaire to undertake any work required to ensure implementation of and compliance with Safety Standards as interpreted or applied by Owner or with the Safety Compliance Order. If at any time a condition or deficiency of the Project violates any Law respecting health, safety or right of use and access, including the Americans with Disabilities Act of 1990, 42 U.S.C. Sections 12101 *et seq.*, and regulations of the United States Occupational Safety and Health Administration (OSHA), Owner may take any immediate corrective actions required.

**17.2.3.2** Subject to Section 17.2.3.3, to the extent that any work done under Section 17.2.3.1 is undertaken by Owner and is reasonably necessary to comply with Safety Standards, perform validly issued Safety Compliance Orders or correct a violation of Law respecting health, safety or right of use and access, Concessionaire shall pay to Owner on

demand the costs of such work including Owner's Recoverable Costs in connection with such work, and Owner (whether it undertakes the work or has directed Concessionaire to undertake the work) shall have no obligation or liability to compensate Concessionaire for any Losses Concessionaire suffers or incurs arising from, resulting to or resulting from such work.

**17.2.3.3** To the extent that Owner requires Concessionaire to perform Work under Section 17.2.3.1 that is not reasonably necessary to comply with Safety Standards, perform validly issued Safety Compliance Orders or correct a violation of Law respecting health, safety or right of use and access, such requirement shall be considered an Owner Change, and Concessionaire's obligation to pay Owner's Recoverable Costs shall not include Owner's costs relating to the Owner Change.

**17.2.3.4** Notwithstanding anything to the contrary contained in this Agreement and without limiting Owner's other rights and remedies under this Agreement, if, in the good faith judgment of Owner, (a) Concessionaire has failed to meet any Safety Standards or perform Safety Compliance and the failure results in an Emergency or danger to persons or property, and (b) Concessionaire is not then diligently taking all necessary steps to rectify or deal with such Emergency or danger, Owner may without notice and without awaiting lapse of the period to cure any breach, (i) immediately take such action as may be reasonably necessary to rectify the Emergency or danger, in which event Concessionaire shall pay to Owner on demand the cost of such action, including Owner's Recoverable Costs, or (ii) suspend Construction Work and/or close or cause to be closed any and all portions of Project affected by the Emergency or danger.

**17.2.3.5** So long as Owner undertakes any action under Section 17.2.3.4 in good faith, even if under a mistaken belief in the occurrence of such failure or existence of an Emergency or danger, such action shall not be deemed unlawful or a breach of this Agreement, shall not expose Owner to any liability to Concessionaire and shall not entitle Concessionaire to any other remedy, except if Owner's action was undertaken in bad faith or constitutes gross negligence, recklessness or willful misconduct.

**17.2.3.6** Concessionaire acknowledges that Owner has a high priority, paramount public interest in protecting public and worker safety at the Project and adjacent and connecting areas. Owner's good faith determination of the existence of such a failure, Emergency or danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary. Immediately following rectification of such Emergency or danger, as determined by Owner, Owner will allow the Construction Work to continue or such portions of the Project to reopen, as applicable.

#### **17.2.4 Owner Step-in Rights**

**17.2.4.1** In accordance with this Section 17.2.4, but subject to the terms of any Direct Agreement, if Concessionaire has not fully and completely cured a Concessionaire Default by the expiration of any cure period, Owner may pay and perform all or any portion of Concessionaire's obligations (a) under the Contract Documents that are the subject of such Concessionaire Default and (b) under any other then-existing breaches or failures to perform for which Concessionaire received prior notice from Owner but has not commenced or does not continue diligent efforts to cure.

**17.2.4.2** Owner may, to the extent reasonably required for or incident to curing Concessionaire Default or such other breaches or failures to perform:

- such Work;
- Project;
- (a) Perform or attempt to perform, or caused to be performed,
  - (b) Employ security guards and other safeguards to protect the
  - (c) Spend such sums as Owner deems reasonably necessary to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required to perform such Work, without obligation or liability to Concessionaire or any Contractors for loss of opportunity to perform the same Work or supply the same materials and equipment;
  - (d) In accordance with Section 17.2.6, draw on and use proceeds from the Performance Security and any other available security or source of funds available to Concessionaire for the purposes set forth in this Section 17.2.4.2 including amounts held in an operating account, to the extent such instruments provide recourse to pay such sums, provided Owner's right to access amounts held in an operating account shall not include a security interest in such funds nor shall the exercise of such right by Owner interfere with the right of the Lenders, if any, under the Security Documents and the Direct Agreement to access such funds;
  - (e) Execute all applications, certificates and other documents as may be required;
  - (f) Make decisions respecting, assume control over and continue Work as may be reasonably required;
  - (g) Modify or terminate any contractual arrangements in Concessionaire's Contracts in Owner's discretion, without liability for termination fees, costs or other charges in accordance with the terms of those Contracts, including the requirements for each Contract listed in Section 9.3.2;
  - (h) Meet with, coordinate with, direct and instruct Contractors and Suppliers, process invoices and applications for payment from Contractors and Suppliers, pay Contractors and Suppliers, and resolve claims of Contractors, Subcontractors and suppliers;
  - (i) Take any and all other actions it may consider necessary to effect cure and perform the Work; and
  - (j) Prosecute and defend any action or proceeding incident to the Work.

**17.2.4.3** Concessionaire shall reimburse Owner on demand for its Recoverable Costs incurred in connection with the performance of any act or Work authorized by this Section 17.2.4.

**17.2.4.4** In addition to its continuing ownership of the Project ROW and rights to have access to the Site throughout the Term, including the rights described in Section 5.6, Owner and its Authorized Representatives, contractors, subcontractors, vendors and employees shall have the right to enter onto all Project-Specific Locations, exercisable at any time or times without notice, for the purpose of carrying out Owner's step-in rights under

Section 17.2.2 and this Section 17.2.4. Concessionaire grants Owner a perpetual, non-rescindable right of entry onto the Project-Specific Locations for such purpose.

**17.2.4.5** If Owner exercises any right to pay or perform under this Section 17.2.4, it nevertheless shall have no liability to Concessionaire for the sufficiency, adequacy or quality of any such payment or performance, or for any effect of such payment or performance on the Work or the Project, unless caused by the gross negligence, recklessness or willful misconduct of Owner. Owner and its Authorized Representatives, contractors, subcontractors, vendors and employees shall have no liability to Concessionaire for any inconvenience or disturbance arising out of any entry onto the Site or Project-Specific Locations as contemplated by Section 17.2.2 or 17.2.4, provided that the foregoing shall not absolve any Person of liability as a matter of law for its gross negligence, recklessness or willful misconduct.

**17.2.4.6** Owner's rights under this Section 17.2.4 (but not Owner's rights under Section 17.2.2 regarding Owner's immediate right of entry and right to cure wrongful use of the Project) are subject to the right of any Surety to assume performance and completion of all bonded work under a performance bond issued as Performance Security.

**17.2.4.7** In the case of a Concessionaire Default which would either then or, following the applicable grace period or the giving of notice or both, constitute a Default Termination Event enabling Owner to terminate or suspend its obligations under this Agreement, Owner's rights under this Section 17.2.4 are subject to Lender rights to cure under any Direct Agreement between Owner and such Lender. Subject to the terms of the Direct Agreement, Owner may nevertheless continue exercise of its step-in rights until, under the terms of any such Direct Agreement then in effect, the Lender obtains possession and control and notifies Owner that it stands ready to commence good faith, diligent curative action. In the case of any other Concessionaire Default, Owner's rights under this Section 17.2.4 are subject to the exercise of step-in rights or other cure rights (not involving step-in) by the Collateral Agent under the Direct Agreement (pursuant to senior Security Documents, which includes liens securing the TIFIA Loan), provided that the Collateral Agent (a) delivers to Owner notice of the Collateral Agent's decision to exercise step-in rights, and commences the good faith, diligent exercise of such step-in rights, within the applicable cure period, and (b) continues such good faith, diligent exercise of remedies until Concessionaire Default is fully and completely cured, in each case, subject to Collateral Agent's decision to cure in lieu of stepping in with respect to certain Concessionaire Defaults, under the terms and subject to the conditions of the Direct Agreement.

**17.2.4.8** If Owner takes action described in this Section 17.2.4 and it is later finally determined that Owner lacked the right to do so because there did not occur a Concessionaire Default or because Concessionaire had previously fully cured the default in accordance with this Agreement, then Owner's action shall be treated as an Owner Change.

**17.2.4.9** This Section 17.2.4 also applies in the event that Concessionaire is assessed (a) 3,600 Noncompliance Points for Operations Availability Noncompliance Events in any one Payment Period, or (b) 1920 Noncompliance Points for Activity Noncompliance Events in any one Payment Period, or (c) a combination of 7,200 Noncompliance Points for any Noncompliance Events over the course of three consecutive Payment Periods (determined on a rolling basis). In any such event, the term "cure" as used in this Section 17.2.4 shall be construed to include "response" and "rectification" and the term "cure period" shall be construed to include "Response Time" and "Rectification Time".

## **17.2.5 Damages; Offset**

**17.2.5.1** Except as limited by Owner's agreement to liquidate certain damages as specified in the Contract Documents, and subject to the limitations in Section 17.6, Owner shall be entitled to recover any and all damages available at law on account of the occurrence of a Concessionaire Default. Concessionaire shall owe any such damages that accrue after the occurrence of Concessionaire Default regardless of when Notice of Concessionaire Default is given or whether Concessionaire Default is subsequently cured.

**17.2.5.2** Where this Agreement is not terminated, the damages recoverable by Owner under Section 17.2.5.1 include (a) costs Owner incurs to complete the D&C Work in excess of unpaid amounts owing for such Work by Owner under this Agreement, (b) compensation and reimbursements due but unpaid to Owner under the Contract Documents, (c) costs to remedy any defective part of the Work, (d) costs, premiums, brokers' commissions, charges or other expenses incurred by Owner arising out of, relating to or resulting from such Concessionaire Default, and (e) costs to rectify any breach or failure to perform by Concessionaire and/or to bring the condition of the Project to that required by the Contract Documents.

**17.2.5.3** Where this Agreement is terminated, the damages recoverable by Owner under Section 17.2.5.1 include the present value of (a) any compensation and reimbursements due but unpaid to Owner under the Contract Documents on or before the Early Termination Date, (b) actual and projected costs to remedy any defective part of the Work, (c) actual and projected costs to rectify any breach or failure to perform by Concessionaire and/or to bring the condition of the Project to the standard it would have been in if Concessionaire had complied with its obligations to carry out and complete the Work in accordance with the Contract Documents, (d) actual and projected costs to Owner to terminate, take over the Project, re-procure and replace Concessionaire, (e) actual and projected delay costs, (f) actual and projected increases in costs to Owner to complete the Project if not completed as of the Early Termination Date, and (g) actual and projected increases in costs to Owner to operate and maintain the Project over the balance of the Term (as if termination had not occurred) following the Early Termination Date.

**17.2.5.4** Damages owed to Owner under this Section 17.2.5 shall bear interest at the Late Payment Rate from and after the date any amount becomes due to Owner until the date paid.

**17.2.5.5** Owner may deduct and offset any damages, or other amounts, owing to it under the Contract Documents from and against any amounts Owner may owe to Concessionaire, excluding the Special Lifecycle Payments.

**17.2.5.6** Without limiting Section 17.2.5.5, but excluding Special Lifecycle Payments:

(a) Periodic payments owing by Owner under Section 13.1 are subject to deduction and offset for the amount of any damages attributable to Concessionaire (including damages attributable to any Concessionaire Default that concerns the D&C Work and is the subject of a notice delivered to Concessionaire before the date such payments are owing); and

(b) The Availability Payments are subject to deduction and offset for the amount of any damages attributable to Concessionaire (including damages

attributable to any Concessionaire Default), provided that in certain cases damages are liquidated by the Deductions under Exhibit 4D.

**17.2.5.7** Subject to Section 17.2.5.5, if the amount of damages owing to Owner from Concessionaire is not liquidated or known with certainty at the time the payment is due, Owner may deduct and offset up to 105% of the amount it reasonably estimates will be due, in which case the Parties shall adjust such deduction or offset when the amount of damages owing to Owner becomes known with certainty, with interest at the Late Payment Rate payable by Owner on excess amounts withheld and interest at the same rate payable by Concessionaire on any shortfall.

**17.2.5.8** Subject to Section 17.2.5.5, Owner's right of offset includes all amounts paid by Owner to satisfy, discharge and defend against any claim of lien, stop notice, equitable lien or any other demand for payment or security made or filed with Owner, Owner's property or the Project by any Person claiming that any Concessionaire-Related Entity has failed to perform its contractual obligations or to make payment for any obligation incurred for or in connection with the Work, provided that no such offset shall be made if Concessionaire has filed surety bonds fully releasing Owner and Owner's property from such claim or lien under applicable Law.

## **17.2.6 Performance Security**

**17.2.6.1** Subject to Sections 17.2.6.2 and 17.2.6.4, upon the occurrence of a Concessionaire Default and expiration, without full and complete cure, of the applicable cure period, if any, under Section 17.1.2, without waiving or releasing Concessionaire from any obligations or limiting other remedies that may be available to Owner, Owner may make demand upon and enforce any bond provided as Performance Security, and make demand upon, draw on and enforce and collect any letter of credit, guaranty or other payment or performance security available to Owner under this Agreement with respect to such Concessionaire Default in any order. Owner will apply the proceeds of any such action to the satisfaction of Concessionaire's obligations under this Agreement, including payment of amounts due to Owner.

**17.2.6.2** If Owner is an additional obligee under a bond for Performance Security, or is a transferee beneficiary under any letter of credit or guaranty, then Owner will forbear from exercising remedies as additional obligee or transferee beneficiary so long as Concessionaire or the Collateral Agent commences the good faith, diligent exercise of remedies within 10 days after Owner delivers notice to Concessionaire and the Collateral Agent of Owner's intent to make a claim under such security, letter of credit or guaranty and subsequently continues such good faith, diligent exercise of remedies until the default is cured.

**17.2.6.3** Section 17.2.6.2, shall not apply where access to a bond, letter of credit, guaranty or other payment or performance security is for the purpose of satisfying damages owing to Owner, in which case Owner shall be entitled to make demand, draw, enforce and collect regardless of whether Concessionaire Default is subsequently cured.

**17.2.6.4** Owner will notify Concessionaire at the same time or promptly after it takes any action to make demand upon, draw on, enforce or collect any Performance Security.

## 17.2.7 Suspension of Work

**17.2.7.1** In addition to any other right to suspend the Work under the Contract Documents, Owner may suspend, in whole or in part, the Work by notice to Concessionaire, due to any of the following, regardless of whether a Concessionaire Default has been declared or any cure period (other than a cure period expressly stated in this Section 17.2.7.1) has not yet lapsed:

(a) Failure to perform the Work in compliance with the Contract Documents, where such failure is not substantially cured within 15 days after Owner delivers notice thereof to Concessionaire, provided that Owner's right to suspend for an Activity Noncompliance Occurrence or a Noncompliance Event shall be limited to circumstances where Concessionaire fails to timely deliver and implement a Remedial Plan in accordance with Section 16.6;

(b) Failure to comply with any Law or Governmental Approval (including failure to implement protective measures for Threatened and Endangered Species, failure to handle, preserve and protect paleontological and cultural (including archaeological and historic) resources, or failure to handle Hazardous Materials, in accordance with applicable Laws and Governmental Approvals);

(c) Performance of Design Work before achieving all conditions in Section 7.4.4, or performance of Construction Work before all conditions precedent to commencement of Construction Work have been met;

(d) Discovery of Nonconforming Work not corrected within 15 days after Owner delivers notice of such Nonconforming Work to Concessionaire or, if correction will require more than 15 days, failure of Concessionaire to deliver to Owner, within 15 days of said notice, a plan acceptable to Owner for correction of the Nonconforming Work or to diligently execute and complete such plan;

(e) Concessionaire has failed to pay in full when due sums owing any Contractor for services, materials or equipment, except only for retainage provided in the relevant Contract and amounts in dispute;

(f) Failure to provide proof of required insurance coverage under Section 11.1.2.4 (which suspension is also available in the case of such failure following a request rather than Notice of Concessionaire Default in accordance with Section 11.1.2.4);

(g) Failure to deliver or maintain Payment Bonds or Performance Security;

(h) The existence of conditions unsafe for workers, other Project personnel or the general public, including failures to comply with Safety Standards or perform Safety Compliance in accordance with Section 17.2.3 (and in any such case the order of suspension may be issued without awaiting any cure period);

(i) Failure to carry out and comply with Directive Letters, where such failure is not substantially cured within 15 days after Owner delivers notice thereof to Concessionaire; and

(j) For the reasons specified in Sections 9.7.4, 11.1.2.4(g) and 17.2.3.4.

**17.2.7.2** In addition to the protections from liability under Section 17.2.3.4, Owner shall have no liability to Concessionaire, and Concessionaire shall have no right to make any Claim against Owner due to any suspension under Section 17.2.7.1.

**17.2.7.3** Owner shall have the right and authority to order suspension of Work, in whole or in part, for reasons other than those in Section 17.2.7.1. If Owner purports to order suspension of Work under Section 17.2.7.1 but it is finally determined under the Dispute Resolution Procedures that there exist no grounds under Section 17.2.7.1 for such suspension, then it shall be deemed a suspension under this Section 17.2.7.3. If Owner orders (or is deemed to order) suspension of Work under this Section 17.2.7.3 and such suspension is an Owner-Caused Delay, then Concessionaire shall be entitled to submit a Claim for Incremental Costs, Delay Costs, compensation for losses due to delays in commencement of Availability Payments and for additional interest costs due to delayed receipt of the Progress Payment, Contract Deadline extensions and performance relief to the extent permitted under Articles 14 and 15.

**17.2.7.4** Concessionaire shall promptly comply with any such suspension order, even if Concessionaire disputes the grounds for suspension. Concessionaire shall promptly recommence the Work upon receipt of notice from Owner directing Concessionaire to resume work. Owner will lift the suspension order promptly after Concessionaire fully cures and corrects the applicable breach or failure to perform or any other reason for the suspension order ceases to apply.

**17.2.7.5** In case of suspension of work for any cause, Concessionaire shall:

(a) Be responsible for the Project and shall take such precautions as may be necessary to prevent loss or damage to the Work, provide for normal drainage and shall erect any necessary temporary structures, signs, or other facilities at Concessionaire's expense; and

(b) Properly and continuously maintain in an acceptable growing condition all living material in newly established plantings, seedings and soddings furnished under this Agreement, and shall take adequate precautions to protect new growth and other important vegetative growth against injury.

### **17.2.8 Other Rights and Remedies**

Subject to Section 19.9, Owner shall also be entitled to exercise any other rights and remedies available under this Agreement, or available at law.

### **17.2.9 Cumulative, Non-Exclusive Remedies**

Subject to Sections 19.9.2 and 21.3, and subject to the stipulated remedial measures for the breaches and failures to perform for which Noncompliance Points may be assessed, each right of Owner under this Agreement shall be cumulative and shall be in addition to every other right provided under this Agreement or at law, and the exercise or beginning of the exercise by Owner of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by Owner of any or all other such rights or remedies.

## **17.3 Default by Owner; Cure Periods**

### **17.3.1 Owner Default**

Owner shall be in breach under this Agreement upon the occurrence of any one or more of the following events or conditions (each an "Owner Default"):

(a) Owner fails to make any payment due to Concessionaire under this Agreement when due, provided that such payment is not subject to a Dispute; or

(b) Subject to Section 21.3, any representation or warranty made by Owner under Section 21.2 is false, misleading or inaccurate in any material respect when made or omits material information when made.

### **17.3.2 Cure Periods**

Owner shall have the following cure periods to cure Owner Defaults:

**17.3.2.1** Respecting an Owner Default under Section 17.3.1(a), a period of 45 days after Concessionaire delivers to Owner notice of the Owner Default; and

**17.3.2.2** Respecting an Owner Default under Section 17.3.1(b), a period of 90 days after Concessionaire delivers to Owner notice of the Owner Default; provided that (a) if the Owner Default is of such a nature that the cure cannot with diligence be completed within such time period and Owner has commenced meaningful steps to cure promptly after receiving the default notice, Owner shall have such additional period of time, up to a maximum cure period of 180 days, as is reasonably necessary to diligently effect cure, and (b) cure will be regarded as complete when the adverse effects of the breach are cured.

## **17.4 Concessionaire Remedies for Owner Breach**

### **17.4.1 Termination**

Refer to Section 19.4 for provisions regarding Concessionaire's right to terminate for Owner Default.

### **17.4.2 Interest for Late Payment**

If Owner fails to make payments owing to Concessionaire under Article 13, then Concessionaire shall be entitled to interest in accordance with Section 13.4. The right to be paid interest shall constitute Concessionaire's sole remedy for late payment until such time as Concessionaire is entitled to exercise the remedies specified in Section 17.4.3 or 19.4.

### **17.4.3 Concessionaire Right to Suspend**

Concessionaire may suspend Work based on Owner's failure to pay undisputed amounts owing to Concessionaire of \$1,000,000 or more, or based on Owner's failure to comply with its obligations under Section 13.6.3, subject to the following:

**17.4.3.1** Concessionaire shall provide Owner with notice regarding its intent to suspend at least 30 days before implementing the suspension, and may implement the suspension only if the breach remains uncured as of the suspension date. If the suspension is

based on payment failure, the notice provided under Section 17.3.2.1 may also serve as notice under this Section 17.4.3.

**17.4.3.2** A suspension by Concessionaire under this Section 17.4.3 shall be deemed to be a suspension of work order issued by Owner for its convenience under Section 17.2.7.3. The suspension order shall be deemed lifted upon Concessionaire's receipt of payment in full of all undisputed amounts owing, in the case of a suspension due to payment failure, or upon Concessionaire's receipt of evidence that funds are available, in the case of suspension due to Owner's failure to comply with its obligations under Section 13.6.3.

#### **17.4.4 Limitations on Remedies**

**17.4.4.1** Concessionaire shall have no right to seek, and irrevocably waives and relinquishes any right to, non-monetary relief against Owner, except for (a) any sustainable action for relief in the nature of that formerly available in mandamus, (b) any sustainable action to stop, restrain or enjoin use, reproduction, duplication, modification, adaptation or disclosure of Concessionaire Intellectual Property in violation of the licenses granted, or to specifically enforce Owner's duty of confidentiality, under Section 23.4, (c) declaratory relief under the Dispute Resolution Procedures declaring the rights and obligations of the Parties under the Contract Documents, or (d) declaratory relief under the Dispute Resolution Procedures declaring specific terms that shall bind the Parties, but only where this Agreement expressly calls for such a method of resolving a Dispute.

**17.4.4.2** If Owner wrongfully withholds an approval or consent required under this Agreement, or wrongfully issues an objection to or disapproval of a Submittal or other matter under this Agreement, Concessionaire's sole remedies against Owner shall be compensation and extensions of time, each to the extent provided in Articles 14 and 15. Concessionaire shall have no right to suspend Work.

**17.4.4.3** Concessionaire's remedies for certain breaches of warranties are limited as provided in Section 21.3.

**17.4.5** Subject to Section 17.4.4 and except as specifically provided otherwise in this Agreement (including Sections 15.1.2, 17.4.2, 17.6 and 19.9), upon breach of this Agreement by Owner Concessionaire may exercise any remedies available at law or in equity.

#### **17.5 No Duplicative Payment**

Notwithstanding any other provisions of this Agreement to the contrary, neither Party shall be entitled to recover compensation or make a claim under this Agreement with respect to any loss that it has incurred to the extent that it has already been compensated with respect to that loss under this Agreement or otherwise.

#### **17.6 Limitation on Consequential Damages**

**17.6.1** Subject to Section 17.6.2, to the maximum extent allowed by Law, neither Party shall be liable to the other for Consequential Damages relating to this Agreement. This limitation shall apply to actions brought under any theory of law, including actions in tort (including negligence) as well as in contract.

**17.6.2** The limitation on Consequential Damages under Section 17.6.1 shall not limit a Party's obligation to make payments as expressly stated in the Contract Documents, including payment of Owner's Recoverable Costs, liquidated damages and interest on late

payments, or Owner's right to assess Deductions in accordance with the Contract Documents. Furthermore, the limitation on Concessionaire's liability shall not apply to or limit:

(a) Owner's right to recover Losses (including defense costs) to the extent covered by (i) the proceeds of insurance required to be carried under Section 11.1, (ii) the proceeds of insurance actually carried by or insuring Concessionaire under policies solely with respect to the Project and the Work, regardless of whether required to be carried under Section 11.1, or (iii) an obligation for Concessionaire to self-insure the Loss as provided in Section 11.1.4.6;

(b) Owner's right to recover Losses (including defense costs) arising out of fraud, criminal conduct, intentional misconduct, recklessness, bad faith or gross negligence on the part of any Concessionaire-Related Entity;

(c) Owner's right to enforce Concessionaire's indemnity under Section 11.5.1(g);

(d) Owner's right to enforce Concessionaire's indemnities, with respect to third party claims only, under in Sections 7.8.1.4(f), 10.3.2, 11.5.1(a) to 11.5.1(f), 11.5.1(h) and 11.5.1(i), 11.5.2, 11.5.3 and 23.3.5;

(e) Owner's right to reduce Availability Payments as specified in the Contract Documents;

(f) Costs and expenses actually incurred by Owner in responding to traffic, utility and similar incidents attributable to the Work; or

(g) Fines, fees and criminal penalties assessed against any Concessionaire-Related Entity by the State or any other Governmental Entity acting under its respective regulatory or police powers (and, with respect to Owner, not acting in its capacity as a Party to this Agreement).

**17.6.3** Notwithstanding the foregoing, Owner's right to recover lost revenues from Concessionaire under this Agreement (including farebox revenues) is limited to the right to make Deductions from Availability Payments and the right to recover Losses attributable to fraud, criminal conduct or intentional misconduct by a Concessionaire-Related Entity.

## **ARTICLE 18. LENDERS' RIGHTS**

### **18.1 Third Party Rights**

This Agreement is exclusively for the benefit of Owner and Concessionaire, and shall not provide any Lender with any remedy, claim, liability, reimbursement, cause of action or other right, except for the rights of any Lender as provided in any Direct Agreement.

### **18.2 Direct Agreement Priority**

The rights of Owner under Articles 17 and 19 are subject to the terms of any Direct Agreement.

## ARTICLE 19. TERMINATION

### 19.1 Termination for Convenience; Condemnation

**19.1.1** Owner may terminate this Agreement in whole, but not in part, if Owner determines, in its discretion, that termination is in Owner's best interest (a "Termination for Convenience"). Termination of this Agreement shall not relieve Concessionaire or any Guarantor or Surety of its obligation for any claims arising before termination.

**19.1.2** Owner may exercise Termination for Convenience by delivering to Concessionaire a Notice of Termination for Convenience specifying the election to terminate. Termination for Convenience shall be effective as and when provided in Section 2 of Exhibit 13B.

**19.1.3** In the event of a Termination for Convenience, Concessionaire will be entitled to compensation determined in accordance with Section 2 of Exhibit 13B. Payment will be due and payable as and when provided in Section 2 of Exhibit 13B.

**19.1.4** If either MTA or MDOT confiscates, sequesters, condemns or appropriates the Concessionaire's Interest or any material part thereof, compensation payable to Concessionaire with respect to such action shall be determined on the same basis as a Termination for Convenience under this Agreement.

### 19.2 Termination for Extended Delay or Insurance Unavailability

#### 19.2.1 Notice of Conditional Election to Terminate – Extended Delay

Either Party, following consultation with the other Party, may deliver to the other Party notice of its conditional election to terminate this Agreement if an Extended Delay has occurred and is continuing. The notice shall state the notifying Party's intent to terminate this Agreement and describe the Extended Delay and consequences thereof in reasonable detail. If the notice is provided by Concessionaire, it shall include an estimate, with supporting documentation, regarding the total amount due to Concessionaire under Section 19.2.4.1.

#### 19.2.2 Notice of Conditional Election to Terminate – Insurance Unavailability

If it becomes apparent that insurance required under the Contract Documents is not available as described in the definition of "Insurance Unavailability", Owner may deliver to Concessionaire notice of its conditional election to terminate this Agreement for Insurance Unavailability. Such notice shall include reasonable details regarding the affected coverages and associated risks, as well as the estimated cost of premiums if Commercially Reasonable Insurance Rates are not available.

#### 19.2.3 Concessionaire Options upon Owner Notice

**19.2.3.1** If Owner gives notice of conditional election to terminate this Agreement under Section 19.2.1 or 19.2.2, then Concessionaire shall either accept such notice or give notice to Owner to continue performing its obligations under this Agreement subject to Section 19.2.3.2 or 19.2.3.3, as applicable, and without limiting any of Owner's other rights under this Agreement. Concessionaire shall deliver to Owner notice of Concessionaire's choice within 30 days after its receipt of notice from Owner. Concessionaire may also dispute Owner's right to terminate, in which case the notice shall state that Concessionaire elects to continue to

perform its obligations under this Agreement pending resolution of the Dispute subject to the provisions of Section 19.2.3.2 or 19.2.3.3. If Concessionaire does not deliver such notice within such 30-day period, then Concessionaire shall be deemed to have accepted Owner's election to terminate this Agreement.

**19.2.3.2** If Concessionaire delivers timely notice (1) choosing to continue performing its obligations under this Agreement following receipt of a conditional election to terminate for an Extended Delay, without disputing Owner's right to terminate or (2) disputing Owner's right to terminate under Section 19.2.3.1, then:

(a) Owner shall have no obligation to compensate Concessionaire for any costs of restoration, repair or replacement arising out of, relating to or resulting from the Extended Delay;

(b) Owner shall have no obligation to compensate Concessionaire for any loss of Availability Payments and/or, if applicable, for any other Incremental Costs or Delay Costs arising out of, relating to or resulting from the continuation of the Extended Delay beyond the date of Owner's notice;

(c) If the Extended Delay commences before the Revenue Service Availability Date and results in a delay to the Critical Path, then the provisions of this Agreement concerning time extensions and payment of Delay Interest for delays due to Force Majeure Events shall apply; and

(d) This Agreement shall continue in full force and effect and Owner's election to terminate for an Extended Delay shall not take effect.

**19.2.3.3** If Concessionaire delivers timely notice (1) choosing to continue performing its obligations under this Agreement following receipt of a conditional election to terminate for Insurance Unavailability, without disputing Owner's right to terminate or (2) disputing Owner's right to terminate under Section 19.2.3.1, then:

(a) Subject to Section 19.2.3.3(b), Owner shall have no liability to any Concessionaire-Related Entity, Collateral Agent or Lender for harm or loss from the risks that are the subject of Insurance Unavailability;

(b) Concessionaire may request that Owner reimburse Concessionaire up to the full amount of insurance coverage that Concessionaire would have been obligated to carry had such coverage been commercially available, and on the terms, and subject to the conditions, of such insurance coverage (as set out in the applicable sections of Exhibit 7A) except to the extent caused by the fraud, criminal conduct, intentional misconduct, recklessness, bad faith or breach of the Contract Documents of or by any Concessionaire-Related Entity, Collateral Agent or Lender;

(c) Concessionaire shall credit to Owner, as part of the insurance adjustment to the Payment Mechanism under Exhibit 4D, all insurance premiums reflected in the most recent Financial Model Update that are the subject of, and during the period of, Insurance Unavailability;

(d) Concessionaire shall promptly and diligently repair and restore all damage and destruction to the Project arising out of, relating to or resulting from Losses born of risks that are not covered by insurance due to Insurance

Unavailability, in order to put the Project in a safe, good and sound condition in compliance with all applicable requirements of the Contract Documents; and

(e) Subject to Section 19.2.9, this Agreement shall continue in full force and effect and Owner's election to terminate on the basis of Insurance Unavailability shall not take effect.

**19.2.3.4** If Concessionaire delivers timely notice choosing to continue performing its obligations under this Agreement, and disputing Owner's right to terminate under this Section 19.2.3, and it is ultimately determined that Owner had the right to terminate, the provisions of Section 19.2.3.2 or 19.2.3.3 shall apply, as applicable. If it is ultimately determined that Owner did not have the right to terminate, the rights and obligations of the Parties shall be determined based on the Force Majeure and Relief Event provisions of this Agreement, as applicable:

#### **19.2.4 Owner Options upon Concessionaire Notice (Extended Delay)**

If Concessionaire gives notice of conditional election to terminate as provided in Section 19.2.1, then Owner may either accept such notice or continue this Agreement in effect by delivering to Concessionaire notice of Owner's choice within 30 days after Concessionaire delivers its notice. If Owner wishes to dispute Concessionaire's right to terminate, then it shall include in its notice both Owner's choice and a notice of dispute, in which case Owner's choice will be contingent upon resolution of the Dispute in favor of Concessionaire. If Owner does not deliver such notice within such 30-day period, then it shall be deemed to have accepted Concessionaire's election to terminate this Agreement. If Owner delivers timely notice choosing to continue this Agreement in effect, then the following provisions shall apply in addition to Owner's obligations under Section 15.9.2.

**19.2.4.1** For an Extended Delay under clause (b) of the definition of Extended DB Force Majeure Event or Extended OM Force Majeure Event, Owner will pay or reimburse Concessionaire an amount equal to (without double counting):

(a) The Incremental Costs to repair, restore or replace any physical loss or damage to the Project and Delay Costs, if any, directly caused by the Extended Delay which are not excluded under Section 15.3.6 and are incurred after the date Concessionaire delivers its notice of conditional election to terminate; plus

(b) The sum of (i) the greater of (A) the proceeds of insurance (including casualty insurance and business interruption insurance) that is required to be carried under Section 11.1 and provides coverage to pay, reimburse or provide for any of the foregoing costs and losses or (B) the proceeds of insurance (including casualty insurance and business interruption insurance) that is actually carried by or insuring Concessionaire under policies solely with respect to the Project and the Work, regardless of whether required to be carried under Section 11.1, and that provides coverage to pay, reimburse or provide for any of the foregoing costs and losses, and (ii) the foregoing costs and losses that Concessionaire is deemed to have self-insured under Section 11.1.4.6.

**19.2.4.2** Concessionaire's rights to an extension of time, compensation, excuse from compliance and other relief under Articles 14 and 15 shall continue to apply with respect to the Extended Delay.

**19.2.4.3** This Agreement shall continue in full force and effect and Concessionaire's election to terminate for an Extended Delay shall not take effect.

### **19.2.5 Unconditional Right to Terminate**

If any Extended Delay results in 365 or more days of Critical Path delay, either Party may deliver to the other Party a notice of its unconditional election to terminate this Agreement, in which case neither Party shall have any further option to continue this Agreement in effect. Notwithstanding the foregoing, if Concessionaire previously provided a notice of conditional election to terminate under Section 19.2.1 and Owner opted to continue this Agreement in effect, Concessionaire's right to issue a notice of unconditional election to terminate will not accrue unless and until an additional 365 days of Extended Delays have accumulated after the date of Concessionaire's notice of conditional election to terminate.

### **19.2.6 No Waiver**

No election by Owner under Section 19.2.4 to continue this Agreement in effect shall prejudice or waive Owner's right to give a notice of conditional election to terminate with respect to the same or any other Extended Delay or Insurance Unavailability.

### **19.2.7 Concurrent Notices**

If Owner and Concessionaire deliver concurrent notices of conditional election to terminate under this Section 19.2, Concessionaire's notice shall prevail. Notices shall be deemed to be concurrent if each Party sends its notice before actually receiving the notice from the other Party. Knowledge of the other Party's notice obtained before actual receipt of the notice shall have no effect on determining whether concurrent notice has occurred.

### **19.2.8 Early Termination Date and Amount**

If either Party accepts the other Party's conditional election to terminate, or if either Party delivers notice of its unconditional election to terminate under Section 19.2.5 or 19.2.9, then this Agreement shall be deemed terminated on an Early Termination Date as described in Section 3 of Exhibit 13B; and Concessionaire will be entitled to compensation determined in accordance with Section 3 of Exhibit 13B. Payment will be due and payable as and when provided in Section 3 of Exhibit 13B.

### **19.2.9 Special Provision Regarding Insurance Unavailability**

In addition to the other provisions in this Section 19.2, and without limitation on such provisions that pertain to Insurance Unavailability, if Owner delivers to Concessionaire notice of its conditional election to terminate this Agreement for Insurance Unavailability under Section 19.2.2, and if Concessionaire delivers timely notice choosing to continue to perform its obligations under this Agreement thereafter under Section 19.2.3.1, and if during the period of such Insurance Unavailability (during which Owner is the insurer of last resort), the Project suffers a Loss for which the Insurance Policy that was the subject of the Insurance Unavailability would have been in place, but for the Insurance Unavailability, and such Loss (or a reasonable estimate of such Loss, determined by Owner) exceeds \$50,000,000, then Owner shall have the unconditional right to terminate this Agreement for Insurance Unavailability by notice to Concessionaire.

### **19.3 Termination for Concessionaire Default**

#### **19.3.1 Concessionaire Defaults Triggering Owner Termination Rights**

Concessionaire acknowledges and agrees that any Concessionaire Default under Sections 17.1.1(b) through 17.1.1(v) would result in material and substantial harm to Owner's rights and interests under this Agreement and therefore constitutes a material Concessionaire Default justifying termination of the Agreement, unless fully and completely cured within the applicable cure period, if any, in Section 17.1.2, any extended cure period available under Section 16.6 or any cure period available to a Lender under a Direct Agreement. A Concessionaire Default shall be considered a "Default Termination Event" if not fully and completely cured prior to expiration of the relevant cure period (if any), or immediately if the Concessionaire Default is not subject to cure. Any Default Termination Event shall, subject to the provisions of any Direct Agreement and Section 21.3, entitle Owner, at its sole election, to terminate this Agreement and the other Contract Documents by delivering notice of termination to (a) Concessionaire and (b) if applicable, the Collateral Agent under the Direct Agreement. Termination shall be effective as and when provided in Section 4 of Exhibit 13B.

#### **19.3.2 Compensation to Concessionaire**

If Owner issues notice of termination of this Agreement due to a Default Termination Event, or if Concessionaire terminates this Agreement on grounds or in circumstances beyond Concessionaire's termination rights under this Agreement, Concessionaire will be entitled to compensation to the extent (if any), and only to the extent, provided in Section 4 of Exhibit 13B. Payment (if any) shall be due and payable as and when provided in Section 4 of Exhibit 13B.

#### **19.3.3 Finality**

If Owner issues notice of termination of this Agreement due to a Default Termination Event, termination shall be effective and final regardless of whether Owner is correct in determining that it has the right to terminate for Concessionaire Default. If it is determined that Owner lacked such right, then such termination shall be treated as a Termination for Convenience as provided in Section 19.1 for the purpose of determining the Termination Compensation due.

### **19.4 Concessionaire Rights to Terminate**

**19.4.1** Concessionaire shall have the right to terminate this Agreement in the event of an Owner Default under Section 17.3.1(a) involving an undisputed payment of \$1 million or more if Owner has failed to cure such default following delivery of the warning notices described in this Section 19.4.1. Concessionaire shall provide a warning notice to Owner at least 15 days before terminating, which notice may not be delivered until 30 days after delivery of the notice under Section 17.3.2.1. Concessionaire shall provide a second warning notice to Owner at least five days before terminating, which notice may not be delivered until 10 days after delivery of the first warning notice. If Owner fails to effect cure within five days after the date of delivery of the second warning notice, Concessionaire shall have the right to terminate this Agreement by delivery of notice to that effect to Owner delivered at any time before the default is cured.

**19.4.2** If any order to suspend all or a material portion of the Work is issued (or deemed issued) by Owner for its convenience under Section 17.2.7.3 and continues for a period of 270 days or more, Concessionaire may terminate this Agreement, effective immediately upon delivery of notice of termination to Owner delivered at any time before the suspension is lifted.

**19.4.3** If Concessionaire's Financial Proposal includes a TIFIA Loan, and (a) USDOT requires execution of the "New Starts Full Funding Grant Agreement" as a requirement for draw on such TIFIA Loan, (b) Owner fails to execute the "New Starts Full Funding Grant Agreement" prior to May 17, 2018, and (c) Owner and Concessionaire have not agreed, in writing, and subject to any approval rights of Lenders then holding Project Debt (other than the TIFIA Loan), upon alternative arrangements with respect to the "New Starts Grant Agreement" prior to April 2, 2018, then Concessionaire may terminate this Agreement, effective immediately upon Owner's receipt of Concessionaire's notice of termination delivered at any time on or after such date.

**19.4.4** In the event of termination under this Section 19.4, Concessionaire will be entitled to compensation determined in accordance with Section 2 of Exhibit 13B. Payment shall be due and payable as and when provided in said Section 2. Any Dispute arising out of the determination of such compensation shall be resolved under the Dispute Resolution Procedures.

**19.4.5** Concessionaire may not terminate under this Section 19.4 if, at the time Concessionaire's right to terminate would arise, circumstances exist entitling either Party to terminate under Section 19.2, 19.3, 19.5 or 19.6.

## **19.5 Termination Due to Court Ruling**

**19.5.1.1** If grounds for Termination Due to Court Ruling exist, either Party has the right to terminate. Any Party that wishes to terminate shall consult with the other before delivering a termination notice. Any notice of Termination Due to Court Ruling shall be effective 10 business days after delivery unless (a) a later date is specified in the notice, (b) the notice is withdrawn or (c) with said 10-day period the other Party delivers an objection to the first Party contesting the first Party's right to terminate. Any disagreement regarding the right to terminate shall be resolved under the Dispute Resolution Procedures.

**19.5.1.2** Once Termination Due to Court Ruling becomes effective, Owner and Concessionaire shall work together to implement Sections 19.7, 19.8, and 19.11.

**19.5.2** Notwithstanding Section 19.5.1.2, if a Termination Due to Court Ruling occurs, Concessionaire shall be entitled to compensation only to the extent provided in Section 3 of Exhibit 13B.

## **19.6 Termination if Financial Close Fails to Occur**

**19.6.1** Concessionaire or Owner may terminate this Agreement without fault or penalty if Financial Close does not occur by the Financial Close Deadline and such failure is directly attributable to any of the contingencies in Section 4.4.6. Termination shall take effect at the date specified in the notification from Concessionaire or Owner to the other party, unless the Parties otherwise agree. In the event of such a termination:

**19.6.1.1** All the Contract Documents shall be deemed terminated as of the Financial Close Deadline, except those Contract Documents (or provisions within) that expressly survive termination of the Contract Documents;

**19.6.1.2** Owner and Concessionaire shall take all actions specified to occur on or about the Termination Date in Section 19.7; and

**19.6.1.3** Concessionaire shall be entitled to compensation to the extent, and only to the extent, provided in Section 5 of Exhibit 13B. Payment shall be due and payable as and when provided in said Section 5. Any Dispute arising out of the determination of such compensation shall be resolved under the Dispute Resolution Procedures.

**19.6.2** If Concessionaire fails to achieve Financial Close by the Financial Close Deadline, such failure is not directly attributable to any of the contingencies in Section 4.4.6, and neither Party is then entitled to terminate this Agreement under Section 19.5, then the following terms apply.

**19.6.2.1** Owner shall have the right to terminate this Agreement upon five days' prior notice to Concessionaire, without need for any other notice and without any additional cure period, unless Concessionaire achieves Financial Close in accordance with the conditions in Section 4.4.4 within such five-day period.

**19.6.2.2** In the event of such termination, Concessionaire shall be liable for and pay to Owner liquidated damages for such failure in the amount of the Financial Close Security. Such liquidated damages shall constitute Owner's sole right to damages on account of such failure.

**19.6.2.3** Upon or after the effective date of termination, Owner shall be entitled to collect the liquidated damages owing under this Section 19.6 through a draw on or forfeiture of the Financial Close Security, as applicable, without prior notice to or demand upon Concessionaire.

**19.6.3** Concessionaire acknowledges that the time period Owner has provided to Concessionaire to achieve Financial Close is ample and reasonable, and that such liquidated damages are reasonable in order to compensate Owner for damages it will incur as a result of the lost opportunity to Owner represented by the Contract Documents. Such damages include the harm from the difficulty, and substantial additional expense, to Owner, to procure and deliver, operate and maintain the Project through other means, loss of or substantial delay in use, enjoyment and benefit of the Project by the general public, and injury to the credibility and reputation of Owner's transportation improvement program, with policy makers, other Governmental Entities and the general public who depend on and expect availability of service. Concessionaire further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it.

**19.6.4** Owner shall not be obligated to make any payment to Concessionaire if this Agreement is terminated for failure to reach Financial Close, other than the payments allowed under Section 5 of Exhibit 13B. Furthermore, even if no payments are owing under Exhibit 13B, if Owner has issued a limited NTP allowing specified Work to proceed before Financial Close, and such NTP establishes terms for payment for such Work by Owner, Concessionaire's failure to reach Financial Close shall not obviate Owner's obligation to pay for Work authorized by the limited NTP. In all other respects, Concessionaire bears the risk that Financial Close may not occur and, as between Owner and Concessionaire, Concessionaire will be solely responsible for costs that it incurs relating to the Project before Financial Close.

## **19.7 Termination Procedures and Duties**

The provisions of this Section 19.7 shall apply upon expiration of the Term or earlier termination of this Agreement. Concessionaire shall timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts

due Concessionaire or Owner on account of termination. If Owner determines that Concessionaire has failed to comply with the provisions of this Section 19.7, then upon notice from Owner to Concessionaire making reference to this Section 19.7, Concessionaire acknowledges and agrees that it shall be deemed to have, surrendered its access rights in accordance with the Contract Documents.

### **19.7.1 Performance of Work Pending Early Termination Date**

In any case where notice of termination precedes the effective Early Termination Date, Concessionaire shall continue performing the Work in accordance with all the standards, requirements and terms of the Contract Documents.

### **19.7.2 Transition Plan**

**19.7.2.1** Within 90 days before expiration of the Term, or, if applicable, within three days after Concessionaire receives or delivers a notice of termination, Concessionaire shall meet and confer with Owner for the purpose of developing a transition plan for the orderly transition of Work, demobilization and transfer of Project management, maintenance, operation, care, custody and control to Owner. The Parties shall use diligent efforts to complete preparation of the transition plan within 30 days before expiration of the Term or, if applicable, within 15 days after the date Concessionaire receives or delivers the notice of termination.

**19.7.2.2** The transition plan shall include a plan to promptly deliver to Owner or its designee possession of all the property, data and documents described in Sections 19.7.5.1 and 19.7.5.2.

**19.7.2.3** The transition plan shall include an estimate of costs and expenses to be incurred by both Parties in connection with implementation of the transition plan. Neither Party shall be liable for the other Party's transition costs and expenses, regardless of the reason for termination.

**19.7.2.4** The transition plan shall be in form and substance acceptable to Owner and shall include and be consistent with the other provisions and procedures in this Section 19.7, all of which procedures Concessionaire shall follow, regardless of any delay in preparation or acceptance of the transition plan. If required by Owner, the transition plan shall provide for Concessionaire to continue to perform specified Work during the period between the Termination Date and the effective date of the release and discharge, following payment of Termination Compensation under Section 19.9.2 (the "Termination Compensation Date").

### **19.7.3 Relinquishment and Possession of Project**

**19.7.3.1** On or as soon as possible after the Termination Date as provided in the approved transition plan, Concessionaire shall relinquish and surrender care, custody and control of the Project, to Owner, and shall cause all persons and entities claiming under or through Concessionaire to do likewise (except as may be set forth in any Direct Agreement), in at least the condition required by the Handback Requirements.

**19.7.3.2** On the later of the Termination Date or the date Concessionaire relinquishes all care, custody and control (having fully performed its obligations under this Section 19.7), Owner shall have the exclusive right to, and shall assume responsibility at its expense for, care, custody and control of the Project and the Project ROW, subject to any rights

to damages against Concessionaire where the termination is due to a Default Termination Event.

**19.7.3.3** If the transition plan developed under Section 19.7.2 requires Concessionaire to perform any obligations under this Agreement after the Termination Date, this Agreement will remain in full force and effect only to the extent necessary for Concessionaire to perform such obligations, and Owner shall pay the Concessionaire the Post-Termination Services Amount in accordance with Exhibit 13B. On the Termination Date, or such later date as is agreed in the approved transition plan, Owner grants to Concessionaire a right to access the Project ROW for the limited purpose of carrying out Concessionaire's obligations contemplated by this Section 19.7, including execution of the transition plan contemplated in Section 19.7.2. This right of access is subject to rescission by Owner for Concessionaire's failure to perform any of its obligations under this Agreement after the Termination Date, and shall automatically expire upon Concessionaire's fulfillment of such obligations.

#### **19.7.4 Continuance or Termination of Key Contracts Before Work Completion**

**19.7.4.1** Subject to the terms of any Direct Agreement, if Concessionaire has not completed the Work, in whole or in part, as of the Termination Date, Owner may elect, by notice to Concessionaire delivered within 30 days after the Termination Date, either to continue in effect some or all of the Key Contracts or to require their termination. Owner may elect to keep certain Key Contracts in effect and require termination of other Key Contracts. If Owner does not deliver notice of election within such time period, Owner shall be deemed to elect to require termination of all Key Contracts. If Owner elects to continue any Key Contracts, then Concessionaire shall execute and deliver to Owner a written assignment, in form and substance acceptable to Owner, of all Concessionaire's interest in such Key Contracts, and Owner will assume in writing Concessionaire's obligations under the Key Contracts that arise from and after the later of the Termination Date or the effective date of assignment.

**19.7.4.2** If Owner elects (or is deemed to elect) to require termination of any Key Contracts, then Concessionaire shall:

(a) Take such steps as are necessary to terminate the relevant Key Contracts, including notifying each Key Contractor that its Key Contract is being terminated and that each of them is to stop Work on the date and to the extent specified in the notice of termination and stop and cancel orders for materials, services or facilities, unless otherwise approved by Owner;

(b) Promptly and orderly demobilize and secure in a safe manner the Site in a manner satisfactory to Owner, remove all debris and waste materials and complete any Hazardous Materials Management Work already in process, except as otherwise approved by Owner;

(c) Take such other actions as are necessary or appropriate to mitigate further costs;

(d) Subject to Owner's reasonable prior approval, settle all outstanding liabilities and all claims arising out of, relating to or resulting from such Key Contracts;

(e) As a condition to Owner's obligation to make payments to Concessionaire under Article 19 and under the requirements of the transition plan, cause each of the Key Contractors to execute and deliver to Owner a written assignment, in

form and substance acceptable to Owner, of all of their interest in (i) all Governmental Approvals, Utility Agreements and other third party agreements and permits pertaining to the Project or the Work (excluding Subcontracts); provided that Owner assumes in writing all of the Key Contractor's obligations under said approvals, agreements and permits that arise after the Termination Date, and (ii) all warranties, to the extent assignable, claims and causes of action held by each of them against Subcontractors and other third parties pertaining to the Project or the Work, provided that Concessionaire shall retain the right to pursue any cause of action against the Subcontractor or other third parties for damages incurred by Concessionaire; and

(f) As a condition to Owner's obligation to make payments to Concessionaire under Article 19 and under the requirements of the transition plan, carry out such other directions as Owner may give for termination of the Work in accordance with the transition plan.

### **19.7.5 Other Close-Out Activities**

**19.7.5.1** Within 90 days before expiration of the Term, or within 30 days after any earlier notice of termination is delivered, Concessionaire shall provide Owner with a true and complete list of all materials, goods, machinery, equipment, hardware, parts, supplies and other tangible property in inventory or storage (whether then held by Concessionaire or any Person on behalf of or for the account of Concessionaire) for use in or respecting the Work or the Project, or on order or previously completed but not yet delivered from Suppliers for use in or respecting the Work or the Project. In addition, on or as soon after the Termination Date as is possible or as is provided in the approved transition plan, Concessionaire shall transfer title through bills of sale or other documents of title, as directed by Owner, and deliver to Owner or Owner's Authorized Representative, all such materials, goods, machinery, equipment, hardware, parts, supplies and other property, provided Owner assumes in writing all of Concessionaire's obligations under any contracts relating to the foregoing that arise after the later of the Termination Date or the effective date of the transfer.

**19.7.5.2** Subject to Sections 23.4 and 23.5, within 90 days before the expiration of the Term, or within 30 days after any earlier notice of termination is delivered, Concessionaire shall provide Owner with a true and complete list of all the data and documents identified in this Section 19.7.5.2. On or as soon after the Termination Date or as is provided in the approved transition plan, Concessionaire shall deliver to Owner the following:

(a) If required by Owner, an executed bill of sale or other written instrument, in form and substance acceptable to Owner, assigning and transferring to Owner all interest of Concessionaire and its Contractors;

(b) All completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, designs, Design Documents, Record Documents, plans, surveys, and other documents and information pertaining to the design or construction of the Project or the Utility Adjustments, free of any Intellectual Property rights or claims of Concessionaire or any Contractor other than the licenses to Concessionaire Intellectual Property granted under Sections 23.4.3 and 23.4.10.1;

(c) All samples, borings, boring logs, geotechnical data and similar data and information relating to the Project or Project ROW;

(d) All Books and Records, reports, test reports, studies and other documents of a similar nature relating to the Work, the Project or the Project ROW; and

(e) All Intellectual Property, documents evidencing licenses of Concessionaire Intellectual Property to Owner, other work product and other materials relating to all such Intellectual Property and Concessionaire Intellectual Property; provided that the transfer of any such Intellectual Property shall be subject to Sections 23.4 and 23.5.

**19.7.5.3** Concessionaire shall take all action that may be necessary, or that Owner may direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, hardware, parts, supplies, data, documentation and other property.

**19.7.5.4** On or as soon as possible after the Termination Date or as provided in the approved transition plan, Concessionaire shall execute and deliver to Owner a written assignment, in form and substance acceptable to Owner, all of Concessionaire's interest in any Intellectual Property Escrows or similar arrangements for the protection of Source Code and Source Code Documentation of others used for or relating to the Project or the Work.

**19.7.5.5** On or as soon as possible after the Termination Date or as provided in the approved transition plan, Concessionaire shall execute and deliver to Owner a written assignment, in form and substance acceptable to Owner, of all Concessionaire's interest in all warranties, claims and causes of action held by Concessionaire against third parties in connection with the Project or the Work, including claims under casualty and business interruption insurance, except to the extent that Owner has already received credit for such matters in calculating Termination Compensation amounts, in which case they may be pursued by Concessionaire for its own account.

**19.7.5.6** Concessionaire shall otherwise assist Owner in such manner as Owner may require before and for a reasonable period following the Termination Date to ensure the orderly transition of management, maintenance, operation, care, custody and control of the Project, to Owner, and shall, if appropriate and if requested by Owner, take all steps as may be necessary to enforce the provisions of the Key Contracts pertaining to the surrender of Project management, maintenance, operation, care, custody and control.

**19.7.5.7** For a period of four years following the Termination Date, Concessionaire shall maintain a secure archive copy of all electronic data transferred to Owner.

## **19.7.6 Compensation; Proration of Costs**

**19.7.6.1** From and after the Termination Date, except as otherwise stated in Exhibit 13B, Concessionaire shall cease to have any right to (a) Availability Payments except for those accrued and owing before the Termination Date and (b) any other compensation, except with respect to compensation that remains due to Concessionaire under this Agreement, if any.

**19.7.6.2** Within 90 days after the Termination Date, the Parties shall adjust and prorate as of the Termination Date costs of operation and maintenance of the Project, including utility costs and deposits. If the Parties do not have complete or accurate information by such date, they shall make the adjustment and proration using a good faith estimate, and promptly readjust when the complete and accurate information is obtained. The Parties acknowledge that certain adjustments or readjustments may depend on receipt of bills, invoices

or other information from a third party, and that the third party may delay in providing such information. Any readjustment necessary only because of error in calculation and not due to lack of complete and accurate information shall be irrevocably waived unless the Party seeking readjustment delivers request therefor to the other Party within 90 days after the Termination Date.

## **19.8 Effect of Termination**

Except to the extent set out in Section 19.7.3.3, and regardless of Owner's prior actual or constructive knowledge thereof:

(a) No Contract or agreement to which Concessionaire is a party as of the Termination Date shall bind Owner, unless Owner elects to assume such Contract or agreement; and

(b) Except in the case of Owner's express written assumption, no such Contract or agreement shall entitle the contracting party to continue performance of work or services respecting the Project following Concessionaire's relinquishment to Owner of Project care, custody and control, or to any claim, legal or equitable, against Owner.

## **19.9 Liability after Termination; Final Release**

**19.9.1** No termination of this Agreement shall excuse either Party from any liability arising out of, related to or resulting from any default as provided in this Agreement that occurred before termination. Notwithstanding the foregoing, any termination of this Agreement under Section 19.2, 19.3, 19.5 or 19.6 shall automatically extinguish any claim of Concessionaire to payment of Compensation Amounts for adverse cost and revenue impacts accruing after the Early Termination Date due to Relief Events that occurred before termination.

**19.9.2** Except as otherwise expressly provided in this Agreement, if this Agreement is earlier terminated for any reason, then Owner's payment to Concessionaire of the amounts required under this Agreement (if any) shall constitute full and final satisfaction of, and upon payment Owner shall be forever released and discharged from, any and all claims, causes of action, suits, demands and Losses, known or unknown, suspected or unsuspected, that Concessionaire may have against Owner arising out of, relating to or resulting from this Agreement or termination thereof, the other Contract Documents, or the Project, excluding any proceedings that are pending as of 30 days after the effective date of termination, remain unresolved at the time of such payment, and are not related to termination or Termination Compensation. Upon such payment, Concessionaire shall execute and deliver to Owner all such releases and discharges as Owner may reasonably require to confirm the foregoing, but no such written release and discharge shall be necessary to give effect to the foregoing satisfaction and release.

## **19.10 Exclusive Termination Rights**

This Article 19 and Exhibit 13B contain the entire and exclusive provisions and rights of Owner and Concessionaire regarding termination of this Agreement, and each Party waives, to the maximum extent permitted by Law, any and all other rights to terminate at law.

### **19.11 Access to Information**

Concessionaire shall conduct all discussions and negotiations to determine any Termination Compensation, and shall share with Owner all data, documents and information pertaining to the termination, on an Open Book Basis.

### **19.12 Transfer of Employees Upon Termination**

Following expiration of the Term or any early termination of this Agreement, Owner or any contractor designated by Owner to perform operations and/or maintenance services for the Project (or portion thereof, as identified by Owner) may make offers of employment to staff retained by or through Concessionaire or any Contractor. Insofar as such offers extend to the employees of the O&M Contractor, Concessionaire shall not hinder or obstruct (and shall cause the O&M Contractor not to hinder or obstruct) the transfer of such employees who wish to accept such offers of employment and so transfer their employment to Owner or any such successor contractor.

## ARTICLE 20. PARTNERING AND DISPUTE RESOLUTION PROCEDURES

### 20.1 Partnering

**20.1.1** Owner, Concessionaire, Contractors and other stakeholders, as appropriate, shall participate in a structured partnering process. The partnering process will be structured to draw on the strengths of each organization through open communication, teamwork and cooperative action to identify and achieve mutual goals. The objective is to create an atmosphere of trust and honest dialogue among all stakeholders. Partnering will not change the legal relationship of the Parties nor relieve any Party from any of the terms of the Contract Documents.

**20.1.2** Owner's and Concessionaire's Authorized Representatives will organize a partnering project team and implement a partnering process with reference to the guidelines for partnering in the Partnering Field Guide at [www.mdqi.org](http://www.mdqi.org), or successor site, provided that:

(a) The jointly selected member of the Technical DRB may act as facilitator for partnering meetings; and

(b) The partnering process shall include the Parties and members of the DRBs attending at least semi-annual Project meetings at which the Parties will provide an update on the status of the Project for the DRB members.

**20.1.3** The objectives of the partnering process are to:

(a) Identify potential problem areas, issues and differences of opinion early;

(b) Develop and implement procedures for resolving them in order to prevent them from becoming Disputes;

(c) Achieve and maintain effective and efficient performance and completion of Work in accordance with the Contract Documents; and

(d) Create mutual trust and respect for each party's respective roles and interests in the Project while recognizing the risk allocation inherent in the Contract Documents.

Concessionaire, Owner and other relevant parties shall meet regularly (e.g., as a "partnering team") throughout the life of the Project at partnering meetings to discuss specific interface issues, oversight interface issues, division of responsibilities, communication channels, and other matters as the parties agree.

**20.1.4** Each party shall bear its own costs associated with participation in partnering and proceedings before the Dispute Resolution Board under Section 20.2, with the cost of facilitators and DRB members and similar meeting costs shared equally between Concessionaire and Owner.

### 20.2 Dispute Resolution Board

**20.2.1** The Parties will designate a Technical DRB to address technical issues, and a Financial DRB to address financial issues arising during the Term. A Dispute may be referred

to either, both or a joint session of the DRBs, depending on the nature of the issues in dispute. In the case of an individual session of the Technical DRB or Financial DRB, the DRB will be composed of three independent members, one selected by Concessionaire, one selected by Owner, and the third selected by the first two members. In the case of a joint session of the Technical DRB and Financial DRB, the DRB will be composed of (a) three members selected as for an individual session above; or (b) where the Parties agree, five independent members, two selected by Concessionaire, two selected by Owner, and the fifth selected by the first four members.

**20.2.2** The Parties will have the right to submit written evidence to the DRB regarding the Dispute, and will be given an opportunity to respond to the evidence presented by the other, including participating in a hearing to the extent the DRB calls one in relation to a particular Dispute. The DRB will have 60 days to provide notice of its decision and summary of reasons for the decision reached.

**20.2.3** A limited category of Disputes will be outside of the jurisdiction of the DRBs and will be directly referred to the MDOT Secretary for resolution rather than a DRB. The following Disputes are outside of the jurisdiction of the DRBs: (a) the interpretation or application of Owner codes and standards over which Owner has jurisdiction for enforcement in its capacity as a regulator, and (b) Disputes involving interpretation of federal or State Law or policies.

**20.2.4** The decision of the DRB is not binding. Unless both Parties agree in writing to the contrary, the decision of the DRB shall not be admissible in any judicial proceeding. Referral of a matter to the DRB is not mandatory and does not waive the requirements of Section 20.3 to file timely notice of Claim(s).

## **20.3 Claims**

### **20.3.1 Presentation of a Claim**

**20.3.1.1** A Claim shall be submitted to the Contracting Officer, or his or her Authorized Representative for decision. As a condition to initiation of the Claims process for Claims regarding the payment of money or extension of time, Concessionaire must first have submitted a Modification Request under Section 14.2.1(a) or a PCO Notice, NCD Notice and/or Request for Change Order under Article 15. Concessionaire shall file a Notice of Claim with the Contracting Officer within 30 days after the basis for a potential Claim is known or should have been known, whichever is earlier. Within 90 days of the filing of a Notice of Claim (or such extended period as may be approved in writing by the Contracting Officer), Concessionaire shall submit the Claim to the Contracting Officer.

**20.3.1.2** A Claim shall contain:

- (a) An explanation of the Claim, including reference to all contract provisions upon which it is based;
- (b) The amount of the Claim;
- (c) The facts upon which the Claim is based;
- (d) All pertinent data and correspondence that the contractor relies upon to substantiate the Claim;

(e) Itemized supporting data for the elements of cost requested in the Claim that the contractor contends it has incurred or it will incur. This shall contain sufficient documentary support of actual costs to permit analysis by Owner of materials, labor, equipment, subcontract and overhead costs; and

(f) A certification by Concessionaire's Authorized Representative that, to the best of his or her knowledge and belief, the Claim is made in good faith, supporting data are accurate and complete, and the amount requested accurately reflects the costs and/or delay for which the person believes Owner is liable.

**20.3.1.3** A Notice of Claim that is not filed within 30 days after the basis for the claim is known or should have been known, whichever is earlier, shall be dismissed.

**20.3.1.4** A Claim that is not filed within 90 days of the filing of a Notice of Claim, or within the time period extended by the Contracting Officer, shall be dismissed.

### **20.3.2 Resolution of Claims by Contracting Officer**

**20.3.2.1** The Contracting Officer or his or her Authorized Representative will render an Initial Decision on all Claims within 90 days of receipt of Concessionaire's Claim unless otherwise agreed to by the Parties. The Initial Decision shall be furnished to Concessionaire, by email with a hard copy delivered by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

**20.3.2.2** Pending resolution of a Claim, Concessionaire shall proceed diligently with the performance of this Agreement.

### **20.3.3 Appeal of Claims**

**20.3.3.1** Within 15 days of receipt of an Initial Decision, Concessionaire may appeal the Initial Decision to the MDOT Secretary or designee. The notice of appeal shall include simple, concise and direct statements of grounds for each of its Claims, with appropriate reference to provisions of the Contract Documents, for each Claim and the dollar amount claimed.

**20.3.3.2** A notice of appeal that is not filed within 15 days of receipt of the Initial Decision shall be dismissed and the Initial Decision shall be the final decision of MDOT.

**20.3.3.3** The notice of appeal shall include the following information:

- (a) A statement of facts which forms the basis for the Claim;
- (b) The action or non-action of Owner which forms the basis for the Appeal;
- (c) An identification of the specific provision of the Contract Documents or other authority which forms the basis for the Appeal; and
- (d) The relief requested.

**20.3.3.4** The MDOT Secretary may request that Concessionaire produce documents, books, or other tangible things in support of the Claim. Within 30 days after receipt

of such a request, Concessionaire shall produce the documents requested or identify appropriate grounds for not producing the documents.

**20.3.3.5** Hearing –

(a) Upon written request, and in the discretion of the MDOT Secretary, Concessionaire may be afforded a de novo review of the Contracting Officer decision and shall be affording an opportunity to be heard and to offer evidence in support of the Claim.

(b) The Contracting Officer may be afforded an opportunity to present evidence in support of the initial decision.

(c) The hearing shall take the form of a quasi-judicial proceeding. Either Party may:

(i) Call witnesses;

(ii) Offer relevant, material evidence;

(iii) Cross-examine any witness; or

(iv) Present summation and argument. The MDOT Secretary may request summation(s) to be in writing.

(d) At the request of any party, the hearing may be recorded and transcribed.

**20.3.3.6** The MDOT Secretary shall make a record of all matters relating to the Appeal, including:

(a) Claim;

(b) The Initial Decision;

(c) All documentary evidence received by the MDOT Secretary;

(d) The written transcript, if any, of a hearing;

(e) The final decision of the MDOT Secretary; and

(f) Any other documentation in the custody of Owner relevant to the Appeal.

**20.3.3.7** The MDOT Secretary may delegate the responsibilities under this section to a designee.

**20.3.3.8** The decision by the MDOT Secretary (or designee) shall, unless otherwise agreed upon by the MDOT Secretary and the Parties, be issued within 180 days from the later of the hearing under Section 20.3.3.5 or receipt of all information requested from the parties under this Section 20.3.3.

**20.3.3.9** The decision by the MDOT Secretary (or designee) shall be the final decision of MDOT and shall be a prerequisite to any judicial review of any Claim by

Concessionaire against Owner. Within 30 days after receipt of the decision of MDOT Secretary (or designee), Concessionaire may commence an action in law against Owner in any court of competent jurisdiction.

#### **20.4 Continuation of Disputed Work and Payments**

At all times pending resolution of any Dispute:

**20.4.1** Concessionaire and all Contractors shall continue with the performance of the Work and their obligations, including any disputed Work or obligations, diligently and without delay, in accordance with this Agreement, except to the extent enjoined by order of a court of competent jurisdiction or otherwise approved by Owner. Concessionaire acknowledges that it shall be solely responsible for the results of any delaying actions or inactions taken pending resolution of any Dispute with respect to the disputed Work, even if Concessionaire's position in connection with the Dispute ultimately prevails.

**20.4.2** The Parties shall continue to comply with all provisions of the Contract Documents, the Project Management Plan, the O&M Management Plan(s), the Governmental Approvals and applicable Law.

**20.4.3** Concessionaire shall keep complete records that provide a clear distinction between the incurred direct and indirect costs of disputed Work and that of undisputed Work.

## ARTICLE 21. REPRESENTATIONS AND WARRANTIES

### 21.1 Concessionaire Representations and Warranties

Concessionaire represents to Owner as follows:

**21.1.1** The Financial Model Formulas (a) were prepared by or on behalf of Concessionaire in good faith, (b) are the same financial formulas that Concessionaire utilized and is utilizing in the Financial Model, in making its decision to enter into this Agreement and in making disclosures to potential equity investors and Lenders under the Initial Funding Agreements, and (c) as of the Effective Date are mathematically and formulaically correct and suitable for making reasonable projections.

**21.1.2** The Financial Model (a) was prepared by or on behalf of Concessionaire in good faith, (b) was audited and verified by an independent recognized model auditor immediately before the Effective Date and such audit will be updated within 48 hours after Financial Close, (c) fully discloses all cost revenue and other financial assumptions and projections that Concessionaire has used or is using in making its decision to enter into this Agreement and in making disclosures to potential equity investors and Lenders under the Initial Funding Agreements and (d) as of the Effective Date represents the projections that Concessionaire believes in good faith are the most realistic and reasonable for the Project; subject to the understanding 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 Concessionaire's stated belief regarding the projections does not constitute a representation 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.

**21.1.3** As of the Effective Date, Concessionaire has reviewed all applicable Laws relating to Taxes, and has taken into account all requirements imposed by such Laws in preparing the Financial Model.

**21.1.4** As of the Setting Date, based upon review of information provided by Owner and other reasonable investigations undertaken by Concessionaire consistent with Good Industry Practice, Concessionaire has evaluated the constraints affecting equipping and supply of LRVs development, design, construction of the Project, including the Project ROW limits, surface and subsurface conditions discoverable through such investigation, the terms of the Owner-Provided Approvals and requirements of applicable Laws, and, based on the foregoing, Concessionaire has reasonable grounds for believing and does believe that the Project can be developed, designed, constructed and equipped and LRVs can be supplied.

**21.1.5** Concessionaire, consistent with Good Industry Practice, conducted an investigation of parcels to which it had access and other available information regarding conditions at the Site before the Setting Date, and as a result of such investigation, Concessionaire is familiar with and accepts the physical requirements of the Work, subject to Concessionaire's rights regarding Relief Events or Force Majeure Events as specified in this Agreement.

**21.1.6** Before the Effective Date, Concessionaire familiarized itself with the requirements of all applicable Laws and the conditions of any required Governmental Approvals.

**21.1.7** Concessionaire shall comply with Section 21.1.5 at its sole cost and without any additional compensation, any extension of time, excuse from compliance or other relief on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment and/or materials not expressly provided for in the Contract Documents or would have an adverse effect on costs, except to the extent Concessionaire is entitled to relief as specified in Article 15. As of the Effective Date, Concessionaire has no reason to believe that any Governmental Approval required to be obtained by Concessionaire will not be granted in due course and will remain in effect so as to enable the Work to proceed in accordance with the Contract Documents.

**21.1.8** All Work shall be performed by, or under the supervision of, Persons who hold all necessary licenses, certifications, registrations, permits or approvals to practice in the State, by personnel who are, experienced, competent and skilled in their respective trades or professions, who are qualified to perform the Work in accordance with the Contract Documents; and all Persons performing Design Work shall assume professional responsibility for the accuracy and completeness of the Design Documents, Construction Documents and other documents prepared or checked by them.

**21.1.9** Concessionaire is a limited liability company, duly organized and validly existing under the laws of Delaware, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute, and deliver this Agreement and to perform each and all of the obligations of Concessionaire provided for under this Agreement. Concessionaire is duly qualified to do business and is in good standing in the State as of the Effective Date, and will remain duly qualified and in good standing throughout the Term and for as long as any obligations remain outstanding under the Contract Documents.

**21.1.10** The execution, delivery and performance of this Agreement has been duly authorized by all necessary action of Concessionaire's governing body, each person executing this Agreement has been duly authorized to execute and deliver each such document on behalf of Concessionaire and this Agreement has been duly executed and delivered by Concessionaire.

**21.1.11** No default under, violation of, or conflict with the governing instruments of Concessionaire or any agreement, judgment or decree to which Concessionaire is a party or is bound will result from (a) the execution and delivery by Concessionaire of this Agreement, or (b) performance by Concessionaire of its obligations under this Agreement.

**21.1.12** The execution and delivery by Concessionaire of this Agreement, and the performance by Concessionaire of its obligations under this Agreement will not conflict with any Laws applicable to Concessionaire that are valid and in effect on the date of execution and delivery. As of the Effective Date, Concessionaire is not in breach of any applicable Law that would have a material adverse effect on the Work or the performance of any of its obligations under the Contract Documents.

**21.1.13** This Agreement constitutes the legal, valid and binding obligation of Concessionaire, enforceable against Concessionaire in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

**21.1.14** As of the Effective Date, there is no action, suit, proceeding, investigation or litigation pending and served on Concessionaire which challenges Concessionaire's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement or which

challenges the authority of the representative of Concessionaire executing this Agreement; and Concessionaire has disclosed to Owner before the Effective Date any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which Concessionaire is aware. No current, pending or outstanding criminal, civil, or enforcement actions have been initiated against Concessionaire by Owner or the State, and Concessionaire agrees that it will immediately notify Owner if any such action is initiated during the Term.

**21.1.15** As of the Proposal Date Concessionaire disclosed to Owner in writing all organizational conflicts of interest of Concessionaire and its Contractors of which Concessionaire was actually aware; and between the Proposal Date and the Effective Date Concessionaire has not obtained knowledge of any additional organizational conflict of interest, and there have been no organizational changes to Concessionaire or its Contractors identified in its Proposal, which have not been approved in writing by Owner. For this purpose, organizational conflict of interest has the meaning in the FTA's Best Practices Procurement Manual.

**21.1.16** As of the effective date of the relevant Key Contract, (a) each Key Contractor is duly organized, validly existing and in good standing under the laws of the state of its organization and is duly qualified to do business, and is in good standing, in the State, (b) the ownership interests (including options, warrants and other rights to acquire ownership interests) of each such entity that is a single purpose entity formed for the Project are held by those Persons identified in a written certification delivered by Concessionaire to Owner before the such effective date; (c) each such entity has the power and authority to do all acts and things and execute and deliver all other documents as are required to be done, observed or performed by it in connection with its engagement by Concessionaire; (d) each such entity has (i) obtained and will maintain all required registrations, licenses, certifications, permits and approvals required under applicable Law as of such date and (ii) expertise, qualifications, experience, competence, and skills and is qualified to perform the Work for which it is responsible; (e) each such Entity will be required by the applicable Key Contract to comply with all health, safety and environmental Laws in the performance of any work activities for, or on behalf of, Concessionaire for the benefit of Owner; and (f) no such entity is in breach of any applicable Law that would have a material adverse effect on any aspect of the Work.

**21.1.17** Concessionaire has not employed or retained, and Concessionaire shall not employ or retain, any Person other than employees, agents, attorneys, consultants and advisors of Concessionaire or a Concessionaire-Related Entity, to solicit or secure this Agreement, and that it has not paid or agreed to pay any Person any fee or any other consideration contingent on the making of this Agreement which would be in violation of Section 9.15. For breach or violation of this representation, Owner shall have the right to terminate this Agreement without liability, or in its discretion, to deduct from payments otherwise owing under this Agreement, or otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee. Notwithstanding the foregoing, if Owner determines that Concessionaire, a Concessionaire-Related Entity or a Lender to Concessionaire acted in good faith, did not directly contribute to any such illegal act or breach of this representation and had no knowledge of the illegal act or breach of this representation as of the Effective Date, then such Person may be entitled to obtain Project Adjusted Costs reasonably incurred and remaining unpaid.

**21.1.18** Concessionaire warrants that it owns, or will own, and has, or will have, good and marketable title to all materials, equipment, tools and supplies furnished, or to be furnished, by any Concessionaire-Related Entity that become part of the Project or are purchased for Owner for the operation, maintenance or repair of the Project, free and clear of all liens or other charges of any kind or nature. All such materials, equipment, devices, or processes shall be

delivered free of any rightful claim of any third party for infringement of any patent or copyright. Refer to Section 2.3.2 for provisions regarding transfer of title to Owner;

**21.1.19** Concessionaire warrants that the individual signing this Agreement on behalf of Concessionaire is the properly authorized representative, agent, member or officer of Concessionaire, that he/she has not, nor has any other member, employee, representative, agent or officer of Concessionaire, directly or indirectly, to the best of the undersigned's knowledge, entered into or offered to enter into any combination, collusion or agreement to receive or pay, and that he/she has not received or paid, any sum of money or other consideration for the execution of this Agreement other than that which appears upon the face of this Agreement.

**21.1.20** Meridiam Infrastructure Purple Line, LLC is a limited liability company, duly organized and validly existing under the laws of Delaware, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to perform each and all of the obligations of an Equity Member provided for under this Agreement.

**21.1.21** Fluor Enterprises, Inc. is a corporation, duly organized and validly existing under the laws of California, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to perform each and all of the obligations of an Equity Member provided for under this Agreement.

**21.1.22** Star America Purple Line, LLC is a limited liability company, duly organized and validly existing under the laws of Delaware, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to perform each and all of the obligations of an Equity Member provided for under this Agreement.

See the Contract Affidavit in Exhibit 14 for additional representations and affirmations by Concessionaire and its Equity Members.

## **21.2 Owner Representations and Warranties**

Owner represents to Concessionaire as follows:

**21.2.1** As of the Effective Date, Owner has full power, right and authority to execute, deliver and perform its obligations under this Agreement;

**21.2.2** Each person executing this Agreement on behalf of Owner is duly authorized to execute and deliver this Agreement, and this Agreement has been duly executed and delivered by Owner;

**21.2.3** This Agreement has each been duly authorized by Owner, and constitutes a legal, valid and binding obligation of Owner enforceable against Owner in accordance with its terms;

**21.2.4** As of the Effective Date, there is no action, suit, proceeding, investigation or litigation pending and served on Owner which challenges Owner's authority to execute, deliver and perform this Agreement, or which challenges the validity or enforceability of, this Agreement or which challenges the authority of Owner officials executing this Agreement; and Owner has disclosed any pending action, suit, proceeding, investigation or litigation against Owner (including filed but un-served complaints of which Owner's senior officials are aware) relating to this Agreement or the Project;

**21.2.5** Neither the execution and delivery by Owner of this Agreement, nor the consummation of the transactions contemplated under this Agreement, is in conflict with or has resulted or will result in a default under or a violation of the enabling legislation of Owner or any agreement, judgment or decree to which Owner is a party or is bound;

**21.2.6** The execution and delivery by Owner of this Agreement, and the performance by Owner of its obligations under this Agreement, will not conflict with any Laws applicable to Owner that are valid and in effect on the date of execution and delivery. Owner is not in breach of any applicable Law that would have a material adverse effect on the performance of any of its obligations under the Contract Documents;

**21.2.7** No consent of any party and no Governmental Approval is required to be made in connection with Owner's execution and delivery of this Agreement, other than consents and approvals already obtained; and

**21.2.8** Owner agrees to administer the funding for the Project so as to ensure that federal funds do not exceed 80% of "Eligible Project Costs" as defined in the TIFIA Term Sheet.

### **21.3 Special Remedies for Mutual Breach of Warranty**

Notwithstanding any other provision of this Agreement, if any circumstance or event occurs that constitutes or results in a concurrent breach by both Concessionaire and Owner of similar warranties referenced in Section 17.1.1(f) or 17.3.1(b) but does not also constitute or result in any other breach or default by either Party, then the only remedies shall be for the Parties to take action to rectify or mitigate the effects of such circumstance or event, to pursue severance and reformation of the Contract Documents in accordance with Section 26.12, or Termination Due to Court Ruling in accordance with Section 19.5 and Exhibit 13B.

### **21.4 Certain Concessionaire Representations and Warranties and "Bring-Down" of Certain Owner Representation and Warranties at Financial Close**

**21.4.1** On the date of Financial Close, Concessionaire shall execute and deliver to Owner a certificate substantially in the form included in Exhibit 5C updating certain of Concessionaire's representations and warranties in this Article 21 and effective as of the date of Financial Close (which date shall be the effective date of the Initial Funding Agreements) and making certain additional representations and warranties. Failure to execute and deliver such certificate shall be a Concessionaire Default.

**21.4.2** On the date of Financial Close, Owner will execute and deliver to Concessionaire a certificate updating certain of Owner's representations and warranties in this Article 21 and effective as of the date of Financial Close. Failure to execute and deliver such certificate shall be an Owner Default.

## ARTICLE 22. ASSIGNMENT AND TRANSFER

### 22.1 Restriction on Change of Ownership Composition of Concessionaire

Concessionaire shall provide all information and complete all such actions required by Owner to enable Owner to comply with the statutory requirements of the Act and/or seek Owner and Board of Public Works approval in connection with any Change of Ownership.

### 22.2 Additional Restrictions on Changes

**22.2.1** Concessionaire shall not voluntarily or involuntarily effect or allow any Change of Ownership unless (a) it has been approved by Owner in writing and is otherwise in compliance with Section 22.1, including any restrictions that may be imposed by Owner and/or the Board of Public Works under Section 22.1, or (b) it is a Change of Ownership identified in Section 22.3.

**22.2.2** Any purported voluntary or involuntary assignment, sale, assignment, financing, grant of security interest, hypothecation, conveyance, transfer of interest, pledge, mortgage, encumbrance, grant of right of entry, or grant of other use, special use or right to, management or control of the Project or Concessionaire's Interest or other change ("Equity Change(s)") in violation of this Article 22 shall be null and void *ab initio*, and Owner, at its option, may declare any such attempted action to be a material Concessionaire Default.

**22.2.3** Except for those Equity Changes identified in Section 22.3, Concessionaire shall provide a written request for approval, accompanied by all information Owner may deem relevant to the request for approval. Owner may evaluate and require qualification of any entity(ies) involved, including a determination of whether the Equity Change would increase or decrease project risk for Owner, positively or negatively affect the ability of Concessionaire or Project to perform, and a review and approval of the identity, financial resources, qualifications, experience, technical capacity, potential conflicts of interest, and responsibility of any entity(ies) involved.

**22.2.4** Certain remote Equity Changes are pre-approved under, and subject to the conditions in, Section 22.3. In addition, Owner may consider requests for an Equity Change prior to two years after the Revenue Service Availability Date when such Equity Change is in the best interest of Owner and Owner receives a 50% share in any positive net proceeds at the time of the Equity Change; provided, however, that any consideration of Concessionaire requests for Equity Changes prior to two years after the Revenue Service Availability Date remains subject to the restrictions in Section 22.1 and Sections 22.2.1 through 22.2.3.

### 22.3 Remote Equity Changes and Equity Changes Required for Financing

Equity Changes of the types listed in Section 22.3.4 are pre-approved Changes of Ownership by the Board of Public Works, but remain subject to compliance with the conditions specified in this Section 22.3.

**22.3.1** Section 22.3 changes do not apply to any change that would result in any interest being gained in the Project by any suspended or debarred entity, including entities subject to an agreement for voluntary exclusion, or subject to a proceeding to suspend or debar from bidding, proposing or contracting with any federal or Maryland state department or agency.

**22.3.2** Concessionaire shall provide written notice to Owner, accompanied by sufficient documentation evidencing the change in form and substance acceptable to Owner, including (a) the names of the transferor and transferee, (b) evidence that the transfer or transaction satisfies the requirements of this Section 22.3 and (c) if applicable, documentation that the transferee, without condition, assumes all of Concessionaire's obligations, duties and liabilities under this Agreement, the other Contract Documents and the Principal Project Documents then in effect and agrees to perform and observe all provisions of such documents applicable to Concessionaire. However, no notice is required for the transfers described in Sections 22.3.4(c) or (f).

**22.3.3** Any notice by Concessionaire under Section 22.3.4(d) or (e) shall be provided at least 30 days in advance of any proposed change permitted under this Section 22.3.

**22.3.4** Pre-approved Changes of Ownership under Section 10A-202(e) of the Act and this Section 22.3 are limited to the following:

(a) Execution and delivery of Funding Agreements and Security Documents, in strict compliance with applicable prescriptions in this Agreement, and/or any other grant to a Lender for security as permitted by this Agreement; provided that, in all cases, Concessionaire retains responsibility for the performance of Concessionaire's obligations under the Contract Documents;

(b) (i) A transfer of custody and control of the Project to a Step-In Party in accordance with the Direct Agreement, until the earlier of delivery of a Step-out Notice and pending approval or explicit disapproval of a Substituted Entity under such Direct Agreement, (ii) a transfer to a Substituted Entity approved by Owner in accordance with such Direct Agreement or (iii) any other exercise of Lender remedies under the Direct Agreement, including foreclosure;

(c) A bona fide open market transaction involving beneficial interests in the ultimate parent organization of an Equity Member (but not if the Equity Member is the ultimate parent organization);

(d) A bona fide upstream business reorganization, consolidation or other transfer in equity of a parent entity with an interest in Concessionaire where the transferor and transferee are under the same ultimate parent organization with ultimate power to direct or control or cause the direction or control of the management of Concessionaire and so long as there occurs no change in such entity as part of such reorganization, consolidation or other transfer in equity;

(e) A transfer of interests between managed funds that are under common ownership or control 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 Concessionaire;

(f) A change due solely to bona fide open market transactions in securities effected on a recognized public stock exchange, including transactions involving an initial public offering; and

(g) The exercise of minority veto or minority voting rights (whether provided by applicable Law, by Concessionaire's organizational documents or by related member or shareholder agreements or similar agreements) over major business decisions of Concessionaire; provided that if such minority veto or minority

voting rights are provided by bona fide shareholder or similar agreements, and Owner has received copies of such agreements.

**22.3.5** Nothing in Section 22.3 shall be construed to permit any Equity Transfer by any Equity Member to any non-Affiliate, without prior approval by the Board of Public Works and Owner in accordance with Section 22.1.

#### **22.4 Assignment by Owner**

Owner may assign all or any portion of its right, title and interest in the Contract Documents, Payment Bonds and Performance Security, guarantees, letters of credit and other security for payment or performance, (a) with 10 days' prior notice to Concessionaire but without Concessionaire's consent, to any other Governmental Entity of the State that succeeds to the governmental powers and authority of Owner by operation of law and (b) to others with the prior written consent of Concessionaire.

#### **22.5 Assumption**

Each transferee of Concessionaire's Interest, including any Person who acquires Concessionaire's Interest through foreclosure, transfer in lieu of foreclosure or similar proceeding, shall execute and deliver to Owner an assumption agreement in form acceptable to Owner, providing that the transferee takes Concessionaire's Interest subject to, and shall be bound by, the Project Management Plan, including the Concessionaire's Design Quality Plan and Construction Quality Plan, the O&M Management Plan, the Key Contracts, the Utility Agreements, the Governmental Approvals, all agreements between the transferor and third parties, and all agreements between the transferor and Governmental Entities with jurisdiction over the Project or the Work, except to the extent otherwise approved by Owner.

#### **22.6 Change of Organization or Name**

**22.6.1** Concessionaire shall not change the legal form of its organization in a manner that adversely affects Owner's rights, protections and remedies under the Contract Documents without the prior written approval of Owner.

**22.6.2** If either Party changes its name, such Party agrees to promptly furnish the other Party with notice of change of name and appropriate supporting documentation.

## ARTICLE 23. RECORDS AND AUDITS; INTELLECTUAL PROPERTY

### 23.1 Maintenance and Inspection of Records

**23.1.1** Concessionaire shall undertake the following with respect to its Books and Records:

(a) Keep and maintain said Books and Records, including copies of all original documents delivered to Owner, in the City of Baltimore, in Montgomery or Prince George's County, Maryland or in another location approved by Owner in writing, and notify Owner where the Books and Records are kept;

(b) Keep and maintain Books and Records in accordance with applicable provisions of the Contract Documents, including the Technical Provisions, applicable provisions of the Project Management Plan and O&M Management Plan, and in accordance with Good Industry Practice;

(c) Make all Books and Records available for inspection by Owner and its Authorized Representatives, designees and legal counsel in Concessionaire's principal offices in Maryland, or in accordance with each Intellectual Property Escrow, at all times during normal business hours, or at other reasonable times during the Term;

(d) Provide to Owner, or make available to Owner for review in accordance with each Intellectual Property Escrow, copies of any Books and Records as and when reasonably requested by Owner. Owner may inspect upon 48 hours' prior notice or without prior notice where there is good faith suspicion of fraud. Owner's right of inspection includes the right to make extracts and take notes and shall not be construed as a waiver by Concessionaire of the attorney-client privilege;

(e) Retain all Books and Records related to the D&C Work until five years after the Final Completion Payment has been made and retain all Books and Records related to the O&M Work until five years after the date of final payment under the Contract Documents, provided that all records which are being audited or which relate to Claims and Disputes being processed or actions brought under the Dispute Resolution Procedures shall be retained and made available until any later date that such audits, Claims, Disputes and actions are finally resolved; and

(f) Permit Owner, upon 10 days' prior notice to Concessionaire (which notice shall identify the persons Owner requests to be present for an interview and describe with reasonable specificity the subject matter to be raised in the interview), to discuss the obligations of Concessionaire under this Agreement with any of the directors, chief executive officer and chief financial officer of Concessionaire or its representatives, for the purpose of enabling Owner to determine whether Concessionaire is in compliance with this Agreement and applicable Law. The interviewees and their employers may have counsel present at the interviews.

**23.1.2** Sections 23.1.1(c), (d) and (f) apply in addition to the Parties' rights under the Dispute Resolution Procedures.

**23.1.3** Concessionaire shall cause each Key Contract and each Major Contract to include the provisions of Section 23.1.1, to the extent applicable, modified as appropriate to reflect the provisions apply to the Contractor's Books and Records.

**23.1.4** Attachment 1 of Exhibit 16 includes additional requirements regarding maintenance and inspection of Books and Records.

## **23.2 Audits**

**23.2.1.1** Owner may review and audit Concessionaire, its Contractors and their respective Books and Records as and when Owner deems necessary for purposes of verifying compliance with the Contract Documents and applicable Law and verifying Claims.

**23.2.1.2** Without limiting Section 23.2.1.1:

(a) Owner may audit Concessionaire's Project Management Plan and O&M Management Plan and compliance therewith, including the right to inspect Work and/or activities and to verify the accuracy and adequacy of the Project Management Plan and O&M Management Plan and its component parts, plans and other documentation;

(b) The audits may be performed by employees of Owner or by an auditor under contract with Owner;

(c) Concessionaire shall provide adequate and appropriate work space for Owner or its representative(s) to conduct audits;

(d) Concessionaire shall allow auditor(s) access to such Books and Records during normal business hours, allow interviews of any employee who might have information related to such Books and Records, and otherwise cooperate with the auditors including furnishing a management representation letter upon request of the auditor; and

(e) Concessionaire shall cause each Contract to include a similar right of Owner to audit records and interview staff of the Contractor, and a similar covenant to cooperate with the auditors.

The foregoing shall not be deemed to waive the right of Concessionaire or Contractor to have counsel or other appropriate representatives present at the interview.

**23.2.2** If any Owner audit results in a correction to the Books and Records, Concessionaire shall pay the reasonable costs of Owner in conducting the audit, but if not, Owner will bear the costs of the audit.

**23.2.3** Failure of Concessionaire, Contractors or their agents to maintain and retain sufficient Books and Records to allow the auditors to verify all or a portion of a Claim or to permit the auditor access to its Books and Records to verify a Claim shall be sufficient basis for Owner to deny recovery by Concessionaire of the Claim to the extent of such failure. At a minimum, the auditors shall be provided access to the following documents relating to the Claim:

- (a) Daily time sheets and supervisor's daily reports;
- (b) Union agreements;
- (c) Insurance, welfare, and benefits records;

- (d) Payroll registers;
- (e) Earnings records;
- (f) Payroll tax forms;
- (g) Material invoices and requisitions;
- (h) Material cost distribution work sheet;
- (i) Equipment records (list of company equipment, rates, etc.);
- (j) Contractors' (including Suppliers') invoices;
- (k) Contractors' and agents' payment certificates;
- (l) Canceled checks (payroll and Suppliers);
- (m) Job cost report;
- (n) Job payroll ledger;
- (o) General ledger;
- (p) Cash disbursements journal;
- (q) All documents that relate to each and every Claim together with all documents that support the amount of damages as to each Claim; and
- (r) Work sheets used to prepare the Claim establishing (a) the cost components of the Claim, including labor, benefits and insurance, materials, equipment, Contractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals, and (b) the lost revenue components of the Claim.

**23.2.4** Full compliance by Concessionaire with the provisions of Section 23.2.3 is a contractual condition precedent to Concessionaire's right to seek relief on a Claim under Article 14.

**23.2.5** Any rights of the federal government and any agency of the federal government, including FTA, to review and audit Concessionaire, its Contractors and their respective Books and Records are stated in Exhibit 16 and applicable Law. Without limiting the foregoing, the U.S. Comptroller General and his/her representatives may:

**23.2.5.1** Examine any records of Concessionaire or any of its Contractors, or any State or local government agency administering this Agreement, that directly pertain to and involve transactions relating to this Agreement or any Contract; and

**23.2.5.2** Interview any officer or employee of Concessionaire or any of its Contractors, or of any State or local government agency administering this Agreement, regarding such transactions.

**23.2.6** Owner's rights of audit include the right to observe the business operations of Concessionaire and its Contractors to confirm the accuracy of Books and Records.

**23.2.7** Concessionaire shall include in the Project Management Plan and O&M Management Plan internal procedures to facilitate review and audit by Owner and, if applicable, FTA.

**23.2.8** Concessionaire represents and warrants the completeness and accuracy of all information it or its agents provides in connection with Owner audits, and shall cause all Contractors to represent and warrant the completeness and accuracy of all information such Contractors provide in connection with Owner audits.

**23.2.9** Concessionaire's internal and third party quality and compliance auditing responsibilities shall be identified in the Project Management Plan and O&M Management Plan, in accordance with Part 2A, Sections 1 and 14 of the Technical Provisions and other related provisions concerning QA and compliance auditing.

**23.2.10** Nothing in the Contract Documents shall in any way limit the constitutional and statutory powers, duties and rights of elected State officials, including the independent rights of the Maryland Legislative Auditor, in carrying out his or her legal authority. Concessionaire understands and acknowledges that:

**23.2.10.1** The Maryland Legislative Auditor may conduct an audit or investigation of any entity receiving funds from the State directly under this Agreement or indirectly through a Contract;

**23.2.10.2** Acceptance of funds directly under this Agreement or indirectly through a Contract acts as acceptance of the authority of the Maryland Legislative Auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds; and

**23.2.10.3** An entity that is the subject of an audit or investigation must provide the Maryland Legislative Auditor with access to any information such auditor considers relevant to the investigation or audit.

### **23.3 Public Information Act**

**23.3.1** Concessionaire acknowledges and agrees that all Submittals, records, documents, drawings, plans, specifications and other materials in Owner's possession, including any Books and Records submitted by Concessionaire to Owner, may be considered public information subject to disclosure under the Maryland Public Information Act ("PIA").

**23.3.2** Concessionaire may designate conspicuously any documents that it believes contain trade secret or information that would be exempted from disclosure in response to a public records request under the PIA by placing "CONFIDENTIAL" in the header or footer of such page or record affected. Any such designation of trade secret or other basis for exemption shall be accompanied by a concise statement of reasons supporting the claim including the specific Law that authorizes the exemption from disclosure under the PIA.

**23.3.3** If a request is made for disclosure of Books and Records that have been designated by Concessionaire as "CONFIDENTIAL", Owner will notify Concessionaire and may request advice from Owner's counsel before disclosing any such documents in accordance with applicable Law. Concessionaire shall then have the opportunity to either consent to the disclosure or assert its basis for non-disclosure and claimed exception under the PIA or other applicable Law to Owner within the time period specified in the notice issued by Owner (if any) and before the deadlines for release in the PIA and other applicable Law. However, it is the

responsibility of Concessionaire to monitor requests for disclosure and proceedings and make timely filings. Owner may make filings of its own concerning possible disclosure; however, Owner is under no obligation to support Concessionaire's positions. By entering this Agreement, Concessionaire consents to, and expressly waives any right to contest, provision by Owner to Owner's counsel of all, or representative samples of, the Books and Records in accordance with the PIA. Owner shall have no responsibility or obligation for a failure of Concessionaire to respond or to respond timely to any request for disclosure of the Books and Records in accordance with the PIA, and Owner shall not be required to wait for a response before making a disclosure or otherwise taking action under the PIA or other applicable Law. Owner may have liability to Concessionaire for any disclosures due to gross negligence or intentional misconduct by Owner, subject to the Maryland Tort Claims Act. Under no other circumstances will Owner be responsible or liable to Concessionaire or any other party as a result of disclosing any such materials, including materials marked "CONFIDENTIAL", whether the disclosure is deemed required by Law or by an order of court or Owner's general counsel or occurs through inadvertence, mistake or negligence on the part of Owner or its officers, employees, contractors or consultants.

**23.3.4** Nothing contained in this Section 23.3 shall modify or amend requirements and obligations imposed on Owner by the PIA or other applicable Law, and the provisions of the PIA or other Laws shall control to the extent of a conflict between the procedures under this Agreement and applicable Law. Owner will not advise a submitting party or Concessionaire as to the nature or content of documents entitled to protection from disclosure under the PIA or other applicable Laws, as to the interpretation of such Laws, or as to definition of trade secret. Concessionaire is advised to contact its own legal counsel concerning the effect of applicable Laws to Concessionaire's Books and Records and actions to be taken to preserve confidentiality.

**23.3.5** In the event of any proceeding or litigation concerning the disclosure of any Books and Records to third parties, Owner's sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court or other authority having jurisdiction. Concessionaire shall be responsible for prosecuting or defending any action, acting on its own behalf, concerning such materials at its sole expense and risk; provided, however, that Owner may intervene or participate in the litigation in such manner as it deems necessary or desirable. Concessionaire shall indemnify and hold harmless the Indemnified Parties from and against any and all claims, causes of action, suits, legal or administrative proceedings, damages, losses, liabilities, response costs, costs and expenses, including any injury to or death of persons or damage to or loss of property (including damage to utility facilities), and including attorneys' and expert witness fees and costs, arising out of, relating to or resulting from Owner's refusal to disclose any material that Concessionaire has designated as a trade secret.

## **23.4 Intellectual Property**

### **23.4.1 Work Made For Hire; Authorized Use**

**23.4.1.1** Except for Concessionaire Intellectual Property, all Intellectual Property, all work product and other related materials, including all Submittals and other materials specifically developed under the Contract Documents, all physical construction and equipment itself and from data, sketches, charts, calculations, plans, drawings, layouts, depictions, specifications, manuals, electronic files, artwork, records, film, tape, articles, memoranda, correspondence and other documents created or collected under the terms of this Agreement or otherwise developed under this Agreement, made by Concessionaire related to the RFP (including the Proposal), exchanges of information during the pre-proposal and post-proposal periods and other work product and other related materials that disclose Intellectual

Property, have been specially ordered and commissioned by Owner, and shall be considered a work-made-for-hire, as that term is defined in Section 101 of Title 17 of the U.S. Code (Copyright Law). To the extent that all such work product and related materials, are determined by a court of competent jurisdiction, the U.S. Copyright Office, or the U.S. Patent & Trademark Office not be a work-made-for-hire or where Owner is not the owner or author, Concessionaire agrees to assign to Owner, or cause all Contractors and Subcontractors, if applicable, all rights, title and interest in all Intellectual Property, excluding Concessionaire Intellectual Property, in such work product and related materials. Concessionaire shall deliver copies of all Concessionaire Intellectual Property owned by Concessionaire and which it uses in performing the O&M Work either to Owner or to an escrow under Section 23.5.

**23.4.1.2** Concessionaire and Concessionaire-Related Entities may not use Owner Intellectual Property or any of the work-made-for-hire described above except in connection with the Work or as otherwise approved by Owner in writing.

**23.4.1.3** During the performance of this Agreement, Concessionaire shall be responsible for any loss of or damage to the Owner Intellectual Property and any of the work-made-for-hire described above while in the possession or control of any Concessionaire-Related Entity. Any such loss or damage shall be restored at Concessionaire's expense.

**23.4.1.4** During the Term and the period of performance of any post-termination obligations, Concessionaire shall provide full and unrestricted access to all of the work-made-for-hire described above, within 24 hours of receipt of notice from Owner requesting such access.

## **23.4.2 Ownership of Concessionaire Intellectual Property**

All Concessionaire Intellectual Property shall remain exclusively the property of Concessionaire, its Affiliates or Contractors, as applicable, subject to Owner's rights as stated in the Contract Documents.

## **23.4.3 License**

Concessionaire grants to Owner a perpetual, nonexclusive, transferable (subject to Sections 23.4.4 and 23.4.5), royalty-free, irrevocable, worldwide, fully paid-up right and license to use, reproduce, modify, adapt and disclose, and sublicense others to use in accordance with Section 23.4.6, reproduce, modify, adapt and disclose, the Concessionaire Intellectual Property solely in connection with the Project; provided that Owner may exercise such license only at the following times:

- (a) From and after the expiration or earlier termination of the Term for any reason whatsoever;
- (b) During any time that Owner is exercising its step-in rights under Section 17.2.2 or 17.2.4, in which case Owner may exercise such license only in connection with the Project;
- (c) During any time that a receiver is appointed for Concessionaire, or during any time that there is pending a voluntarily or involuntary proceeding in bankruptcy in which Concessionaire is the debtor; and
- (d) During any time that Concessionaire has been replaced.

#### **23.4.4 No Right to Sell**

Owner may not sell any Concessionaire Intellectual Property or use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any Concessionaire Intellectual Property for any purpose other than as set forth in Section 23.4.6.

#### **23.4.5 Transfer to Successor**

Owner has the right to transfer the license to any Governmental Entity that succeeds to Owner's interests in all or any portion of the Project, or to the power and authority of Owner generally or with respect to all or any portion of the Project. The license is divisible in the event of a transfer of or with respect to a portion of the Project permitted under this Agreement.

#### **23.4.6 Rights of Use**

Owner's right and license to the Concessionaire Intellectual Property under Section 23.4.3 includes use, reproduction, modification, adaptation and disclosure, and sublicense to others relating to interfaces and interconnections between the Project and other facilities, and specifically to grant the owners of such other projects (and any of their agents) a sublicense to use applicable Concessionaire Intellectual Property for and at such interfaces and interconnections, in each case subject to Section 23.4.7.

#### **23.4.7 Covenants**

Owner will:

(a) Not disclose any Concessionaire Intellectual Property to any third party other than (i) Owner's employees, agents, officers, directors, representatives, consultants and sublicensees who agree to be bound by confidentiality obligations of Owner under this Agreement or (ii) disclosures under the PIA as contemplated by Section 23.3;

(b) Enter into a commercially reasonable confidentiality agreement if requested by Concessionaire with respect to the licensed Concessionaire Intellectual Property; and

(c) Include, in the contract with the sublicensee its covenant to employ sound business practices no less diligent than those used for its own confidential information, and no less diligent than required by commercially reasonable standards of confidentiality, to protect all Concessionaire Intellectual Property and other materials provided under the sublicense against disclosure to third parties not in receipt of a sublicense, and to use the sublicense only for the permitted purposes.

#### **23.4.8 No Liability**

Notwithstanding any contrary provision of this Agreement, in no event shall Owner or any of its directors, officers, employees, consultants or agents be liable to Concessionaire, any Affiliate or any Contractor for any damages, including loss of profit, arising out of, relating to or resulting from breach of the duty of confidentiality in Section 23.4.7 unless such breach is the result of gross negligence or intentional misconduct. Concessionaire irrevocably waives all claims to any such damages. The foregoing provisions do not limit Concessionaire's equitable remedies under Section 17.4.5.

### **23.4.9 Right to Use Duplicates**

Concessionaire shall continue to have a full and complete right to use any and all duplicates or other originals of the Concessionaire Intellectual Property in any manner it chooses consistent with Law.

### **23.4.10 Licenses from Third Parties**

The following provisions shall apply with respect to any Proprietary Intellectual Property that is considered Concessionaire Intellectual Property but is owned by a Person other than Concessionaire, including any Affiliate of Concessionaire, except for mass-marketed software products (sometimes referred to as “shrink wrap software”) owned by such a Person where such a license cannot be extended to Owner using commercially reasonable efforts.

**23.4.10.1** Concessionaire shall obtain from such owner, concurrently with execution of any contract, subcontract or purchase order with such owner or with the first use or adaptation of the Concessionaire Intellectual Property in connection with the Project, both for Concessionaire and Owner, perpetual, nonexclusive, transferable, royalty-free, irrevocable, worldwide, fully paid-up licenses to use, reproduce, modify, adapt and disclose such Concessionaire Intellectual Property with identical scope, purpose, duration and applicability as the license granted under Section 23.4.3.

**23.4.10.2** The limitations on sale, transfer, sublicensing and disclosure by Owner in Sections 23.4.4 and 23.4.7 also apply to Owner’s licenses in such Concessionaire Intellectual Property. Concessionaire shall cause all Contracts and Subcontract with owners (other than Concessionaire) of Concessionaire Intellectual Property to acknowledge such owners’ obligations of pertaining to Owner’s rights and disclaimers with respect to such Concessionaire Intellectual Property under Sections 23.4.5, 23.4.6 and 23.4.8 also apply to Owner’s licenses to such Concessionaire Intellectual Property.

**23.4.10.3** Concessionaire shall also either cause to be delivered to Owner copies of such Concessionaire Intellectual Property or obtain from such owner consent to have the relevant Concessionaire Intellectual Property deposited into an Intellectual Property Escrow under the provisions of Section 23.5.

### **23.4.11 Owner Intellectual Property**

Except as stated in this Section 23.4.11:

**23.4.11.1** Concessionaire shall not acquire any license, interest or other right in or to any Owner Intellectual Property, or any work product and other related materials, including all physical construction and equipment itself and from data, sketches, charts, calculations, plans, drawings, layouts, depictions, specifications, manuals, electronic files, artwork, correspondence and other documents created or collected under the terms of any agreement (including this Agreement) or otherwise developed under the terms of any agreement (including this Agreement) and other work product and other related materials that disclose such Owner Intellectual Property, nor shall Concessionaire have any license, interest or other right to any improvements, modifications, enhancements or derivative works to or of the Owner Intellectual Property, whether such improvements, modifications, enhancements or derivative works are developed by Owner, Concessionaire, any Contractor or Subcontractor, individually or jointly.

**23.4.11.2** Subject to the terms and conditions of this Agreement, Owner hereby grants to Concessionaire a revocable, non-exclusive, non-transferable, non-sub-licensable (without Owner's prior written consent) license to use and implement, solely in connection with the performance of the Work and for the Term (including any period of Concessionaire's performance of post-termination or post-expiration obligations), the Owner Intellectual Property. If Concessionaire, any Affiliate, any Contractor or any Subcontractor creates or develops any improvements, modifications, enhancements or derivative works to or of the Owner Intellectual Property, Concessionaire will promptly notify Owner thereof and provide to Owner all data, sketches, charts, calculations, plans, drawings, layouts, depictions, specifications, manuals, electronic files, artwork, correspondence and other documents, information and other work product and other related materials that disclose such Owner Intellectual Property related to such improvements, modifications, enhancements or derivative works. Any and all such improvements, modifications, enhancements or derivative works created or developed by Concessionaire, any Affiliate, any Contractor or any Subcontractor will be deemed to be a Submittal under the terms of this Agreement.

## **23.5 Intellectual Property Escrows**

**23.5.1** Owner and Concessionaire acknowledge that Concessionaire and/or Contractors that supply software, Source Code and Source Code Documentation (including related modifications, updates, revisions, replacements and upgrades) and similar Proprietary Intellectual Property, may not wish to deliver such Proprietary Intellectual Property directly to Owner, as public disclosure could deprive Concessionaire and/or Contractors of commercial value. Concessionaire further acknowledges that Owner nevertheless must be given access to such Proprietary Intellectual Property at any time, and that such Proprietary Intellectual Property is released and delivered to Owner:

**23.5.1.1** In the case of such Proprietary Intellectual Property owned by Concessionaire or any Controlling Affiliate, when (a) this Agreement is terminated for Concessionaire Default, (b) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of Concessionaire occurs, (c) Concessionaire is dissolved or liquidated or (d) Concessionaire fails or ceases to provide services as necessary to permit continued use of such Proprietary Intellectual Property under the applicable license or relevant sublicense; or

**23.5.1.2** In the case of such Proprietary Intellectual Property owned by a Contractor that is not a Controlling Affiliate, when this Agreement is terminated for any reason (excluding termination under Section 19.4.1 relating to certain Owner Defaults) and either (a) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Contractor occurs or (b) the Contractor is dissolved or liquidated or otherwise ceases to engage in the ordinary course of the business of manufacturing, supplying, maintaining and servicing the software, product, part or other item containing such Proprietary Intellectual Property that is the subject of a license under Section 23.4.

**23.5.2** Instead of delivering such Proprietary Intellectual Property directly to Owner, Concessionaire may elect to deposit it with a neutral custodian. In such event, Concessionaire shall (a) select, subject to Owner's prior approval, one or more escrow companies or other neutral custodian (each an "Escrow Agent") engaged in the business of receiving and maintaining escrows of Source Code and Source Code Documentation, and (b) establish one or more escrows (each an "Intellectual Property Escrow") with the Escrow Agent on terms reasonably acceptable to Owner and Concessionaire for the deposit, retention, upkeep and release of such Proprietary Intellectual Property. The location of such escrows is limited to Baltimore, Maryland or another location Owner approves. Intellectual Property Escrows also may include Affiliates and Contractors as parties and may include deposit of such Proprietary

Intellectual Property owned by Affiliates and Contractors. Owner shall not be responsible for the fees and costs of the Escrow Agent.

**23.5.3** If Concessionaire elects to deliver such Proprietary Intellectual Property to an Intellectual Property Escrow, Concessionaire shall make such delivery to the Escrow Agent as follows:

**23.5.3.1** For pre-existing software, Source Code and Source Code Documentation, immediately upon execution of this Agreement or, if provided by a Contractor, execution of the relevant Contract;

**23.5.3.2** For software, Source Code and Source Code Documentation incorporated into or used on or for the Project or any portion thereof, by the first to occur of (a) 15 days after it is first incorporated or used, or (b) the Final Completion Date; and

**23.5.3.3** For any Technology Enhancement, update, upgrade or correction of software, Source Code and Source Code Documentation incorporated into or used on or for the Project or any portion of the Project, within 15 days after the end of the calendar quarter in which it is first incorporated or used.

**23.5.4** Owner shall be a named, intended third party beneficiary of each escrow agreement and each Intellectual Property Escrow with direct rights of enforcement against Concessionaire and the Escrow Agent. Each escrow agreement shall provide that neither Concessionaire nor the Escrow Agent shall have any right to amend or supplement it, or waive any provision of the escrow agreement, without Owner's prior approval.

**23.5.5** Intellectual Property Escrows shall provide rights of access and inspection to Owner and its designees at any time, subject to terms reasonably necessary to protect the confidentiality and proprietary nature of the contents of such Intellectual Property Escrows.

**23.5.6** The Intellectual Property Escrows shall survive expiration or earlier termination of this Agreement regardless of the reason, until both Parties mutually agree, in their respective discretion, that the Intellectual Property contained in the Intellectual Property Escrows is of no further use or benefit to the Project.

## **23.6 Cost and Pricing Data**

**23.6.1** Concessionaire has delivered to Owner Cost and Pricing Data with respect to the Proposal, which data is being held in safekeeping by Owner. Concessionaire represents and warrants that the Cost and Pricing Data constitutes all of the information used in determining the cost of the Work for the preparation of its Proposal and, unless Owner agrees or directs, Concessionaire shall not use any other Proposal preparation information in any request for a Modification.

**23.6.2** Concurrently with submission of quotations or revisions to quotations provided in connection with formally proposed amendments to the Contract Documents, and concurrently with approval of each Modification, if appropriate, one copy of all documentary information used by Concessionaire in preparation of the quotation or Modification shall be delivered to Owner to be held with the other Cost and Pricing Data.

**23.6.3** Except as otherwise provided in the RFP, Concessionaire shall submit the Cost and Pricing Data in the same format used in connection with the Proposal. It is not intended that Concessionaire or its Contractors perform any significant extra work in the

preparation of the Cost and Pricing Data. However, Concessionaire represents and warrants that the Cost and Pricing Data provided in connection with the Proposal were personally examined before delivery by an authorized officer of Concessionaire and that they meet the requirements of Exhibit C to the ITP, and that the Cost and Pricing Data provided in connection with quotations and Modifications will be personally examined before delivery by an authorized officer of Concessionaire, and that they will meet the requirements of Section 23.6.1.

**23.6.4** The Cost and Pricing Data provided in connection with the Proposal shall clearly detail how the components of the Financial Proposal (and Financial Model) were determined, shall be adequate to enable a complete understanding and interpretation of how Concessionaire arrived at its pricing, and shall be sufficient to allow a cost analysis to be performed under COMAR 21.05.03.05E. The Cost and Pricing Data shall include copies of offers received from all Contractors identified in the Proposal and any other potential Contractors that provided data upon which the Proposal is based. The Cost and Pricing Data provided in connection with quotations and Modifications shall, inter alia, clearly detail how the total price and individual components of that price were determined. In this regard, crews, equipment, quantities and rates of production shall be detailed.

**23.6.5** Estimates of costs shall be further divided into Concessionaire's and its Contractor's usual cost categories such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials and Subcontract costs as appropriate. Plant and equipment and indirect costs shall also be detailed in Concessionaire's usual format. Concessionaire's allocation of plant and equipment, indirect costs, risk contingencies, markup and other items to each direct cost item shall be clearly identified. The Cost and Pricing Data shall itemize the estimated costs of the Payment and Performance Security and the insurance premiums for each coverage required to be provided by Concessionaire under Section 11.2. The Cost and Pricing Data shall include electronic media data files associated with all assumptions, detailed quantity takeoffs, rates of production and progress calculations, quotes from Subcontractors and suppliers, quotes for insurance and bond premiums, memoranda, narratives and all other information used by Concessionaire to arrive at the Proposal price or amendment or Modification price.

**23.6.6** Concessionaire shall require each Key Contractor and each other construction Contractor with a Contract price that equals or exceeds \$10,000,000 to submit to Owner a copy of all documentary information used in determining its Contract price (or the price for Contract Work included in any Modification), immediately before executing the Contract and each Modification and Contract amendment, to be held in the same manner as the Cost and Pricing Data and which shall be accessible by Owner in accordance with Section 9.1.4. Each such Contract shall include (a) a representation and warranty from the Contractor, for the benefit of Concessionaire and Owner, stating that its Cost and Pricing Data constitute all the documentary information used in establishing its Contract price, and (b) an agreement by the Contractor to provide a sworn certification in favor of Concessionaire and Owner together with each supplemental set of Cost and Pricing Data, stating that the information contained in such supplemental information is complete, accurate and current. Each Contract that is not subject to the foregoing requirement shall include a provision requiring the Contractor to preserve all documentary information used in establishing its Contract price and to provide such documentation to Owner in connection with any claim made by such Contractor.

**23.6.7** The price under this Agreement, including any Change Order or Modification, including profit or fee, shall be adjusted to exclude any significant price increase occurring because Concessionaire furnished cost or price information which, as of the date agreed upon between the parties, was incomplete, inaccurate or not current.

**23.6.8** Owner may at any time conduct a review of the Cost and Pricing Data to determine whether it is complete. In the event Owner determines that any data is missing, Concessionaire shall provide such data within three business days of the request, and at that time it will be date stamped, labeled to identify it as supplementary information, and added to the Cost and Pricing Data. Concessionaire shall have no right to add documents to the Cost and Pricing Data except as otherwise provided in this Agreement.

## **23.7 Access to Cost and Pricing Data and Financial Model; Return of Materials**

**23.7.1** Owner shall maintain the Cost and Pricing Data and the Financial Model and accompanying materials in a secure location, and shall take appropriate measures to ensure that the documents remain confidential. The Cost and Pricing Data and the Financial Model and accompanying materials may be reviewed by Owner during normal business hours, after Owner has executed and delivered to Concessionaire that certain Confidentiality Agreement that was attached to the RFP, executed by Concessionaire and submitted with the Proposal. Owner will notify Concessionaire in writing at least two business days in advance of such review, and shall allow Concessionaire to be present at the review. Owner may make and retain copies of such documents only after it has executed and delivered the Confidentiality Agreement. The Parties recognize that examination of such material may be relevant in understanding the Proposal, reaching Financial Close, negotiation or determination of payment adjustments, extensions of time, compensation, excuse from compliance, Request for Change Proposals, Owner Changes, Modification Requests, Refinancing Gain calculations, calculation of Termination Compensation and resolution or settlement of Claims and Disputes.

**23.7.2** The Cost and Pricing Data and the Financial Model and accompanying materials are, and shall always remain, the property of Concessionaire, subject to Owner's review rights as provided in Section 5.1.4. Owner acknowledges that Concessionaire may consider that the Cost and Pricing Data and the Financial Model and accompanying materials constitute confidential commercial or financial information. This acknowledgment is based upon Owner's understanding that the information contained in the Cost and Pricing Data and the Financial Model and accompanying materials is not known outside Concessionaire's business and the business of its Contractors, is known only to a limited extent and by a limited number of employees of Concessionaire and Contractors, is safeguarded while in the possession of Concessionaire and its Contractors, and may be valuable to Concessionaire's strategies, assumptions and approach to public-private partnerships. Owner further acknowledges that Concessionaire expended money in developing the information included in the Cost and Pricing Data and the Financial Model and accompanying materials, and further acknowledges that it would be difficult for a competitor to replicate the information contained in such documents.

**23.7.3** Concessionaire agrees that the Cost and Pricing Data and Financial Model and accompanying materials are not part of the Contract Documents and that nothing in the Cost and Pricing Data or Financial Model and accompanying materials shall change or modify the Contract Documents.

**23.7.4** Owner will have the right to hold the Cost and Pricing Data and the Financial Model and accompanying materials, subject to this Section 23.7, until all of the following have occurred: (a) 180 days after the end of the Term; (b) all Disputes regarding this Agreement have been resolved; and (c) final payment under the Contract Documents has been made by Owner and accepted by Concessionaire.

**23.7.5** Concessionaire shall maintain originals of the Cost and Pricing Data in accordance with Section 23.6.

**23.7.6** The Parties shall promptly abide by any request from the court or other dispute resolver to receive, review and utilize Cost and Pricing Data and the Financial Model and accompanying materials to assist the dispute resolver in its deliberations.

## **ARTICLE 24. FEDERAL REQUIREMENTS; COMPLIANCE WITH OTHER LAWS**

### **24.1 Compliance with Federal Requirements**

Concessionaire shall comply with, and require its Contractors to comply with, all federal requirements applicable to transportation projects that receive federal credit or funds, including the requirements stated in Exhibit 16.

### **24.2 Federal Status of Project**

**24.2.1** Concessionaire acknowledges that:

(a) The Project is proceeding under FTA's "New Starts" program, which requires submission, approval and updating of a project management plan and financial plan;

(b) The Project Management Plan, Concessionaire's Financial Proposal and updates to such Financial Proposal required under the Contract Documents are intended to assist Owner in fulfilling these requirements; and

(c) FTA may have certain approval and oversight rights respecting the Project Management Plan, the Financial Proposal and design and construction standards for the entire Project.

**24.2.2** Concessionaire shall cooperate with FTA in the reasonable exercise of FTA's duties and responsibilities in connection with the Project.

### **24.3 Conflicting Provisions**

In the event of any conflict between any applicable federal requirements and the other requirements of the Contract Documents, the federal requirements shall prevail.

### **24.4 Compliance with Other Laws**

**24.4.1** Concessionaire shall comply with all applicable federal, state and local Laws, and all provisions required by such laws to be included in this Agreement are incorporated by reference into this Agreement.

## ARTICLE 25. ADVERTISING AND OTHER BUSINESS OPPORTUNITIES

### 25.1 No Interest in Project and Project ROW

Concessionaire's rights and interests in the Project and Project ROW are limited to such rights and interests that are required for performing the Work and Concessionaire's timely fulfillment of its obligations under the Contract Documents. Concessionaire's rights and interests exclude any Airspace which is not necessary and required for such purposes.

### 25.2 Advertising and Business Opportunities

**25.2.1** Owner reserves all rights and opportunities:

(a) Relating to advertising on the Project and, as between Concessionaire and Owner, within the O&M Limits, including use of Project physical assets (for example, Stations, LRVs, etc.) for advertising purposes; and

(b) To develop and pursue itself or through others worldwide, entrepreneurial, commercial and business activities that are ancillary or collateral to the use and operation of the Project and Project ROW. The rights and opportunities reserved to Owner under this Section 25.2.1(b) include the rights described in Section 25.2.1(a) and any sponsorships, naming rights, etc. (collectively, "Business Opportunities").

**25.2.2** Concessionaire shall cooperate and grant all necessary access to Owner and any third party designees authorized by Owner in connection with Owner's exercise of its rights relating to advertising and Business Opportunities. Concessionaire shall be compensated for reasonable costs and expenses incurred directly by Concessionaire in installing and maintaining facilities for advertising or Business Opportunities (other than routine maintenance), through a Change Order issued under Article 14.

**25.2.3** Except as authorized by Owner, Concessionaire shall not engage in, and shall not permit:

(a) Any advertising within the O&M Limits (including on or within LRVs);

(b) Use of occupation of the Project for any Business Opportunities; and

(c) Operation of any business on LRVs, at Stations or within the Project ROW, including (i) the sale of products or services (including any newsstand or concession stand for the sale of food, beverages or gifts or other retail or rental services); or (ii) the sale or rental of any wire, cable, transmission or receiving device or any other utility on, or transmission or receipt of any electronic communication to or from, any part of the Project.

**25.2.4** Concessionaire may request Owner to consider Business Opportunities. If Owner consents, the parties shall execute a Modification memorializing the agreement reached, including as to any revenue and cost sharing. Unless otherwise expressly stated in the Modification, Owner shall be entitled to all revenues generated by Business Opportunities arising out of, relating to or resulting from the Project or in the Airspace. Notwithstanding the foregoing, Concessionaire shall be compensated for reasonable costs and expenses it incurs that are directly attributable to implementation of such Business Opportunities (other than

routine maintenance), through a Change Order issued under Article 14 as well as any support efforts the Change Order requires Concessionaire to provide.

**25.2.5** Unless expressly approved by Owner, Concessionaire may not allow any Person to use or occupy the Project for any ancillary or collateral purpose.

### **25.3 Remedies**

If a Concessionaire Default concerns a breach of the provisions of Section 25.2, then, in addition to any other remedies available to Owner under this Agreement or applicable Law, Owner shall be entitled to receive from Concessionaire an amount equal to all profits from the prohibited activity, together with interest thereon at the Late Payment Rate from the date of collection until the date payment is made. In addition, Owner may require Concessionaire to restore the System to its original condition or to transfer to Owner all of Concessionaire's interest in the prohibited assets and improvements and revenues derived therefrom, or any combination of the foregoing.

## ARTICLE 26. MISCELLANEOUS

### 26.1 Taxes

Concessionaire shall pay all applicable Taxes before the due date (or delinquency date if applicable). Concessionaire is solely responsible for and has no right to make any Claim due to its misinterpretation of Laws respecting Taxes or incorrect assumptions regarding applicability of Taxes.

### 26.2 Amendments

The Contract Documents may be amended only by a written instrument duly executed by or on behalf of the Parties, except to the extent expressly provided otherwise in this Agreement (e.g., Sections 7.2.6, 8.1.2, 14.1 and 14.3).

### 26.3 Waiver

**26.3.1** The failure of a Party to exercise or delay in exercising any right under this Agreement shall not:

- (a) Constitute a waiver of such right or any other right under the Contract Documents; or
- (b) Relieve the other Party from performance of its obligations under the Contract Documents except as otherwise provided in the Contract Documents.

**26.3.2** No waiver of any right under this Agreement shall be effective unless made in a writing duly executed by a duly authorized representative of the Party charged with the waiver.

**26.3.3** Any waiver under Section 26.3.2 shall be limited to the specific instance and shall not constitute a waiver of such right in the future or of any other right under this Agreement.

**26.3.4** Furthermore, if the Parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future Disputes.

**26.3.5** No waiver of any right under this Agreement shall be deemed to have occurred as the result of any acceptance by Owner, any payment for or acceptance of the whole or any part of the Work, any extension of time, or any possession taken by Owner.

### 26.4 Independent Contractor; No Joint Venture or Partnership

**26.4.1** Concessionaire is an independent contractor. In no event shall the relationship between Owner and Concessionaire be construed as creating any relationship whatsoever between Owner and Concessionaire's employees or agents. Except as otherwise provided in the Contract Documents, Concessionaire has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Contractors and for all other Persons that Concessionaire or any Contractor hires to perform or assist in performing the Work.

**26.4.2** Nothing in the Contract Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between Owner and Concessionaire; and in no event shall either Party take a position in any tax return or other writing of any kind that a partnership, joint venture or similar relationship exists. While the term “public-private partnership” may be used on occasion to refer to contractual relationships of the type created by this Agreement, use of said term does not indicate any intention by the Parties to form or hold themselves out as a de jure or de facto partnership, joint venture or similar relationship, to share net profits or net losses, or to give Owner control or joint control over Concessionaire’s financial decisions or discretionary actions concerning the Project and Work.

**26.4.3** Neither Concessionaire nor any of its employees or agents is or shall be deemed to be an employee or agent of Owner. Concessionaire shall not have, or be deemed to have, power or authority to make any commitments on Owner’s behalf or to execute agreements in the name of or on behalf of Owner. Concessionaire shall not enter into any agreement with any Governmental Entity, Utility, property owner or other third party having regulatory jurisdiction over any aspect of the Project or Work or having any property interest affected by the Project or the Work that in any way purports to obligate Owner, or states or implies that Owner has an obligation to the third party, to undertake any activity, unless Owner otherwise approves.

## **26.5 Financial Disclosure**

Concessionaire shall comply with the provisions of Section 13-221 of the State Finance and Procurement Article of the Annotated Code of Maryland which requires that every business that enters into Contracts, leases or other agreements with the State of Maryland or its agencies during a calendar year under which the business is to receive in the aggregate \$100,000 or more, shall, within 30 days of the time when the aggregate value of these Contracts, leases or other agreements reaches \$100,000, file with the Secretary of the State of Maryland certain specified information to include disclosure of beneficial ownership of the business.

## **26.6 Successors and Assigns**

The Contract Documents shall be binding upon and inure to the benefit of Owner and Concessionaire and each of their permitted successors, assigns and legal representatives.

## **26.7 Designation of Representatives, Contracting Officer; Cooperation with Representatives**

**26.7.1** Owner and Concessionaire shall each designate an individual or individuals who shall be authorized to make decisions and bind the Parties on matters relating to the Contract Documents (“Authorized Representative”). Owner shall designate an individual who shall be authorized to act in the role of “Contracting Officer” under this Agreement (the “Contracting Officer”). Exhibit 3 provides the initial Authorized Representative and Contracting Officer designations. A Party may change such designations by written notice in accordance with Section 26.12.

**26.7.2** Concessionaire shall cooperate with Owner and all representatives of Owner designated as described above in performance of their obligations under the Contract Documents.

## **26.8 Survival**

Concessionaire's and Owner's representations and warranties, the dispute resolution provisions contained in Article 20, the indemnifications, limitations and releases contained in Sections 7.8.1.4(f) and 11.5, the express obligations of the Parties following termination (including those in Sections 11.1.8.3, Articles 19 and 22, any Direct Agreement and Exhibit 13B), and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the Work shall survive the expiration or earlier termination of this Agreement and/or the completion of the Work. The jurisdiction of the DRB shall continue to apply after expiration or earlier termination of this Agreement to all Claims and Disputes between the Parties arising out of, relating to or resulting from the Contract Documents that are subject to its jurisdiction.

## **26.9 Limitation on Third Party Beneficiaries**

Except to the extent that specific provisions (such as the warranty and indemnity provisions, and the provisions for the protection of certain Lenders under any Direct Agreement) identify third parties and state that they are entitled to benefits, (a) it is not intended by any of the provisions of the Contract Documents to create any third party beneficiary to this Agreement or to authorize anyone not a Party to maintain a suit for personal injury or property damage under this Agreement, and (b) the duties, obligations and responsibilities of the Parties with respect to third parties shall remain as imposed by Law. The Contract Documents shall not be construed to create a contractual relationship of any kind between Owner and a Contractor or any Person other than Concessionaire.

## **26.10 No Personal Liability of Public Employees**

In carrying out any of the provisions of the Contract Documents, or in exercising any right granted to them under the Contract Documents, there shall be no liability upon the Secretary, Administrator or other authorized representatives of Owner, either personally or as officials of the State, it being understood that in all such matters they act solely as agents and representatives of the State.

## **26.11 Governing Law; Venue**

**26.11.1** Concessionaire consents to jurisdiction in the courts of the State of Maryland or the U.S. District Court for the District of Maryland in the circumstances set out in this Section 26.11.1, with respect to any claim that Owner may have against Concessionaire arising out of, relating to or resulting from any matter relating to this Agreement. Concessionaire waives any defense of *forum non conveniens*.

**26.11.2** This Agreement shall be construed and interpreted in accordance with the laws of the State of Maryland, except to the extent that United States federal law otherwise applies. Disputes arising out of, relating to or resulting from this Agreement shall be determined by a competent State court in the State of Maryland, unless a Maryland court lacks jurisdiction over the action, in which case the matter shall be submitted to the U.S. District Court for the District of Maryland, assuming it has jurisdiction. These courts, and the courts with jurisdiction to review the decisions of said courts, shall be the only courts with any authority to determine any such dispute.

**26.11.3** Neither Party shall commence any action in any other court or attempt to remove an action to any other court.

**26.11.4** The Parties acknowledge and agree that any violation of this Section 26.11 may be specifically enforced by mandatory injunction because money damages would be an inadequate remedy.

**26.11.5** Subject to such waivers of immunity as may be applicable under the laws of the State of Maryland, nothing in this Agreement may be considered as a waiver by Owner or the State of their rights of sovereign immunity or under the Eleventh Amendment of the U.S. Constitution.

## **26.12 Notices and Communications**

**26.12.1** Notices under the Contract Documents shall be in writing and: (a) delivered personally; (b) sent by certified mail, return receipt requested; (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by facsimile or email communication followed by a hard copy and with receipt confirmed by telephone.

**26.12.2** Notices under Section 26.12.1 shall be sent to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

**26.12.3** All notices to Concessionaire shall be delivered to the following addresses or as otherwise directed by Concessionaire's Authorized Representative:

Name: Christophe Petit  
Title: President  
Address: 165 Roslyn Road, Roslyn Heights, NY 11577  
Telephone: 516-882-4100  
Facsimile: 516-882-4058  
E-mail Address: cpetit@starinfrapartners.com

Name: Mark Melson  
Title: Chief Operating Officer  
Address: 165 Roslyn Road, Roslyn Heights, NY 11577  
Telephone: 516-882-4096  
Facsimile: 516-882-4058  
E-mail Address: mmelson@starinfrapartners.com

Name: Benjamin Goldberg  
Title: Chief Compliance Manager  
Address: 605 3rd Ave, Floor 28, New York, NY 10128  
Telephone: 212-798-8625  
Facsimile: 212-798-8690  
E-mail Address: b.goldberg@meridiam.com

Name: Jean-Michel Martinez  
Title: Senior Investment Director (Asset Management)  
Address: 605 3rd Ave, Floor 28, New York, NY 10128  
Telephone: 212-798-8579  
Facsimile: 212-798-8690  
E-mail Address: jm.martinez@meridiam.com

Name: Terence M. Easton  
Title: Vice President, Sales  
Address: 3 Polaris Way, Aliso Viejo, CA 92698

Telephone: (949) 349-6327  
Facsimile: (949) 349-5605  
E-mail Address: Terence.Easton@Fluor.com

Name: Spencer C. Weiss  
Title: Vice President and Managing General Counsel  
Address: 100 Fluor Daniel Drive, C102B, Greenville, South Carolina 29607  
Telephone: (864) 281-8088  
Facsimile: (864) 281-6868  
E-mail Address: Spencer.Weiss@Fluor.com

**26.12.4** All notices to Owner shall be marked as regarding the Project and shall be delivered to the following address or as otherwise directed by Owner's Authorized Representative:

Maryland Transit Administration  
Transit Development & Delivery  
100 S. Charles Street, Tower II, Suite 700  
Baltimore, Maryland 21201  
Attention: Contracting Officer  
Telephone: 443-451-3723  
Facsimile: 410-685-2605  
E-mail: contractingofficer@purplelinemd.com

In addition, copies of all Notices to Proceed, notices regarding Disputes, and suspension, termination and default notices shall be delivered to the following persons:

Maryland Transit Administration  
Transit Development & Delivery  
100 S. Charles Street, Tower II, Suite 700  
Baltimore, Maryland 21201  
Attention: Contracting Officer  
Telephone: 443-341-3723  
Facsimile: 410-685-2605  
E-mail: contractingofficer@purplelinemd.com

*and*

Maryland Transit  
Office of the Attorney General  
6 St. Paul Street, 12<sup>th</sup> Floor  
Baltimore, Maryland 21202  
Attention: Chief Counsel  
Telephone: 410-767-5833  
Facsimile: 410-333-2584

**26.12.5** Subject to Section 26.12.6, notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery.

**26.12.6** Notices sent by facsimile after 4:00 p.m. Eastern time and all other notices received after 5:00 p.m. shall be deemed received on the first business day following delivery

(that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m.).

**26.12.7** Any technical or other communications pertaining to the Work shall be conducted by Concessionaire's Authorized Representative and technical representatives designated by Owner.

**26.12.8** Concessionaire shall promptly provide to Owner a copy of each communication received from any Lender relating to any default or event of default under any Funding Agreement or Security Document.

### **26.13 Severability**

**26.13.1** If any provision or part of the Contract Documents is ruled invalid (including invalidity due to any statutory change or other change in Law) by a court having proper jurisdiction, then the Parties shall: (a) promptly meet and negotiate a substitute for such provision or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including an equitable adjustment to the Financial Model Update (or, if there has been no Update, the original Financial Model) and Concessionaire's compensation to account for any change in the Work resulting from such invalidated portion; and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such provision or part shall not affect the validity or enforceability of the balance of the Contract Documents, which shall be construed and enforced as if the Contract Documents did not contain such invalid or unenforceable provision or part.

**26.13.2** If after the efforts required by Section 26.13.1, there is no interpretation or reformation of the Contract Documents that can reasonably be adopted which will return the Parties to the benefits of their original bargain, then the court order shall be treated as a Termination Due to Court Ruling under Section 19.5.

### **26.14 Construction and Interpretation of Agreement**

**26.14.1** The Contract Documents shall be construed simply, as a whole and in accordance with the fair meaning of the language used and not strictly for or against any Party.

**26.14.2** The Parties acknowledge and agree that (a) the Contract Documents are the product of an extensive and thorough, arm's length exchange of ideas, questions, answers, information and drafts during the Proposal preparation process, (b) each Party has been given the opportunity to independently review the Contract Documents with legal counsel, and (c) each Party has the requisite experience and sophistication to negotiate, understand, interpret and agree to the particular language of the provisions of the Contract Documents. Accordingly, in the event of a conflict, ambiguity or inconsistency in or Dispute regarding the interpretation of the Contract Documents, the Contract Documents shall not be interpreted or construed against the Party preparing it, and instead the Dispute resolver shall consult other customary rules of interpretation and construction.

**26.14.3** Owner's final answers to the questions posed during the Proposal preparation process for the Contract Documents shall in no event be deemed part of the Contract Documents and shall not be relevant in interpreting the Contract Documents except as they may clarify provisions otherwise considered ambiguous.

**26.14.4** The captions of the articles, sections and subsections in this Agreement are for convenience only and are not to be treated or construed as part of this Agreement.

**26.14.5** Unless otherwise expressly stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meaning.

**26.14.6** Wherever the word “including”, “includes” or “include” is used in the Contract Documents, it is deemed to be followed by the words “without limitation.” Wherever reference is made in the Contract Documents to a particular Governmental Entity, it includes any public agency succeeding to the powers and authority of such Governmental Entity.

**26.14.7** References to “days” contained in the Contract Documents shall mean calendar days unless otherwise stated.

**26.14.8** Subject to Section 26.14.9, if the day on or by which any thing is to be done in accordance with this Agreement is not a business day, that thing must be done on the next business day.

**26.14.9** If the Contract Documents require action to be taken in the event of an emergency and otherwise where it is clear that performance is intended to occur on a non-business day, Concessionaire shall be required to perform such obligations, even though the date in question may fall on a non-business day.

**26.14.10** 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.

**26.14.11** All monetary amounts and obligations in the Contract Documents are expressed and payable in U.S. dollars.

**26.14.12** Each party must perform its obligations in accordance with this Agreement at its own cost, unless expressly provided otherwise.

**26.14.13** The term “may”, when used in the context of a power or right exercisable by Owner or Owner Authorized Representative, means that Owner or Owner Authorized Representative can exercise that right or power in its discretion. With respect to Change Orders, statements that Concessionaire “may” receive or request a time extension or additional compensation means that Concessionaire’s entitlement to a Change Order is subject to all applicable conditions and limitations contained in the Contract Documents or applicable as a matter of Law with respect to the relief requested, including strict adherence to contractual notification and recordkeeping requirements, limitations on allowable costs, requirements to mitigate damages, requirements to establish that the Critical Path has been delayed, requirements to establish that no Concessionaire-Related Entity caused the occurrence giving rise to the cost or delay or is otherwise at fault, and requirements to otherwise provide satisfactory justification for any claims for a time extension and additional compensation.

**26.14.14** If this Agreement requires calculation of an amount payable to a party there must be no double counting in calculating that amount.

**26.14.15** If any escalation index referenced in the Contract Documents is changed after the Effective Date so that its base year changes, the index shall be converted in

accordance with the conversion factor published by the U.S. Department of Labor, Bureau of Labor Statistics.

#### **26.15 Further Assurances**

Each Party shall promptly execute and deliver to the other Party all such instruments and other documents and assurances as are reasonably requested by the second Party to further evidence its obligations hereunder, including, specifically with respect to Concessionaire, assurances regarding the validity of (a) the assignments of Contracts contained herein and (b) any instruments securing performance hereof.

#### **26.16 Entire Agreement**

Owner and Concessionaire agree and expressly intend for this Agreement and the other Contract Documents to constitute a single, non-severable, integrated agreement whose terms are interdependent and non-divisible. The Contract Documents contain the entire understanding of the Parties with respect to the subject matter of this Agreement and supersede all prior agreements, understandings, statements, representations and negotiations, in each case oral or written, between the Parties with respect to their subject matter.

#### **26.17 Counterparts**

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

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first above written.

WITNESS:

PURPLE LINE TRANSIT PARTNERS LLC

Mary Ann Mayshaw

Mary Ann Mayshaw

By:   
(Signature)

Terence M. Easton  
(Printed Name)

Authorized Manager  
(Title)

\_\_\_\_\_

By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_

\_\_\_\_\_  
(Printed Name)

Authorized Manager  
(Title)

\_\_\_\_\_

By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_

\_\_\_\_\_  
(Printed Name)

Authorized Manager  
(Title)

WITNESS:

PURPLE LINE TRANSIT PARTNERS LLC


\_\_\_\_\_

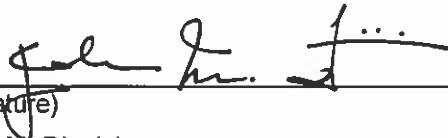
By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_

\_\_\_\_\_  
(Printed Name)

Authorized Manager \_\_\_\_\_  
(Title)

  
\_\_\_\_\_  
JONATHAN DINGLE

By:   
(Signature)  
John M. Dionisio  
\_\_\_\_\_  
(Printed Name)

Authorized Manager \_\_\_\_\_  
(Title)

\_\_\_\_\_

By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_

\_\_\_\_\_  
(Printed Name)

Authorized Manager \_\_\_\_\_  
(Title)

WITNESS:

PURPLE LINE TRANSIT PARTNERS LLC

\_\_\_\_\_

By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_

\_\_\_\_\_  
(Printed Name)

Authorized Manager  
(Title)

\_\_\_\_\_

By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_

\_\_\_\_\_  
(Printed Name)

Authorized Manager  
(Title)

Sam Maw

By: \_\_\_\_\_  
(Signature)

Samantha Markella

William A. Marino  
(Printed Name)

Authorized Manager  
(Title)